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24 Cal.2d 298

BIGGS DITCH CO. v. JONGSTE et al.

Sac. 5561.

Supreme Court of California.

May 23, 1944.

1. Covenants ⇨57

Provisions in deeds that owners of land conveyed should have right to use water from irrigation company's canal over land without payment for water right were mere self-serving declarations and not binding on a ditch company, which was not party to or in privity to deeds, but claimed title to easement over land for canal or ditch purposes by adverse possession and user under claim of right, not by deed or color of title from any predecessor in interest.

2. Waters and water courses ⇨152(8)

Evidence was sufficient to establish ditch company's claim or title to easement or right of way over certain land for canal or ditch purposes by adverse possession and user under claim of right for over 30 years.

3. Waters and water courses ⇨152(6)

A ditch company, claiming merely easement in land for irrigation ditch purposes, is not required to prove that it paid taxes on ditch or water therein or that no taxes were levied or assessed thereon in order to support its claim of title to such easement by adverse possession, as law does not require assessment of easement and burden of showing such assessment is on party contesting claim of adverse possession.

In Bank.

Appeal from Superior Court, Butte County; W. T. Belieu, Judge Assigned.

Action by the Biggs Ditch Company against Louise T. Jongste and another to quiet title to an easement or right of way across defendants' land for canal or ditch purposes and enjoin defendants from obstructing such easement or right of way.

149 P.2d—1

CAL.REP.149-150 P.2d-1

Judgment for plaintiff, and defendants appeal.

Affirmed.

Prior opinion, Cal.App., 142 P.2d 322.

Chas. L. Gilmore, of Sacramento, for appellant.

Jack McPherson, of Chico, for respondent.

SCHAUER, Justice.

Defendants appeal from a judgment quieting in plaintiff corporation, a mutual water company, title in and to "an easement or right-of-way upon, over, along and across the entire extreme northerly and westerly boundaries" of certain "lands of defendant, Louise T. Jongste * * * for canal and/or ditch purposes," and enjoining and restraining both of the defendants (Louise T. Jongste and her brother, Bernard Jongste) from "using, interfering or obstructing" such easement or right of way and from "in any wise damming up, holding, obstructing or diverting the water flowing in said canal and/or ditch and from in any wise preventing plaintiff, its agents and employees, from free ingress or egress to said easement or right-of-way for the purposes of maintenance, care and preservation thereof." Plaintiff bases its claim of title solely on asserted adverse possession and use of the ditch in question under a claim of right (but not color of title; see 1 Cal. Jur. 570, § 51) for a period of more than thirty years last past, while defendants contend that plaintiff's own evidence establishes that defendant Louise T. Jongste and her predecessors in interest for more than twenty years last past have used waters from such ditch without payment therefor, and that "the water from the ditch or canal has [thereby] become a part of" defendants' land by user. The deeds by which defendant Louise Jongste and certain of her predecessors in interest acquired the land in question contained the following provision: "Provided However that all of the lands that are now being used as a

'Right of Way' to and for the 'Main Canal' of the Butte County Irrigated Land Company, of Biggs, Cal., as it is now built on, along, and over the North and West Lines of the above described premises are hereby reserved from the land intended to be conveyed by this deed, and the same is so reserved for and in consideration, that the owner or owners of the above described land and premises are at all times hereafter to have the privilege and right to use water from and out of the said Canal, (as hereinbefore described) for the purpose of irrigating of any and all of the said lands and premises, without the payment for a 'Water Right' to the Butte County Irrigated Land Company, or any other Company or any Companies for such a right, and the said Butte County Irrigated Land Company, shall not be required to pay or give any other compensation for their right of way, for their main canal, excepting a water right to and for the above named lands."

[1] It is to be noted that plaintiff was not a party and is not in privity to any of the above mentioned deeds, and, as previously mentioned, claims title only by adverse possession and user under a claim of right, *not by deed or color of title* from any predecessor in interest. It is unnecessary, therefore, to determine whether the provision above quoted (that the "owners of the above described land * * * are at all times hereafter to have the privilege and right to use water from and out of the said Canal * * * *without the payment for a 'Water Right' * * **" [italics added]) meant that the owners of the land described were authorized for all time to come to *take and use* water from this distribution ditch *without paying for such water*, regardless of who owned it, or were merely given a form of appurtenant right to *purchase* water from the ditch for the irrigation of their land without further payment for *such appurtenant right of purchase*.

Even if we assume that the provision was intended to give the right to take and use the water without payment therefor, such provision is a mere self-serving declaration; plaintiff, not being in privity to the deeds containing such provision, is not bound by it. The right of defendants to *purchase water* from the ditch for irrigating their land, on the same terms as other

appurtenant land owners, has not been disputed and is not in issue.

Plaintiff was incorporated May 22, 1908, and ever since then has been engaged solely in distributing water for irrigation and domestic use, only to owners of its capital stock. The shares of such stock are appurtenant to the lands described in the stock certificates, are issuable on the basis of one share for each acre of land, and are transferable only with the land. The water distributed by plaintiff through its canals and ditches, including the ditch here involved, is purchased by the users (shareholders in plaintiff corporation) directly from another corporation, the Sutter Butte Canal Company, a public utility, to whom each user makes payment for his water.

[2] The ditch with which we are here concerned was constructed in 1907 and it is upon alleged actual, exclusive, open, notorious, continuous, and adverse possession and user of the ditch under a claim of right ever since the date of plaintiff's incorporation that plaintiff rests its claim of title. The following epitomized excerpts from the evidence, considered in connection with the investment which the construction of the ditch itself connotes, the by-laws of plaintiff, and the method of plaintiff's operation of the ditch, indicate a claim of right and suffice to show that plaintiff fully proved its allegations as to the extent and character of its possession and user of the ditch.

W. S. Schill testified that he is one of the directors of plaintiff ditch company and since 1910 has owned land in the area served by the company; that the expense of maintenance of the laterals and ditches of the company and the salary of the "ditch tender" are met by annual assessment on the shareholders of the company; that the company has used the ditch in question since prior to 1910; that the water flowing in the ditch comes from the main canal of the Sutter Butte Canal Company; that he knew of no occasion on which anyone not a member of the ditch company had taken water from the ditch; that after defendant Louise Jongste bought (in March, 1941) the land along which the ditch runs defendant Bernard Jongste notified the company that he intended to construct weirs in the ditch and take water for such land at any time he wished; that he im-

mediately started and practically completed two weirs; that the witness went over to see Mr. Jongste about the weirs and Jongste "stated he had the right and was entitled to" take water free of charge, although he was offered membership in the ditch company on the same basis as that of other shareholders (annual assessment and payment of water rate to the Sutter Butte Canal Company); that the effect of use of the two weirs by defendants would be to cause the water in the canal to flow onto the Jongste land and prevent it from going to the consumers below. It appears that this proceeding was filed on May 5, 1941, as a result of the above stated acts and claims of defendants.

Adolph Peterson testified that in 1908 or 1909 he purchased and settled upon land in the area served by plaintiff company and became a stockholder in the company; that he knew of no occasion on which "anyone * * * ever claimed any right to take water out of there [the ditch here involved] free of charge" and had never heard that "anyone ever claimed title to that ditch as against the ditch company [plaintiff]."

Joseph L. Williams testified that since 1928 he had resided in the area served by plaintiff company and been a stockholder in the company and since July 7, 1941, had been the "ditch tender" for the company; that he is familiar with the Jongste property; that he had no knowledge that "anyone other than Mr. Jongste put weirs in that ditch or any holes or anything else in it," except that on an occasion two or three years prior to 1941 the then owner of the Jongste property, a Mr. Rutherford, had claimed the right to take free water from the ditch and had "put a door in the ditch to take water out on the place," but that the witness had told Rutherford that the only way to get water was to pay for it and had himself removed the door and Rutherford had "left it out."

O. F. Brown testified that since 1911 he had resided and owned land in the area served by plaintiff company and had held various offices in the company; that he had been familiar with the Jongste property for the thirty years since 1911 and in that time he knew of no one except Mr. Rutherford who "ever made any claim as against the ditch company to any title in

that ditch"; that in approximately 1938 Rutherford had blocked the ditch and attempted to take water from it without payment therefor, but that the witness had "warned him of it a time or two by letter and word of mouth" and Rutherford had desisted.

S. C. Pereria testified that since 1912 he had resided and owned land in the area served by plaintiff company and had held various offices in the company; that for the twenty-nine years since 1912 he had been familiar with the Jongste property; that he knew of nobody who had taken water from the ditch without complying with the rules and regulations of the ditch company.

George Milford testified that he had been the first president of plaintiff company and had resided in the vicinity since 1910; that since that date the ditch company had operated the ditch here in question; that he is familiar with the Jongste property; and that to his knowledge no one who had ever held that property had been given free water.

The record contains other testimony, merely cumulative to that above epitomized, in support of the finding in plaintiff's favor on the issue of adverse possession; no useful purpose would be served, however, by setting forth such testimony.

[3] Defendants also assert that plaintiff must prove either payment of taxes on the ditch or on the water or else that no taxes were levied or assessed thereon, in order to support its claim of title by adverse possession. Admittedly no such proof was made. Although the rule advanced by defendants applies as a general proposition, it is to be noted that plaintiff here claims an easement rather than a title in fee, that the law does not require an easement to be assessed, and that the burden of showing such an assessment is upon the party contesting the claim of adverse possession. (See *McMorris v. Pagano*, 1944, 63 Cal. App.2d 446, 146 P.2d 944, and cases there cited.)

For the reasons above stated the judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

24 Cal.2d 232

DAVENPORT v. STRATTON.

L. A. No. 18664.

Supreme Court of California.

May 2, 1944.

Rehearing Denied May 29, 1944.

1. Guaranty $\hookrightarrow$ 31

Where guaranty was joint and several, an action would lie against either or both of the guarantors.

2. Evidence $\hookrightarrow$ 471(3, 34)

In action on contract of guaranty executed in consideration of execution of lease, testimony of landlord's employee who had charge of the rent collection department in response to questions as to gross amount unpaid under the lease, and as to gross amount of re-rentals after eviction of tenant, was not objectionable on ground that questions called for conclusions of witness.

3. Evidence $\hookrightarrow$ 591

Defendant, having introduced in evidence as an exhibit the statement of accounts kept by plaintiff's assignor, was bound by its provision.

4. Appeal and error $\hookrightarrow$ 1082(2)

A point which was not raised at trial of the action nor in the District Court of Appeal could not be considered by the Supreme Court.

5. Estoppel $\hookrightarrow$ 22(1)

Where contract of guaranty executed in consideration of execution of lease expressly recited that it was annexed to and formed part of lease and agreement referring to lease, guarantor was estopped from denying liability on ground that lease was not physically attached to the guaranty at time guarantor signed latter document.

6. Estoppel $\hookrightarrow$ 52

"Estoppel" is a bar by which a man is precluded from denying a fact in consequence of his own previous action which has led another to so conduct himself that, if the truth were established, that other would suffer.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

7. Guaranty $\hookrightarrow$ 7(3)

A contract of guaranty executed in consideration of execution of lease, being

absolute in form, was binding on guarantors without notice of acceptance.

8. Guaranty $\hookrightarrow$ 46(1)

Guarantors of lease were not entitled to notice of default by tenant where guarantors' agreement was to be performed without requiring any notice of any default from landlord.

9. Guaranty $\hookrightarrow$ 50

Guarantor on contract of guaranty executed in consideration of execution of lease was not relieved from liability by landlord's altering leased premises to suit convenience of new tenants secured by landlord after repossessing leased premises, where landlord's right to make such alterations was expressly provided for in the lease.

10. Guaranty $\hookrightarrow$ 27, 72

Where contract of guaranty executed in consideration of execution of lease was made at time agreement extending lease was executed, the three instruments would be considered as one instrument for purpose of interpretation, and guarantor would be deemed to have assented to provisions of the lease and agreement extending the lease.

11. Limitation of actions $\hookrightarrow$ 183(2)

An answer pleading as defense an entire section of a limitation statute which had two subdivisions did not sufficiently plead limitations. Code Civ.Proc. §§ 337, 458.

12. Limitation of actions $\hookrightarrow$ 184

The refusal of leave to plead bar of statute of limitations by way of amendment to an answer already filed is not an abuse of discretion, unless it appears that amendment will be in furtherance of justice.

13. Limitation of actions $\hookrightarrow$ 51(2)

Where plaintiff, by action on contract of guaranty executed in consideration of execution of lease, was seeking to enforce tenant's obligation, after landlord repossessed premises, to pay several installments of rent called for by terms of the lease, the installments would be barred by statute of limitations four years after their respective maturity and, hence, statute of limitations was an issue in the case. Code Civ.Proc. §§ 337, 458.

14. Limitation of actions $\hookrightarrow$ 184

Where statute of limitations would have been an issue in case if properly plead-

ed, and an attempt was made by defendant to plead statute, upon plaintiff's objection to plea of statute and defendant's request for leave to amend his plea, trial court should have exercised its discretion to determine whether granting or denying of defendant's application would be in furtherance of justice. Code Civ.Proc. §§ 337, 458.

15. Evidence ⇨35

California Supreme Court would take judicial notice of laws of New York.

16. Appeal and error ⇨1066

Trial ⇨252(12)

In action on contract of guaranty executed in consideration of execution of lease, an instruction given at defendant's request which purported to inform jury as to rules of law of New York, the state where contract of guaranty, the lease and agreement extending lease were executed, was erroneous, in absence of any evidence involving such rules, and the error was prejudicial to plaintiff, where it appeared that jury might have been misled by such instruction into believing that defendant was released from his contract of guaranty by landlord's acts subsequent to its repossessing the leased premises.

17. Appeal and error ⇨1066

Trial ⇨252(1)

An instruction, though couched in proper language, is improper if it finds no support in the evidence, and giving of it constitutes prejudicial error if it is calculated to mislead jury.

18. Appeal and error ⇨757(4)

Plaintiff was not precluded from requiring Supreme Court to consider alleged error in instruction on ground that plaintiff failed to comply with Supreme Court rule requiring that, when instructions are attacked as erroneous, all other instructions given, bearing upon that instruction, must be printed in full in brief, where defendant failed to call attention of Supreme Court to any other instructions which trial court gave bearing upon the subject matter, and examination of instructions given revealed none. Rules of Supreme Court, rule 8, subd. 3.

19. Appeal and error ⇨109

An appeal will not lie from an order denying motion for a judgment notwithstanding the verdict.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Alice Davenport against George W. Stratton to recover from defendant as guarantor upon a lease for breach of the covenants of the lease. From a judgment for the defendant and from an order refusing judgment notwithstanding verdict, the plaintiff appeals.

Judgment reversed, and appeal from order dismissed.

Prior opinion, 141 P.2d 713.

Mathes & Sheppard and Gordon F. Hampton, both of Los Angeles, for appellant.

James V. Brewer, of Los Angeles, for respondent.

CURTIS, Justice.

Plaintiff, as the assignee of 11 West 42nd Street, Inc., a New York corporation (hereinafter referred to as the lessor or the corporation), instituted this action to recover from the defendant an amount alleged to have been due and unpaid under the terms of a certain lease and agreement executed by her assignor, as lessor, and one Albert De Windt, as lessee, and guaranteed by the defendant, George W. Stratton, and one Stanley E. Comstock. The property was described in the lease as two offices numbered 1454 and 1456 in a certain building situated in the city of New York. The term of the lease was for five years and two and one-half months beginning on February 16, 1929, and ending on April 30, 1934. The rental was \$3,000 per year, payable \$250 per month in advance on the first day of each month of the term, except as to the first month's rent, which was made payable on the signing of the lease. The evidence shows without any substantial conflict that such a lease was executed by the parties thereto at or about the first day of February, 1929. Thereafter the lessee, De Windt, concluded that he required additional room in which to carry on his business and began negotiating with the lessor for such additional space. The result of these negotiations was that on April 8, 1929, an agreement was entered into by the 11 West 42nd Street, Inc., the lessor, and De Windt, the lessee, whereby there was incorporated in the terms of the original lease additional rooms in said building, and in con-

sideration thereof the rent was increased from the sum of \$250 per month to the sum of \$500 per month payable as provided in the original lease. Before entering into this agreement the corporation required that De Windt furnish responsible persons to guarantee the lease and on the date of the agreement, April 8, 1929, defendant Stratton and Stanley E. Comstock executed and delivered to the corporation the written guaranty upon which the plaintiff relies in support of her right to recover in this action. Said guaranty being in words and figures as follows:

"Annexed to and forming part of agreement dated April 8, 1929, between 11 West 42nd Street, Inc., as Landlord, and Albert De Windt, as Tenant, which agreement refers to lease dated February 1, 1929, between 11 West 42nd Street, Inc., as Landlord, and Albert De Windt, as Tenant.

"That in consideration of the landlord entering into the said agreement dated April 8, 1929, hereto annexed, and the sum of One (1) Dollar to each of us paid and other good and valuable considerations, receipt of which is hereby acknowledged, we do hereby jointly and severally covenant and agree, to and with 11 West 42nd Street, Inc., the said landlord above named, and the landlord's legal representatives, successors and assigns, that if default shall at any time be made by Albert De Windt, the said tenant, in the payment of the rent, or the performance of the covenants contained in the said lease dated February 1, 1929 and/or the said agreement dated April 8, 1929, hereto annexed, on the tenant's part to be paid and performed or should the landlord institute summary proceedings or any other action or proceedings for the recovery of the possession of the said premises, by reason of the nonpayment of the rent or otherwise, that we jointly and severally will well and truly pay the said rent or any arrears thereof, or any other sum or sums provided to be paid by the tenant under any of the terms of the said lease dated February 1, 1929, and the said agreement dated April 8, 1929, hereto annexed, that may remain due unto the said landlord or that may become due, and any or all damages that may arise in consequence of the non-performance of said covenants, or any of them, without requiring notice of any such default from the said landlord, and without requiring any proceedings to be taken against said

tenant for the collection of said amount or amounts. This guarantee agreement is intended to apply to and to affect both the said lease dated February 1, 1929, and the said agreement dated April 8, 1929, hereto annexed."

After the execution of this written agreement and guaranty the lessee, De Windt, took possession of two additional rooms, Nos. 1446 and 1450, and paid the rent called for under this new agreement at irregular intervals until some time in September, 1929. The September rent not being paid, the corporation instituted proceedings to dispossess De Windt from the leased premises. Judgment was rendered in favor of the plaintiff in said action, and De Windt was evicted under said judgment and possession of the leased premises was restored to the corporation. On acquiring possession of the property under the judgment of eviction against De Windt, the corporation advertised it for rent and made all reasonable efforts to secure tenants for the property. In this it was only partially successful. Part of the time all the property was vacant, and at other times the corporation was successful in renting only a portion of it. In doing so, it was necessary for it to make certain alterations in the arrangement of the rooms covered by the lease so that they might be rented to, and occupied by, two or more tenants carrying on separate lines of business. The right to do so was expressly authorized by the terms of the lease. The lessee was given credit for all amounts received by the lessor as rental of the property, or of any part thereof, from the time it took possession thereof after the judgment of eviction against the lessee, until the termination of the lease. After giving the lessee credit for all payments of rent received during this period of time, a substantial amount was claimed by the lessor to be due and unpaid from the lessee, and as the defendant had guaranteed to "pay the said rent or any arrears thereof, or any other sum or sums provided to be paid by the tenant under any of the terms of the said lease dated February 1, 1929, and the said agreement dated April 8, 1929, hereto annexed," this action was brought to recover said amount.

Prior to the commencement of this action the lessor had assigned to the plaintiff its claim against the defendant.

[1] The action, as we have seen, is against one of the guarantors only. As

the guaranty was joint and several, the action would lie against either or both of the guarantors. The amount claimed by plaintiff under her amended complaint to be due and unpaid under the lease is the sum of \$11,835.17 together with interest on each installment "going to make up said amount at the rate of seven per cent (7%) per annum from the date upon which each installment was due and payable respectively, said interest to be computed up to and including the date of entry of judgment herein," and for costs and general relief. The amended complaint under which the action was tried, like the original complaint, is in two counts. In one count it is alleged that the total amount due under the entire lease from September 1, 1929, to the termination of the lease on April 1, 1934, was \$28,000 and that the lessor had received from reletting the premises the sum of \$16,164.83, leaving a balance due and unpaid of \$11,835.17. The second count of the amended complaint is practically a restatement in a different form of the cause of action set out in the first count. The amount claimed in each count is the same. The only difference between the original complaint and the amended complaint is in the amount claimed to be due and unpaid. In the original complaint this amount is alleged to be \$12,233.29 and in the amended complaint this amount is given as \$11,835.17. The original complaint was filed March 30, 1937. (There is a slight difference of \$2 between the allegations of the pleading and the evidence. This discrepancy will later appear in the discussion of certain issues in the case. This slight discrepancy is not material to any issue before us.)

Defendant by his answer to the amended complaint makes practically a general denial of all the allegations of the amended complaint; claims that the action is barred by the provisions of section 337 of the Code of Civil Procedure; and sets up a number of affirmative defenses which will be given further consideration later in this opinion. At the close of the trial the case was submitted to the jury upon the pleadings, the evidence introduced in support thereof and the instructions to the jury. The jury returned a verdict in favor of the defendant, upon which the court entered its judgment, and from which the plaintiff has appealed, and in support thereof makes the following contentions:

(1) That the evidence is insufficient to support the verdict.

(2) That the defense of the statute of limitations is unavailable to defendant.

(3) That the giving of Instruction No. 27 was prejudicial error.

(4) That the judgment should be reversed with directions to enter judgment for the plaintiff.

The evidence on the part of plaintiff purports to show the due execution of the lease and the agreement by the lessor and the lessee, and the execution of the guaranty of the terms of the lease by the defendant, along with his co-guarantor, Comstock; that the lessee, De Windt, took possession of the leased premises pursuant to the terms of the lease and agreement; that he defaulted in the September, 1929, rent, and due to said default was evicted from the premises by the lessor; that upon such eviction the lessor repossessed the leased premises, and rented such parts thereof during the balance of the term of the lease, as it was able to obtain tenants therefor; and that after giving credit to the lessee for all amounts received by the lessor for the rental of said premises after the lessor took possession thereof, there remained due and unpaid at the commencement of this action from the lessee according to the lease the sum of \$11,833.17, besides interest and costs.

Defendant offered no evidence in his defense except his own testimony. He did not purport to have any personal knowledge whatever of any dealings between the lessor and the lessee, after his guaranty had been executed and delivered; neither did he purport to know anything about the occupancy of the leased premises after the guaranty was executed. He visited the property only twice, on one occasion in the latter part of the year 1929. He did not see De Windt on that visit and he was informed either by the elevator man or the directory that De Windt had moved. He did not know whether the rooms were vacant or not, but he did not believe they were. His other visit to the premises was after the commencement of this action.

[2] Defendant contends however, that certain evidence in plaintiff's behalf was erroneously admitted, and that when this erroneously admitted evidence is excluded, the record fails to establish plaintiff's case. This criticism of plaintiff's evidence is particularly aimed at the testimony of the witness Scala, whose deposition was taken and introduced in evidence by the plaintiff at the trial of this action. Mr. Scala tes-

tified that he had charge of the rent and collection departments of the lessor, 11 West 42nd Street, Inc., and that the gross amount unpaid under the lease was \$28,000 and the gross amount of all re-rentals and moneys received in connection with the leased premises was \$16,166.83.

Evidence in proof of these two amounts was given by Mr. Scala as shown by the record as follows:

"Q. Will you state the amount unpaid? A. The amount unpaid under this lease in full is \$11,833.17.

"Mr. Brewer: Objected to and move to strike as a conclusion of the witness, incompetent, irrelevant and immaterial, no showing that he had any authority to show what the amount unpaid was.

"The Court: Be overruled. Denied.

"Q. What was the gross amount unpaid? A. \$28,000.

"Q. What was the gross amount of all re-rentals and moneys received in connection with premises 1446-50, and 1454-56 between September 1, 1929 and April 30, 1934? A. \$16,166.83."

In support of defendant's contention that the question calls for the conclusion of the witness, he cites *Parker v. Otis*, 130 Cal. 322, 331, 62 P. 571, 574, 927, 92 Am.St.Rep. 56, which holds that the question "Do you owe Otis & Co. any money?" is improper as it calls for a conclusion of the witness. But the question asked the witness Scala related to the amounts "paid" and "unpaid." Such questions call for facts and not conclusions. See *Krieger v. Feeny*, 14 Cal. App. 538, 112 P. 901; 20 Cal.Jur. p. 947, § 28; 21 Cal.Jur. p. 35, § 19.

[3] Defendant devotes many pages of his briefs and petitions to his attack upon the evidence of the witness Scala fixing the amounts received by the lessor, after taking possession of the leased premises upon the eviction of the lessee. He particularly assails his own Exhibit A so marked when received in evidence at the trial of this action. This exhibit was offered in evidence by the defendant, and marked Exhibit I for identification at the taking of the deposition of Mr. Scala. At the trial the defendant renewed his offer and the exhibit was admitted in evidence as defendant's Exhibit A without objection, and is entitled "Statement of Account, Albert De Windt, Tenant, George W. Stratton and Stan E. Comstock, guarantors" with a description of the leased prem-

ises. It purports to show the amount due under the lease from the date the lessor took possession of the leased property after the tenant's eviction until the end of the term, four years and eight months at \$6,000 per year, amounting to the sum of \$28,000. It further purports to show the amount received during this same period of time by the lessor as rental of the property from tenants procured by him after taking possession of the leased premises. This amount as shown by the exhibit was \$16,166.83. The difference between these two amounts is \$11,833.17, the amount claimed by plaintiff to be due and unpaid under the terms of the lease. Defendant now contends that the witness Scala knew nothing about the books of the lessor company, nor did he have any personal knowledge of the figures constituting said exhibit, and that his answers were based solely upon the figures contained in that exhibit. This contention might possibly have some merit, were it not for the fact that the defendant himself, both at the taking of the deposition of Scala and at the trial of this action, offered in evidence this statement of account, and the same was admitted in evidence without objection. This exhibit having been introduced in evidence by the defendant, he is bound by its provisions. *Reclamation Dist. No. 70 v. Sherman*, 11 Cal.App. 399, 419, 105 P. 277; *Groves v. Jones*, 252 Mich. 446, 448, 233 N.W. 375.

Furthermore, after this exhibit had been offered and received in evidence and at the close of the examination of Mr. Scala, he was asked by defendant's counsel the following questions, to which he gave the following answers:

"Q. So from tenants who occupy the same premises originally occupied by tenant De Windt, subsequent to the date of his dispossession, you have collected a total amount of how much money up to April 30, 1934? A. \$16,166.83.

"Q. Based upon your records, Mr. Scala, over that same period of time how much have you charged up against Mr. De Windt as the gross amount? A. \$28,000.00.

"Q. And crediting what you have collected, \$16,166.83, you claim, I take it, that there is a balance due the 11 West 42 Street Inc. of how much? A. \$11,833.17.

"Q. And does that \$11,833.17 represent rent not paid? A. It represents the

amount due from Mr. De Windt which has not been paid.

"Q. For rent only? A. Yes."

[4] Defendant next contends that the jury could have entirely disregarded the testimony of Scala as he was an employee of the plaintiff's assignor and because his evidence was not clear, but was incompetent and contradictory. As we have before noted, proof of the amount due plaintiff under the terms of the lease did not depend entirely upon the testimony of Scala, for the reason that defendant introduced in evidence the statement of account as his Exhibit A, and was therefore bound by its provisions. Defendant offered no evidence that in any manner discredited the statement of account or the evidence just quoted from the testimony of Mr. Scala. However, plaintiff introduced in evidence as her Exhibits 4 and 5, photostatic copies of the ledger of the lessor, which defendant contends show two items aggregating the sum of \$5,700.04, for which no credit has been given Mr. De Windt on his rent account. We confess our inability to decipher these ledger sheets and satisfy ourselves as to their precise meaning in respect to the two items which the defendant questions. No explanation of their meaning is found in the record before us, nor does plaintiff's counsel attempt to explain either of these. Mr. Scala was not asked any question in regard to those two particular items. Defendant made no claim of any credit based upon these two items until his petition for a hearing in this court was filed. At the most, even if they should be allowed in defendant's favor, they would only reduce the amount due on the lease, and would not justify an affirmation of the judgment in defendant's favor, as there would still be a considerable amount due as rental under the lease after deducting the amount of these two items. However, it does not appear that this point was raised at the trial of this action, nor in the District Court of Appeal. Under these circumstances the question therein involved may not be considered by this court (2 Cal. Jur. p. 234; 2 McKinney's New Digest, p. 523, and cases cited in each of these publications) and for that reason we expressly decline to consider it.

In addition to the foregoing contention the defendant claims that there are other grounds why the evidence is sufficient to support the verdict of the jury. Some of these contentions are so technical and lack-

ing in merit as not to justify any special attention. Others however, are of sufficient substance to warrant special discussion. In the main these contentions are put in issue by the affirmative defenses set forth in defendant's answer.

[5, 6] The first of these contentions is that the lease was not physically attached to the guaranty at the time defendant signed the latter document, and therefore he is released from any liability under the guaranty. The agreement of guaranty expressly refers to both the lease of date February 1, 1929, and the agreement of date April 8, 1929, and states that "This guarantee agreement is intended to apply to and affect both the said lease dated February 1, 1929, and the said agreement dated April 1, 1929, hereto annexed." It was signed by the defendant and his co-guarantor, Stanley E. Comstock. Defendant had prior to signing the guaranty been informed of its purpose. He knew at the time of signing the guaranty that the lessor in said lease had required that it be guaranteed before it would deliver the lease. To now permit the defendant after signing the guaranty, which recited that the lease and agreement were annexed thereto, to deny that they were so annexed would be to enable him to perpetrate a fraud of a most flagrant character. To put it mildly would be to hold that he is estopped to deny the plain and explicit terms of the solemn document which he voluntarily executed. Estoppel may be defined to be a bar by which a man is precluded from denying a fact in consequence of his own previous action which has led another to so conduct himself that, if the truth were established, that other would suffer. 10 Cal.Jur. p. 611.

[7, 8] Defendant further contends that the judgment should be affirmed because he was never notified of his acceptance by the lessor as a guarantor of the lease. The guaranty was absolute in form and bound defendant without notice of his acceptance. Thorpe v. Story, 10 Cal.2d 104, 117, 118, 73 P.2d 1194; Union Bank v. Coster's Ex'rs, 3 N.Y. 203, 212, 53 Am. Dec. 280; American Woolen Co. v. Moskowitz, 159 App.Div. 382, 144 N.Y.S. 532. Neither was defendant entitled to notice of the tenant's default. American Taximeter Co. v. Smith, App.Term, 199 N.Y. S. 578, 579; Webel v. Clark, 29 Misc. 329, 60 N.Y.S. 516; Brown v. Curtiss, 2 N.Y. 225. This is particularly so in the present

case as the defendant's agreement of guaranty was to be performed "without requiring any notice of any such default from said landlord."

[9, 10] Defendant was not released from his liability under said guaranty by the lessor's altering the leased premises to suit the convenience of new tenants secured by the landlord after repossessing the leased premises. The lessor's right to make such alterations was expressly provided for in the lease. Defendant relies upon the case of *Salomon v. Cawston Ostrich Farm*, 43 Cal.App. 465, 185 P. 314, 315. There the lease contained no provision as does the lease now before us, permitting the lessor, on retaking possession of the leased premises, to make any physical changes and alterations. In that case, which was an action by the landlord against the guarantor of a lease of real property in the State of New York, we find it stated that "In New York, as well as in California, the obligations of the guarantor are strictly construed. Any change made by the person to whom performance is due in the subject to which the guaranty applies, without the knowledge or consent of the guarantor, releases the latter." Had the present lease contained no provision permitting changes and alterations in the building, the statement of the law just quoted would no doubt be controlling, but such is not the case. The language of the lease in respect to changes and alterations reads as follows: "In any such case or in any other case in which the Landlord shall resume possession of the demised premises by summary proceedings or otherwise, the Landlord at its option may repair, subdivide, alter or change the character of the demised premises from time to time as the Landlord shall deem best, may let the demised premises or any part or parts thereof for the whole or any part or parts of the residue of the original term hereof, and receive the rents therefor." With this provision in the lease it cannot be successfully contended that the changes and alterations which were made by the landlord were without the knowledge and consent of the lessee. The guaranty having been made at the time the agreement extending the lease was executed, the three instruments must for the purpose of interpretation of their meaning be considered as one instrument. *Catskill Nat. Bank v. Dumary*, 206 N.Y. 550, 100 N.E. 422, 424;

Reios v. Mardis, 18 Cal.App. 276, 281, 122 P. 1091. The defendant guarantor must therefore be deemed to have assented to their provisions. *Smith v. Molleson*, 148 N.Y. 241, 42 N.E. 669, 672; see, also, *W. P. Fuller & Co. v. Alturas School District*, 28 Cal.App. 609, 612, 613, 153 P. 743. In *American Trust Co. v. Jones*, 130 Cal.App. 651, 655, 20 P.2d 346, 347, we find it stated that "When, as here, the contract provides in advance for changes, substitutions, etc., they may be made in accordance with the terms of the guaranty and such acts do not release the guarantor."

A further contention is raised by defendant in support of the judgment in his favor that there is no proof that the landlord gave notice of intention to relet the leased premises for tenant's account and that such reletting was for a term greater than the lease, and accordingly the tenant and defendant were released thereby. This defense does not appear to have been made at the trial of the action. No instruction was asked or given upon this question. No reference to this defense is made in defendant's brief or in the petition for a rehearing filed in the District Court of Appeal, or in his petition for a hearing in this court. The first time this point was raised as near as we can ascertain from the record before us was in defendant's answer to plaintiff's supplemental brief filed herein after argument. Under the rule hereinbefore announced the absence of evidence that the landlord gave notice to the tenant of his intention to relet the leased premises will not be considered.

As we view the record in this case as discussed above, we find nothing therein which would justify the jury in returning a verdict in favor of the defendant, and it must therefore be held that the verdict finds no support in the evidence unless the questions hereinafter discussed lead to a different conclusion.

[11] We now come to the consideration of the statute of limitations. Defendant purported to plead the statute of limitations. The plaintiff claims that the statute is not available to defendant. The solution of this problem depends upon two contingencies—first, whether the statute was properly pleaded, and if not, should the court have permitted the defendant to so amend his answer as to properly plead the statute; and second, if the statute was properly pleaded or the plea thereof could

have been amended so as to properly present such a plea, was it a bar to plaintiff's cause of action?

Defendant claims that plaintiff's cause of action is barred by the provision of section 337 of the Code of Civil Procedure. His plea of the statute in his fifth separate defense in answer to plaintiff's amended complaint is as follows: "That the said amended complaint, and each of the causes of action therein, is barred by the provisions of the Statute of Limitations as found in section 337 * * * of the Code of Civil Procedure."

Section 458 of the same Code provides that the statute of limitations may be pleaded by stating "generally that the cause of action is barred by the provisions of section—(giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure." Section 337 of the Code of Civil Procedure contains two sections numbered 1 and 2. Subdivision 1 applies to contracts and similar obligations; subdivision 2 applies to book accounts, accounts stated, and current accounts.

Section 458 of the Code of Civil Procedure was first construed by this court in the case of *Wolters v. Thomas*, 3 Cal. Unrep. 843, 32 P. 565. It was there held that a plea of the statute of limitations, alleging that a cause of action is barred by the Code of Civil Procedure, section 339, is insufficient, since that statute contains several subdivisions. That case was followed by two decisions of the District Court of Appeal, *Overton v. White*, 1937, 18 Cal.App.2d 567, 64 P.2d 758, 65 P.2d 99 and *Hart v. Slayman*, 1939, 30 Cal.App.2d 556, 86 P.2d 861. In each of those cases the section under consideration was 337, the same section of the Code relied upon by the defendant in the present action. The section relied upon was pleaded, but no subdivision of the section was stated. The court in the case of *Overton v. White*, supra, went rather fully into the question as to whether the statute was correctly pleaded. After quoting quite fully from the case of *Wolters v. Thomas*, supra, the court held as follows [18 Cal.App.2d 567, 64 P.2d 761]: "In the instant case only the provisions of subdivision 1 of section 337 were applicable to the facts of the case. That section contains two subdivisions. The answer did not refer to the proper subdivision. It was not amended in the

trial court. The objection of the insufficiency of the pleading was raised in the trial court. For these reasons the cases cited by defendant are distinguishable and are not controlling here. As the case of *Wolters v. Thomas*, supra, cannot be distinguished in principle from the instant case, and as it has not been overruled or modified, we feel it is controlling here, and consequently hold that the provisions of section 458 of the Code of Civil Procedure must be strictly applied, and that the attempted plea of the statute of limitations by defendant was insufficient to raise that issue in the trial court.

"It necessarily follows that the answer raised no issue and presented no defense. Therefore, the trial court properly granted plaintiff's motion for judgment on the pleadings and the judgment must be affirmed unless the trial court committed prejudicial error in refusing to permit defendant to amend his answer." A petition for hearing by this court was denied.

The case of *Hart v. Slayman*, supra, was decided by the same court two years after the decision in *Overton v. White*. It followed the latter case and its conclusion was that (30 Cal.App.2d at page 558, 86 P.2d at page 861) "As section 337 of the Code of Civil Procedure contains two subdivisions, and as *Slayman* pleaded the section without pleading the subdivision relied upon by him, his answer did not present the defense of the bar of the statute of limitations, and that defense was waived."

While the plaintiff demurred to defendant's answer to the amended complaint, she did not demur to defendant's fifth separate defense, which, as we have seen, purported to set up the statute of limitations as a defense, nor did she in any manner by her demurrer raise the sufficiency of defendant's answer to the amended complaint to properly plead the statute of limitations. In *Churchill v. Woodworth*, 148 Cal. 669, 84 P. 155, 113 Am.St.Rep. 324, where the defendant attempted to plead the bar of section 339 of the Code of Civil Procedure, a section of the Code having two subdivisions, without stating the subdivision relied upon, it was held that the failure to raise the sufficiency of the plea of the statute was waived by failure to demur to such an answer. In so holding the court announced the rule in such cases as follows: (148 Cal. at page 676, 84 P. at page 158, 113 Am.St. Rep. 324) "No demurrer was interposed to

the answer, which, for the purposes of the trial, was assumed to sufficiently present the defense, and the court made its findings thereon. Under these circumstances, we are satisfied that the attempt to plead subdivision 1 of section 339 should not be treated as a nullity, and that the objection to the manner of pleading it was waived by the failure of plaintiffs to urge such objection in the trial court." In *Universal Sales Corp. v. California, etc., Mfg. Co.*, 20 Cal.2d 751, at page 773, 128 P.2d 665, at page 678, on the authority of *Churchill v. Woodworth*, it was held: "The rule as to the proper plea of the statute of limitations is not self-operating but depends for its enforcement on the diligence of the plaintiff in objecting to the insufficiency of the plea either by demurrer to the answer or by timely objection at the trial."

While, as we have seen, the plaintiff failed to demur to the fifth special defense in defendant's answer, which purported to set up the statute of limitations as a bar, she did object during the trial to the introduction of any evidence in support of said defense on the ground that the statute as pleaded presented no defense to said action. Again near the close of the trial the plaintiff asked to be heard upon the question of the statute of limitations, whereupon the trial judge stated that he did not think the matter of the statute of limitations could "be raised or the statute tolled. Therefore I am going to instruct the jury that the statute of limitations has no bearing on this matter." Counsel for defendant then asked the court if his intended action just stated was based upon the defect in the pleading, and the court replied: "No, that is based upon the entire record." Counsel for defendant then asked to amend this pleading "to designate the particular part of Section 337 intended to apply," but upon the objection of the plaintiff the request of defendant was denied. It thus appears that the plaintiff made timely objection to defendant's plea of the statute. Ordinarily we think the objections of plaintiff to the insufficiency of defendant's plea of the statute as just set forth rendered said plea ineffective for any purpose. In *Overton v. White*, supra, 18 Cal.App.2d 567, at page 574, 64 P.2d 758, at page 761, 65 P.2d 99, in considering an identical situation as that before us, the court held: "The answer did not refer to the proper subdivision. It was not amended in the trial court. The objection of the insufficiency of the pleading

was raised in the trial court. * * * It necessarily follows that the answer raised no issue and presented no defense."

[12] It does not appear in this last-cited case that any request was made to amend the answer, while in the present case such a request was made and denied by the court. A refusal by the court for permission to amend an answer for the purpose of interposing the defense of the statute of limitations has been held not to be an abuse of the court's discretion. *Rudd v. Byrnes*, 156 Cal. 636, 105 P. 957, 26 L.R.A., N.S., 134, 20 Ann.Cas. 124; *Cooke v. Spears*, 2 Cal. 409, 56 Am.Dec. 348; *Wells, Fargo & Co. v. McCarthy*, 5 Cal.App. 301, 90 P. 203. In the first of these three cases, it was held: (156 Cal. at page 638, 105 P. at page 958, 26 L.R.A., N.S., 134, 20 Ann. Cas. 124) "This court, very early in its history, established the rule that the refusal of leave to plead the bar of the statute of limitations by way of amendment to an answer already filed will not be regarded as an abuse of discretion, unless it is made to appear that the amendment will be in furtherance of justice."

In the early case of *Cooke v. Spears*, supra, 2 Cal. 409, at page 412, 56 Am.Dec. 348, we find the rule stated as follows: "If the statute of limitations had been pleaded in the first instance, there would have been no ground to have objected to it, and the Court would have had no legal discretion to have ordered it to be stricken out. But having been omitted, when the application to amend was made, the first question certainly presented was, Will it be in the furtherance of justice? Such is the language of the statute. Such clearly was the intent of the law."

Those authorities, and particularly the language in *Cooke v. Spears* just quoted, hold that the trial court may in its discretion and in furtherance of justice deny applications to amend an answer by setting up the bar of the statute of limitations. However, the trial court in the instant action did not deny defendant's application to amend on the ground that it would not be in the interest of justice to permit such an amendment, but because "the statute of limitations has no bearing upon this case." In line with this statement that the statute of limitations has no bearing upon this case, the court later instructed the jury "that the statute of limitations is not an issue in this case and that you are to disregard the defendant's attempt to plead the

statute of limitations as a defense." It thus appears that the trial court did not base its denial of defendant's application to amend his answer on the ground that such amendment would not be in furtherance of justice, but upon the ground that the statute of limitations had no bearing upon the case.

Whether the statute of limitations was an issue before the court and therefore had a bearing upon the case depended upon the terms of the lease, and the nature and character of the present action. It is contended by plaintiff that by the terms of the lease the lessor could wait until the termination of the lease, and then sue for damages for the lessee's failure to comply with the terms of the lease, or the lessor was given the right to sue the lessee after the former had taken possession of the leased premises as the monthly payments became due. Whether these two independent remedies were available to the plaintiff becomes immaterial and of no consequence in view of the nature and character of the present action.

The amended complaint as well as the original complaint, besides alleging the execution and delivery of the agreement of guaranty, also alleges the execution of the lease and the agreement of April 8, 1929; the breach of the terms of the lease and agreement by the defendant, the repossession of the leased premises by the lessor, and the reletting of certain portions thereof, after making alterations under the terms of the lease. By Paragraph VIII of the first cause of action it is alleged:

"VIII

"That under and by virtue of the terms of said lease and said agreement referred to in Paragraphs II and IV respectively hereof, a monthly installment of Five Hundred Dollars (\$500) as rental became due to and owing to 11 West 42nd Street, Inc., a corporation, on September 1, 1929, and additional installments of Five Hundred Dollars (\$500) each have fallen due on the first day of each and every month thereafter, up to and including the first day of April, 1934, or a total amount in the sum of Twenty-eight Thousand Dollars (\$28,000)."

It is then alleged that the sum of \$16,166.83 had been received by reason of reletting, and that the same has been credited to defendant's account.

Paragraphs X and XII of said first cause of action are as follows:

"X

"That there is now due, owing and unpaid from defendant herein, under and by virtue of the terms of said Exhibit 'A' and said lease and said agreement, referred to in Paragraphs II and IV respectively hereof, the sum of Eleven Thousand Eight Hundred and Thirty-five and 17/100 Dollars (\$11,835.17) on account of rental as aforesaid, together with interest on each installment going to make up said amount at the rate of seven per cent (7%) per annum from the date upon which each installment was due and payable respectively."

"XII

"That at all times herein mentioned, said lease and said agreement, referred to in Paragraphs II and IV respectively hereof, were in full force and effect; that at all times herein mentioned, said Exhibit 'A' was and still is in full force and effect; that said 11 West 42nd Street, Inc., a corporation, has performed all the terms and conditions on its part to be performed under and by virtue of the terms of said lease and said agreement referred to herein."

Somewhat similar allegations are made in the second cause of action. The prayer of the amended complaint is for judgment in the sum of \$11,835.17 together with interest on each installment at 7 per cent per annum from the date of each installment respectively. The pleadings of plaintiff contain no allegations of damage whatever. It would be difficult indeed, allowing the utmost liberality in its construction, to hold that such a pleading is one sounding in damages and not upon contract. What different language could be used in order to state a cause of action upon a contract? It is alleged in the amended complaint that there is due and unpaid "interest on each installment going to make up said amount [\$11,835.17] at the rate of seven per cent (7%) per annum from the date upon which each installment was due and payable respectively." No interest would be payable on any of these installments of rent until the particular installment became due, that is, until it matured, and an action to collect the same would be barred four years after its maturity.

In the case of Tillson v. Peters, 41 Cal. App.2d 671, 107 P.2d 434, a similar pleading was before the court. That action, like the present one, was to collect the balance due on the lease of real property.

It was there contended, as plaintiff contends here, that his action was not barred as it was brought within four years after the termination of the lease. In answer to the contention, 41 Cal.App.2d at pages 674, 675, 107 P.2d at page 436, of the opinion the court said: "If the rent became due in monthly installments, which the uncontradicted evidence shows that it did, the right of action accrued upon each installment of rent when it became due, and the statute of limitations began to run on each monthly installment of rent from such dates. *Lee v. De Forest*, 22 Cal.App.2d 351, 360, 71 P.2d 285; sec. 1947, Civ.Code; 15 Cal.Jur. 723, sec. 133. The plaintiff, no doubt, alleged that \$1,625 rental for the premises was due for the five-year period from April 1, 1931, to April 1, 1936, so as to avoid the effect of the statute of limitations. If that were all that he alleged, the complaint might be deemed to state a good cause of action in assumpsit, on the theory that the rent was really not due until the end of the term specified. But he further alleges that there was \$700 interest due on deferred installments of rent, which refutes the theory that the rent was due only at the termination of the contract." The amended complaint in this case is more specific in its allegations than was the pleading in the cited case, for, as we have seen by Paragraph VIII, it is expressly alleged that monthly installments of rent became due and owing on each and every month after September 1, 1929, the month during which the lessor repossessed the leased premises.

[13, 14] From the foregoing we can arrive at no other conclusion than that the plaintiff by her present action seeks to enforce the obligation of the tenant, after the landlord repossessed the leased premises, to pay at the times fixed by the lease the several installments of rent called for by the terms of the lease. These installments of rent, as noted above, would be barred by the statute of limitations four years after their respective maturity, provided the statute had been properly pleaded. The statute of limitations was therefore an issue in the case, and if properly pleaded would have been a bar to the recovery of any installment of rent which accrued more than four years before the commencement of this action. An attempt had been made to plead the statute. Upon plaintiff's objection to the plea of the statute, the defendant asked leave to amend his plea. It was within the discretion of the court to grant or deny

said request, basing its action upon whether the application to amend would be in furtherance of justice. Instead of exercising such discretion, as we have seen, the court denied the application on a ground which we have held to be erroneous and untenable. Its action therefore cannot be approved. As the judgment in this case for other reasons must be reversed and the case remanded for a new trial, the court upon a retrial may then rule upon the defendant's application to amend its plea of the statute of limitations, and in so ruling decide whether in the opinion of the court the granting of said application would be in furtherance of justice.

[15, 17] We now come to the consideration of Instruction No. 27 given by the court at the request of the defendant. This instruction purports to inform the jury as to the rules of law of the State of New York, the state where the contract of guaranty involved was executed as well as the lease and agreement annexed to the guaranty of which laws the courts of this state take judicial notice. Said instruction consists of fourteen different rules of law. While from a strictly legal approach each of these rules of law is correctly stated, in our opinion probably only one of them is applicable to the facts in this case. The first of these rules reads as follows: "The guarantor is discharged from liability if there is any alteration in the contract guaranteed." Nos. 2 and 4 of these rules as set forth in this instruction are along the same line as Rule No. 1 just quoted. We agree with plaintiff that "one searches the record in vain to discover even the remotest hint of any modifying of the contract between the landlord and De Windt." The same observation may be made in respect to Rules Nos. 6 (extension of time for performance discharges guarantor), No. 7 (reduction of rental payments by landlord discharges guarantor), No. 9 (assignment of lease by lessee discharges guarantor), No. 13 (unnecessary delay upon part of creditor in bringing action for money due discharges guarantor), and No. 14 (a debtor has the right to direct how payments on debt shall be applied). Rules Nos. 5 and 8 refer to a change by the person to whom performance is due in the subject to which the guaranty applies without the knowledge of the guarantor, or which substitutes a guaranty of another's contract releasing the guarantor from liability. We find not a scintilla of evidence which involves either

of these rules. With the exception of Rule 3, which provides that contracts of guaranty are strictly construed in favor of the guarantor, we find no evidence in the record of this case which relates to any of the various propositions of law set forth in this instruction or which would make any of them applicable to any issue before us.

The defendant made but a feeble attempt to justify the giving of this instruction. He maintains however, that even if the instruction was erroneous, it was not prejudicial to the plaintiff. In this claim we cannot agree. It will be noted that the instruction refers in at least two instances "to any change in the subject to which the guaranty applies" under the conditions therein set out, which could release the guarantor. The evidence shows that changes and alterations were made in the leased premises, but they were permitted by the lease. This instruction also contains a statement that reduction of rental payments by the landlord discharges the guarantor. The evidence shows that the landlord was forced to lower the rent on repossession of his property, but that the right to do so was expressly given him by the terms of the lease. Under these conditions, as well as others, of like kind which might be mentioned, we think the jury may well have been confused by this instruction and misled into believing that the defendant was released from his contract of guaranty by the acts of the landlord subsequent to the latter repossessing the leased premises. Even though an instruction is couched in proper language it is improper, if it finds no support in the evidence, and the giving of it constitutes prejudicial error if it is calculated to mislead the jury. 24 Cal.Jur. p. 830, § 95, and the authorities there cited.

[18] Defendant further contends that this court should refuse to consider any error in the giving of said instruction for the reason that plaintiff failed to comply with subdivision 3 of Rule VIII of the Rules of this Court then in effect, which required that when "instructions given to a jury are attacked as erroneous, all other instructions given, bearing upon that subject, must be printed in full in the appellant's brief." As already stated, Instruction No. 27 relates entirely to the law of the State of New York which the court in this action was required to take judicial notice of, and which, if applicable to any issue in the present action, "the jury was

bound to accept as given to you by this court." The basis for the giving of this instruction was the fact that the contract of guaranty, as well as the lease and agreement, was executed in the State of New York. While plaintiff in her opening brief did not print any other instructions, the defendant has not called to our attention any other instruction which the court gave bearing upon the law of the State of New York upon any question involved in this action. We have examined the instructions given by the court in this action, and we find no instruction except Instruction No. 27 which in any way refers to the laws of the State of New York, or bears upon "the duty of the jury to accept them as given to you by the court." In these circumstances we do not feel that the plaintiff should be precluded from requiring the court to consider the error in said instruction.

In view of what has been said in respect to the plea of the statute of limitations, it is apparent that in the condition in which the case now stands, no direction should be made at this time to the trial court requiring it to render judgment in favor of the plaintiff, even if this court had the power in this case which was tried by a jury, to make such an order. If the trial court should grant leave to the defendant to amend its answer by stating the subdivision of section 337, Code of Civil Procedure, upon which he relies as a bar to plaintiff's cause of action, it would then be necessary to determine what portions of plaintiff's claim are barred by the statute. On the other hand, if the trial court should deny defendant's application to amend its answer, a different result entirely would follow. Whatever determination we might make as to the power of the court to direct a verdict in an action of this character would be without the issues as now before the court. For this reason it is proper that the decision on this question be reserved until it is before us as a justiciable issue.

[19] Plaintiff also made a motion for a judgment notwithstanding the verdict of the jury. Assuming that she had previously made a proper motion for a directed verdict which the court denied, due to the condition of the record in respect to the plea of the statute of limitations it was not error to deny said motion. Plaintiff has attempted to appeal from the order denying her motion for a judgment notwithstanding

ing the verdict. As no appeal lies from said order, the purported appeal therefrom is dismissed.

The judgment is reversed.

SHENK, EDMONDS, and CARTER, JJ., concur.

SCHAUER, Justice.

I concur in the judgment of reversal, and generally in the opinion prepared by Mr. Justice CURTIS, but subject to the following qualifications:

1. I am not in accord with the discussion relative to the discretion of the trial court to *either* grant or *deny, upon the record in this case*, defendant's request for permission to amend the form of his pleading of the statute of limitations as a defense. His fifth separate defense alleges "That the said amended complaint, and each of the causes of action therein, is barred by the provisions of the Statute of Limitations as found in Sections 337 and 361 of the Code of Civil Procedure." This plea does not state the applicable subdivision of section 337 as required by section 458 of the same code. (Section 361 is not here involved.) But the latter section (§ 458) is merely permissive and directory in form. Recognizing the strict construction and application accorded that section in *Wolters v. Thomas* (1893), 3 Cal.Unrep. 843, 32 P. 565, *Overton v. White* (1937), 18 Cal.App.2d 567, 64 P.2d 758, 65 P.2d 99, and *Hart v. Slayman* (1939), 30 Cal.App.2d 556, 86 P.2d 861, it still does not follow that the pleading of the section by number without specification of the pertinent subdivision is a complete nullity. In *Churchill v. Woodworth*, (1906), 148 Cal. 669, 676, 84 P. 155, 113 Am. St.Rep. 324, section 339, which contains two subdivisions, was pleaded without specification of the subdivision relied on. No objection to the pleading, by demurrer or otherwise, was urged in the trial court. It was held that objection to the form or sufficiency of such pleading could not be raised for the first time upon appeal and that such pleading "should not be treated as a nullity." In *Universal Sales Corp. v. California, etc., Mfg. Co.*, (1942), 20 Cal.2d 751, 773, 128 P.2d 665, 678, Mr. Justice Curtis, speaking for this court, cited the *Churchill* case and declared, "The rule as to the proper plea of the statute of limitations is not self-operating but depends for its enforcement on the diligence of the plaintiff in objecting to the insufficiency of the plea

either by demurrer to the answer or by timely objection at the trial."

In the case at bar plaintiff demurred to the answer, attacking specifically the first, second, sixth, eighth, ninth, tenth, eleventh, twelfth, and thirteenth separate defenses. No objection by demurrer was taken to the form or substance of the fifth separate defense above quoted. After the trial was entered upon, plaintiff objected orally to consideration of that defense. Under the circumstances, since the pleading of the statute was not a nullity, the objection necessarily went to the *form* of the pleading rather than, strictly, to its substance. In response to such objection defendant asked leave to amend the pleading by inserting the subdivision he relied upon. This was not a request for leave to amend to *initially* plead the statute as a defense—it had already been pleaded sufficiently in the absence of objection—but was a mere request, as timely as was the objection, to amend the form to cure the defect pointed out by the objection. The trial court refused to permit the amendment and refused to submit to the jury the issues raised by the plea. Both rulings were in my opinion erroneous.

In making such rulings the court disavowed the defect in the pleading as a ground thereof and declared that it so ruled because "the statute of limitations has no bearing upon this case." That position is untenable. The statute pleaded appears to be a meritorious defense to at least a part of the cause of action sued upon. The court should have considered defendant's request for leave to amend upon its merits, and, in the circumstances shown, it was an abuse of discretion not to grant such request and thereupon submit the issues to the jury.

2. By concurring generally in the opinion otherwise than as stated above I intend no implication that the contract sued upon gives to the plaintiff an option to await the end of the term of the lease and then to sue for damages for breach of the lease. The cause of action pleaded, as stated by Mr. Justice Curtis, admits of "no other conclusion than that the plaintiff by her present action seeks to enforce the obligation of the tenant [and of the guarantor], after the landlord repossessed the leased premises, to pay at the times fixed by the lease the several instalments of rent called for by the terms of the lease." Therefore the claim of the plaintiff, urged in her briefs, that she had such an option, and the con-

trary contention of the defendant that under the provisions of paragraph twenty-first of the lease the several installments of rental, insofar as they were delinquent, became due absolutely and in any event "at the times herein fixed for the payment of the several installments of rent," are not necessarily before us for decision on this appeal, and for that reason we make no determination of such conflicting claims.

GIBSON, C. J., and TRAYNOR, J., concur.



64 Cal.App.2d 554

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION v. WALTERS
et al.

No. 12597.

District Court of Appeal, First District,
Division 1, California.

May 26, 1944.

Hearing Denied July 24, 1944.

1. Partnership ⚡22

A partnership may be established although the parties may not have used the word partner or partnership.

2. Partnership ⚡22

It is not essential that the parties should have known that their contract created a partnership.

3. Partnership ⚡17

It is the intent to do the things which creates a partnership that usually determines whether the relationship exists between the parties.

4. Partnership ⚡22

That agreement failed to provide how losses should be shared did not prevent constitution of partnership, since an agreement to divide profits implies an agreement for corresponding division of losses.

5. Partnership ⚡263

That two partners withdrew did not destroy legal status of partnership which parties had agreed should endure for a specified time.

6. Evidence ⚡455

That plaintiff questioned meaning of certain words in partnership agreement showed that the agreement was ambiguous so as to permit parol evidence by defendants to clear up ambiguity.

7. Partnership ⚡55

In action to recover unemployment contributions, evidence showed that defendants constituted a partnership, and hence were not liable for such contributions. California Unemployment Insurance Act, St.1935, p. 1226, as amended.

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Action by California Employment Stabilization Commission, successor to the California Employment Commission, formerly Unemployment Reserves Commission, against Eda H. Walters, individually and doing business as the Big Basin Inn and others, to recover certain sums of money alleged to be due as compensation, interest and penalties under the California Unemployment Insurance Act. From a judgment for defendants, the plaintiff appeals.

Judgment affirmed.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen. (Forrest M. Hill and Ralph R. Planteen, both of Sacramento, of counsel), for appellant.

Carroll S. Bucher, of San Francisco, for respondents.

KNIGHT, Justice.

Plaintiff brought this action to recover certain sums of money alleged to be due as contributions, interest and penalties under the provisions of the California Unemployment Insurance Act, St.1935, p. 1226, as amended. The sole issue the trial court was called upon to decide was whether during the year 1937 the Big Basin Inn, in California Redwood Park, and the concessions connected therewith, were operated under an arrangement constituting a partnership. If it was, then admittedly defendant was not subject to payment of the contributions provided for in the act.

The cause was tried twice. The judge before whom it was tried first, after hearing the evidence, held that a partnership existed; but subsequently he was stricken with fatal illness and his death prevented the signing of the findings. The judge be-

fore whom the case was tried the second time reached the same conclusion and made findings to that effect. From the judgment entered thereon plaintiff appeals.

The material facts are these: For more than ten years preceding January 1, 1937, the defendant, Mrs. Walters, operated the Inn and the concessions connected therewith, under a lease from the state which by its terms expired on December 31, 1937; and at the end of 1936 she concluded she would not ask for a renewal of the lease. The open season began May first of each year and ran on into the fall. Prior to 1937 most of the twenty-five or more persons Mrs. Walters had employed to assist in carrying on the business had been with her each year for several years, some of them being students and teachers on vacation. Mrs. Walters owned the equipment in the Inn, and each year the resort and the concession had been operated at a substantial profit. At the beginning of the year 1937 Mrs. Walters decided to show her appreciation for the faithful and efficient services of those who had theretofore assisted in the successful operation of the business by inviting them to join with her in an agreement to operate the business for the remaining year of the lease and to divide the profits in proportion to the salaries theretofore received by them. An agreement was prepared and signed to that effect. It bore the title "Co-operative Agreement." Mrs. Walters was referred to therein as the proprietor, and the other parties as "persons heretofore designated as 'Employees'"; and the agreement provided as follows: that "the net earnings realized from the operation of the hotel, store, lunchroom and other concessions * * * shall be divided between the persons whose names appear on sheet attached hereto marked Page 2, in the proportion representing a percentage based on the total salary or earnings of each employee for the year 1937. Net earnings shall be construed as meaning the gross earnings or income from all operating sources less cost of merchandise sold and less operating expenses including supplies, salaries, wages, insurance, taxes, interest, depreciation and all other charges or unusual expenses incident to the operation of all the various units or concessions." The substance of the third and final paragraph of the agreement was that the parties thereto were given the privilege of requesting and receiving monthly or semi-monthly the amounts accruing to them to

that date on the basis of the minimum salaries shown on page two of the agreement. The agreement was drawn prior to April 15, 1937, and signed at that time by Mrs. Walters and about twelve of the other parties thereto who began work at that time in preparing the Inn and the concessions for the opening of the season; and it was signed by the remaining parties as they reported for work during the progress of the season. Page 2 of the agreement set forth the names of the parties, the character of the work they performed and the amounts of monthly salaries to be used as the basis for the division of the profits. The first name on the list was Mrs. Walters—occupation department "manager," minimum monthly salary \$150; the next was Frank Harkins—outside manager, salary \$150; the third was Kwock Sing—"Chef Hotel," salary \$200; the fourth was Jim Yuen—"2nd Chef Hotel," salary \$175; and so on down the entire list of names.

Before the season opened Mrs. Walters notified plaintiff commission by letter of the intention to operate the resort under the plan mentioned, and she sent enclosed a copy of the agreement, with the request that if it had not been properly drawn to send a form of an agreement that would be satisfactory to the commission. In reply the commission wrote that it would send a man down to investigate; but it never did; so the resort was opened and throughout the 1937 season was operated and managed pursuant to the provisions of the agreement by a committee of the workers selected by them.

At the end of the season a profit and loss sheet was prepared showing the names and occupations of those who had signed the agreement and carried on the business, and the dates on which their services began and ended; the minimum salaries used as a basis for the division of the profits, and the total amount received by each. For example, it shows that the chef worked five months, and that his share of the net earnings amounted to \$1,000 plus \$248, or a total of \$1,248.

The findings of the trial court were that the individuals signing said agreement "did intend to and did enter into a partnership with Eda H. Walters for the operation of said Big Basin Inn for the year 1937"; that "said agreement did establish a partnership between Eda H. Walters and the aforementioned individuals and that said Eda H. Walters and the individuals signing

said agreement were partners"; that "the individuals signing said partnership agreement received as partners the same proportionate rate per month in 1937 as they had in previous years"; that "at the end of the 1937 season, each of said partners received, in addition to the above-mentioned rate, a certain amount which was derived from the net earnings of the Big Basin Inn for the season of 1937"; and that "the defendant Eda H. Walters received no more and no less than her proportionate share for the year 1937, as a partner." It is our opinion that the evidence sustains the foregoing findings.

[1-4] In support of the appeal plaintiff stresses the fact that the word "partnership" was not used in framing the agreement. It is held, however, that the existence of a partnership may be established although the parties may not have used the words "partner" or "partnership"; nor is it essential that the parties should have known that their contract in law created a partnership. 20 Cal.Jur. p. 686. It is the intent to do the things which constitute a partnership that usually determines whether or not that relationship exists between the parties. Associated Piping, etc., Co., Ltd., v. Jones, 17 Cal.App.2d 107, 61 P.2d 536. Nor does it matter, as plaintiff contends, that the agreement failed to provide for a share of the losses, for it is well settled that an agreement to divide profits implies an agreement for corresponding division of losses. San Joaquin L. & P. Corp. v. Costaloupes, 96 Cal.App. 322, 274 P. 84; see also cases cited in 20 Cal.Jur. at p. 692.

Plaintiff argues that there was a want of "community right of management" and an absence of equal powers of representation; but the evidence shows to the contrary, for as already pointed out the business was conducted under the management of a committee of the parties to the agreement selected by them. The fact that Mrs. Walters was the owner of the equipment is unimportant for the reason that the partnership arrangement pertained only to the operation of the business. It does not appear whether or not a charge was made by Mrs. Walters for the use of the equipment; however, if such charge was made as an expense of the operation of the business it would tend to serve as further support for the conclusion that a partnership existed.

[5] Two of the parties who signed the agreement quit before the season was over,

but their withdrawal did not destroy the legal status of the partnership, for the rule is that where as here parties have contracted as to the duration of the business, the withdrawal of a member or breach of the agreement does not effect a dissolution as to the copartners. 20 Cal.Jur. p. 795.

[6,7] Plaintiff further contends that the written agreement was unambiguous and that therefore the trial court erroneously admitted parol evidence. The very fact, however, that plaintiff questioned the meaning of certain words and clauses used in framing the agreement in itself shows that it was ambiguous. Body-Steffner Co. v. Flotill Products, Inc., 63 Cal.App.2d 555, 147 P.2d 84. It is quite evident that the agreement was not skillfully drawn, which doubtless accounts for the ambiguity; and since it was ambiguous the determination of the question of whether a partnership existed became one of fact upon which the court was justified in admitting parol evidence.

The remaining points urged by plaintiff are without merit and do not require special notice.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.



64 Cal.App.2d 522

**MIRICH v. UNDERWRITERS AT
LLOYD'S LONDON.**

Civ. 14149.

District Court of Appeal, Second District,
Division 3, California.

May 25, 1944.

Hearing Denied July 20, 1944.

I. Insurance $\approx$ 285½

Where physician signed application for liability policy containing statement that he had not been sued or paid any sums for claims for malpractice, error, or mistake, but listed one claim as an exception, the statement constituted a positive representation that the applicant had been sued but once and had paid no claim except the one.

2. Insurance ⇨285½

False statement in physician's application for liability policy regarding his experience with malpractice suits and claims, and insurer's reliance thereon in ignorance of the true facts, warranted insurer in rescinding the policy when it became acquainted with the facts, since it was a representation as to a material fact.

3. Insurance ⇨670

Where physician making application for liability policy made false statement regarding his experience with malpractice suits and claims, purported finding that it was not true that the statement was false and untrue and was known by insured to be false and untrue did not negative the falsity of the statement, for purpose of determining insurer's right to rescind the policy.

4. Insurance ⇨665(3)

In action involving question of insurer's right to rescind liability policy because of insured's false statement regarding his experience with malpractice suits and claims, evidence sustained finding that insured had been sued many times and had full knowledge of the suits.

5. Insurance ⇨665(3)

In action involving question of insurer's right to rescind liability policy because of false statement in insured's application regarding his experience with malpractice suits and claims, evidence did not sustain finding that insurer was not deceived by the statement.

6. Appeal and error ⇨1071(1)

Where a finding establishes the existence of a fact from which plaintiff's right to recover flows as a matter of law and another finding is to the effect that the fact does not exist, and there is substantial evidence to support both findings, a reviewing court is obliged to reverse a judgment in favor of either party.

7. Appeal and error ⇨1122(2)

In action involving question of insurer's right to rescind liability policy because of insured's false statement in application, where one set of findings would support judgment for insured's judgment creditors and another set of findings would support judgment for insurer but evidence would support only findings in favor of insurer, reviewing court would not reverse a judgment for insurer, but would make findings in accordance with the facts estab-

lished by uncontradicted evidence and set aside unsupported findings of trial court. Code Civ.Proc. § 956a.

8. Insurance ⇨670

Finding that statement in application for liability policy was false, that insurer was ignorant of true facts, and that insurer relied on the statement in issuing the policy, supported judgment for insurer which defended on ground that it had rescinded policy.

9. Insurance ⇨285½

Where insured made false statement in application for liability policy and insurer was ignorant of the true facts and relied upon the statement in issuing policy, insurer was entitled to rescind the policy regardless of whether the omission to state true facts was intentional. St.1935, p. 505, § 331.

10. Insurance ⇨388(5)

The defense by an insurer of an action against insured, without knowledge that policy was procured by insured by means of fraud, does not preclude the insurer from rescinding the policy on discovering the truth.

11. Estoppel ⇨54

One of the essential elements of estoppel and waiver is knowledge of the facts.

12. Insurance ⇨388(3)

There can be no waiver of right to charge fraud, misrepresentation, or breach of warranty except by acts and conduct subsequent to discovery of the facts, and by conduct evidencing an actual intent to relinquish a right.

13. Estoppel ⇨104

One who by his misrepresentation induces another to take action, to the latter's prejudice, cannot rely upon the action taken to relieve him of the consequences of his deceit.

14. Insurance ⇨388(5)

Where insured obtained liability policy by making false statements in application and insurer discovered truth while its attorney was engaged in defense of action against insured, fact that attorney continued with case until it was finished did not constitute a waiver by insurer of its right to rescind policy, in view of fact that it gave notice of rescission immediately after trial and as soon as it was in a position to do so.

15. Attorney and client ☞112

Insurer's attorney who had assumed obligation of defending action against insured would not have right to abandon it in midst of trial against insured.

16. Insurance ☞311(1)

Where insured had obtained liability policy by false statement, right of insured's judgment creditor to recover on the policy could be no better than that of the insured. St.1935, p. 505, § 331.

17. Insurance ☞377(2)

Where insured obtained liability policy through false statement in application regarding his experience with malpractice suits and claims, the fact that insurer could have discovered the suits against insured by examination of court records did not preclude insurer from rescinding policy on theory that it was deemed to have had knowledge of the suits.

18. Contracts ☞94(5)

One who is induced to enter into a contract by positive representations of fact is under no duty to inquire as to truth of representations unless he is made aware of facts which brings them under suspicion and which would induce a prudent man to make inquiry.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Doreen Mirich, a minor, by Morris Mirich, her guardian ad litem, against the Underwriters at Lloyd's London on a policy to collect unpaid amount of a judgment for malpractice against insured. Judgment for defendant, and plaintiff appeals.

Affirmed.

Phillip W. Silver, of Los Angeles, for appellant.

Lasher B. Gallagher and Joseph F. Rank, both of Los Angeles, for respondent.

SHINN, Justice.

Plaintiff recovered a judgment against William E. Balsinger for malpractice in the sum of \$3850, of which amount she was able to collect only \$313. Dr. Balsinger was insured by defendant herein under a policy which ran in favor of any person who might obtain judgment against him within its indemnity provisions. Plain-

tiff brought the present suit on the policy to collect the unpaid amount of her judgment. The company in its defense alleged that Dr. Balsinger had obtained the policy by means of false statements in his application and that it had been rescinded by the company for fraud, concealment and misrepresentation. Upon the trial the court made conflicting findings upon this defense but rendered judgment for plaintiff for the balance of her judgment against Dr. Balsinger. Defendant made a motion under section 663 of the Code of Civil Procedure for the entry of another and different judgment on the findings. In ruling upon this motion the court ordered stricken from the findings all conclusions of law, and amended the conclusions of law to call for a judgment in favor of defendant. A new judgment was entered in defendant's favor and plaintiff appeals from this judgment.

The first question in order is whether the judgment is sustained by the findings. The case hinged upon the defense that the policy had been rescinded for fraud, concealment, and misrepresentation. For brevity we shall refer to it as the defense of fraud and as embracing unintentional as well as intentional concealment. There is an irreconcilable conflict between general findings on the issue of fraud and the findings as to specific facts bearing upon the alleged fraud. The court found specifically that Dr. Balsinger signed an application for the policy, reading in part as follows: "12. I have not been sued or paid any sums for claims made against me for malpractice, error or mistake except as follows: 1 claim—7 yrs ago—U. S. F. & G. * * * 15. Remarks: The Doctor remodeled a woman's nose—and told her to return for treatment, she did not and was dissatisfied with the work. She then sued—and case was settled out of court for \$200.00." It was found that before the application was signed, Dr. Balsinger had been sued for malpractice three times in Illinois, three times in the Superior Court of Los Angeles County, and once by cross-complaint in the Municipal Court of the City of Los Angeles, that two of the superior court actions had been decided in favor of Dr. Balsinger, that the third had been settled by his insurer, and that the municipal court suit had been settled by offsetting Dr. Balsinger's claim for services rendered against the patient's claim for damages. It was found that Dr. Balsinger

knew of all of these suits and had filed answers in them, but mentioned none of them in his application. It was further found that defendant had no knowledge or information as to any of these suits at the time the policy was issued; that it learned of them during the trial of plaintiff's action against Dr. Balsinger and that it then gave notice of rescission of the policy and tendered return of the premium that had been paid. Notwithstanding these findings the court also found that it was not true that the statement in the application respecting claims and suits "was false and untrue and was known by said William E. Balsinger to be false and untrue"; that it was not true that the answer was made knowingly and with the intent that the defendant herein would be deceived thereby; that it was not true that the defendant was deceived thereby; that it was not true "that the said William Ernest Balsinger engaged in any concealment, either deliberate or intentional or otherwise with the intent that this defendant would not be fully advised relative to the risk that it might purport to assume, or was made with the intent of deceiving this defendant in connection with the execution and issuance of said purported certificate of insurance"; that it was not true that the said William Ernest Balsinger knew that the replies inserted on his behalf in said application for insurance were false and untrue. It was further found, "that it is not true that the purported concealment alleged to have been engaged in by the said William Ernest Balsinger could not have been ascertained by the defendant herein with the exercise of ordinary care."

[1,2] The foregoing summary includes all of the material findings upon the defense of fraud, except those relating to the notice of rescission, which are not in question. There is only one point of disagreement between the parties as to the material facts on the issue of fraud. Plaintiff contends that the statement which we have quoted from the application was not a representation of fact. She relies upon the rule, sometimes recognized, that where a question in an application for insurance has not been answered at all or where it manifestly appears to have been incompletely answered and the policy has been issued without further inquiry, the insurer cannot later treat the omission to give an answer or a complete answer as a false representation. Appellant would have us

construe the statement "I have not been sued or paid any sums for claims made against me for malpractice" as calling for two answers, one as to suits and the other as to the payment of claims without suit, and it is contended that under this construction it would appear that the inquiry as to suits had not been answered, while the inquiry as to the payment of claims had been. We do not regard this as a reasonable interpretation of the statement. We think the statement of the insured would be understood as meaning that only one suit had been filed against him and that no claim had been paid except the one he specified and explained. The statement should be construed as it naturally would have been understood and as it was intended to be understood by the company. It would seem apparent that the applicant was called upon and was expected to list suits that had been filed against him and claims that he had paid, in a single statement, and that the answer would be understood as embracing all of the matter inquired about in paragraph 12 of the application. If that had not been the understanding, there would have been two inquiries instead of one. The statement constituted a positive representation that the applicant had been sued but once and had paid no claim except the one set forth in his answer. *Westphall v. Metropolitan L. Ins. Co.*, 1915, 27 Cal.App. 734, 151 P. 159; *McEwen v. New York Life Ins. Co.*, 1921, 187 Cal. 144, 201 P. 577. In the *Westphall* case [27 Cal.App. 734, 151 P. 160] the application read in part: "I have never had any of the following complaints or diseases: Apoplexy * * * fits or convulsions * * * (naming a number of well-recognized diseases) varicose veins, except—" Nothing was written by the applicant after the word "except" and it was held that his failure to note any exception constituted a positive representation that he had never had or suffered from any of the designated complaints or diseases. In the *McEwen* case the inquiry was: "What illnesses, diseases, or accidents have you had since childhood?" The applicant listed pneumonia but failed to list an injury occasioned by the kick of a mule. It was said that the answer, which omitted all mention of the accident, was in effect an answer that no accident had been sustained. A judgment on directed verdict for defendant was sustained on appeal, upon the ground that the applicant's answer constituted a fraudulent misrep-

sentation which voided the life insurance policy. Appellant insists that these cases were wrongly decided and should be overruled, but we do not doubt that they were correctly decided. The false statement in Dr. Balsinger's application and defendant's reliance thereon in ignorance of the true facts warranted the company in rescinding the contract when it became acquainted with the facts. It was a representation as to a material fact. It was important for defendant to know Dr. Balsinger's experience with malpractice suits and claims before assuming the risk of insuring him, just as it is important for a life insurance company to inquire as to the previous state of health of an applicant or for a fire insurance company to inquire as to an applicant's previous experience with fires. There was no evidence from which the court could have drawn an inference that the representation was not a material one.

[3,4] There was no finding that the statement in the application was true. The purported finding that it was not true that the statement "was false and untrue and was known by said William E. Balsinger to be false and untrue" does not negative the falsity of the statement. It may be that the court intended to find that even though the statement was false, Dr. Balsinger did not know it to be false. This, as we have seen, would be contrary to the proven facts and to other findings. The evidence that Dr. Balsinger had been sued many times and had full knowledge of the suits was undisputed. The specific findings as to prior suits and claims and the applicant's knowledge thereof demonstrate that the statement was untrue and was known by Dr. Balsinger to be untrue, and these findings are supported by undisputed evidence.

[5] The finding that defendant was not deceived by the statement would be sustained if the representation had been true or if it had been false but defendant did not rely and act upon it. The falsity of the representation having been established and found to be a fact, the remaining question is as to defendant's reliance upon it. There was a specific finding that defendant had no knowledge or information as to the other suits against the insured until long after the policy had been issued. The application read in part: "Signing this form does not bind the Applicant to complete the Insurance, but it

is agreed that this form shall be the basis of the Contract should policy be issued." The direct and undisputed testimony of defendant's agent was that he received and relied solely upon the application in issuing the policy, that defendant made no inquiry except by means of the application, and that the policy would not have been issued if defendant had known of the other suits against the insured. There was no other testimony upon that issue and there was no circumstantial evidence from which it could have been inferred that defendant was not deceived by the false statement.

[6,7] The question then is what should be done with an appeal presented upon such a record? Where a finding establishes the existence of a fact from which the plaintiff's right to recover follows as a matter of law, and another finding is to the effect that the fact does not exist, and there is substantial evidence in the record to support both findings, a reviewing court would be obliged to reverse a judgment in favor of either party. The trial court would have to make new findings. But that is not necessarily true where one finding is supported by the evidence and the other is not. The case before us is unique; the facts upon the fraud issue have been found both ways, and upon one set of findings the case has been decided each way. We have quoted findings which, considered by themselves, would support the judgment that was given for plaintiff, but these findings have no support in the evidence. The uncontradicted evidence admits only of findings in favor of defendant. Under these circumstances we should not reverse the judgment because of the conflicts in the findings. The entire evidence is before us and the case is one where we should make findings in accordance with the facts established by the uncontradicted evidence and set aside the findings of the trial court which are in conflict with those made by us. Sec. 956a, Code of Civ.Proc.; *Kirk v. Culley*, 1927, 202 Cal. 501, 261 P. 994; *Donahue v. Conley*, 1927, 85 Cal.App. 15, 258 P. 985; *Hamilton v. Hollman*, 1929, 102 Cal.App. 166, 282 P. 977; *Wallace Ranch Water Co. v. Foothill Ditch Co.*, 1935, 5 Cal.2d 103, 53 P.2d 929. The finding that it was not true that the questioned statement in the application "was false and untrue and was known by said William Ernest Balsinger to be false and untrue" is stricken for

insufficiency as a finding of any fact and, under any construction thereof, unsupported by the evidence. We find as a fact, upon the direct and undisputed evidence, that defendant relied upon the statement in the application respecting prior suits and claims, and issued the policy in the belief that Dr. Balsinger had not been sued and that he had not paid any sums for claims except in the one instance stated in the application.

[8,9] The trial court's specific findings as to the falsity of the statement and defendant's ignorance of the true facts and our finding that defendant relied upon the statement in issuing the policy furnish support for the judgment in favor of defendant. There are other findings to the effect that Dr. Balsinger did not engage in intentional concealment and did not intend that the company would be deceived by any statement or omission in the application. It is unnecessary to take particular notice of these findings, although we think they have no support in the evidence. It is immaterial whether the omission to state the true facts was intentional or unintentional if defendant was misled by the statements that were made by the applicant. Section 331 of the Insurance Code, St.1935, p. 505, provides: "Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance." See also *Telford v. New York Life Ins. Co.*, 1937, 9 Cal.2d 103, 105, 69 P.2d 835; *Iverson v. Metropolitan Life, etc., Co.*, 1907, 151 Cal. 746, 91 P. 609, 13 L.R.A.,N.S., 866; and *Pierre v. Metropolitan Life Ins. Co.*, 1937, 22 Cal.App.2d 346, 70 P.2d 985.

[10-16] Appellant makes the further contention that even though the policy were procured through fraud, the company is estopped to question liability by reason of the fact that it defended Dr. Balsinger in the action in which plaintiff recovered judgment. Cases have been cited by appellant which support the general proposition that an insurer waives the right to claim invalidity of the policy where it undertakes and carries through a defense of the insured against a claim covered by the policy. This general statement of the rule is sufficient for the purposes of our opinion. It rests upon the doctrine of estoppel. No case has been cited by appellant in which it has been held that the defense by an insurer of an action against the assured, without knowledge that the pol-

icy was procured by the assured by means of fraud or misrepresentation, precludes the insurer from rescinding the policy upon discovering the truth. One of the essential elements of estoppel and waiver is knowledge of the facts. There can be no waiver of the right to charge fraud, misrepresentation, or breach of warranty except by acts and conduct subsequent to the discovery of the facts, and by conduct evidencing an actual intention to relinquish a right. *McDanels v. General Ins. Co.*, 1934, 1 Cal.App.2d 454, 35 P.2d 394, 36 P. 2d 829; *California Western States, etc., Co. v. Feinsten*, 1940, 15 Cal.2d 413, 101 P.2d 696, 131 A.L.R. 608. One who by his misrepresentation induces another to take action, to the latter's prejudice, cannot rely upon the action taken to relieve him of the consequences of his deceit. The evidence in the instant case is that defendant learned of prior suits against Dr. Balsinger while its attorney was engaged in the defense of plaintiff's suit against him. The attorney who had assumed the obligation of defending the suit for Dr. Balsinger would have had no right to abandon it in the midst of the trial (*McDanels v. General Ins. Co.*, supra), and the fact that he continued with the case until it was finished did not constitute a waiver by defendant of its right to rescind the policy. It gave notice of rescission immediately after the trial and as soon as it was in a position to do so. The company undertook the defense of the suit because it was required to do so under its policy, and it was placed in that position through the misrepresentation of Dr. Balsinger. He could not justly complain because the company's attorney protected his rights until the trial was finished. He could not escape the consequences of his misrepresentation or fraud upon the technical claim that the undertaking of his defense without knowledge of the truth, or the completion of the trial after such knowledge was obtained in the course of the trial, constituted a waiver of defendant's right to rescind. Plaintiff's right to recover on the policy can be no better than that of Dr. Balsinger, and the claim of waiver or estoppel asserted by her has no validity. *Kindred v. Pacific Auto. Ins. Co.*, 1938, 10 Cal.2d 463, 466, 75 P. 2d 69, and cases there cited.

[17,18] The further argument is made that defendant must be deemed to have had knowledge of the suits against Dr. Balsinger because they would have been dis-

covered by an examination of the court records. The argument is without merit. One who is induced to enter into a contract by positive representations of fact is under no duty to inquire as to the truth of the representations unless he is made aware of facts which bring them under suspicion and which would induce a prudent man to make inquiry. This is an elementary principle of law and of business.

The judgment is affirmed.

DESMOND, P. J., and PARKER
WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.



64 Cal.App.2d 537

PEOPLE v. GIBSON,

Cr. No. 1873.

District Court of Appeal, Third District,
California.

May 25, 1944.

1. Poisons ☞9

Evidence sustained conviction for possessing and for transporting without a prescription therefor preparations of morphine and codeine contrary to statute. St. 1941, p. 2820, § 11160.

2. Criminal law ☞568

Guilty knowledge and intent to violate the law may be shown by circumstances, including conduct of defendant and any false or misleading statements which he may make to the arresting officers or others with relation to the material facts. Pen.Code, § 21.

3. Poisons ☞9

False statements made by defendant to arresting officer regarding defendant's right as licensed physician to use narcotics furnished some evidence of defendant's consciousness of guilt of crime of possessing and transporting without a prescription therefor preparations of morphine and codeine. St.1941, p. 2820, § 11160; Pen. Code, § 21.

149 P.2d—214

4. Criminal law ☞742(1), 1159(6)

Poisons ☞9

In prosecution for possessing and transporting without a prescription therefor preparations of morphine and codeine contrary to statute, where evidence showed possession, transportation and use of narcotics by defendant, it was sole province of jury to determine weight and sufficiency of evidence and credibility of witnesses and to apply any reasonable inferences which might be drawn from the circumstances, and with that province the appellate court could not interfere. St.1941, p. 2820, § 11160.

Appeal from Superior Court, Lassen County; Ben. V. Curler, Judge.

George Hamilton Gibson was convicted of having in his possession and transporting without a prescription therefor preparations of morphine and codeine contrary to statute, and he appeals.

Affirmed.

George Hamilton Gibson, in pro per.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

The defendant was convicted by a jury on two counts of an information which was filed against him of the crimes of having in his possession and transporting without a prescription therefor preparations of morphine and codeine contrary to the narcotic statute of California. Sec. 11160, Health and Safety Code, St.1941, p. 2820. From the judgment of conviction sentencing him to imprisonment in the county jail of Lassen County for the period of one year for each offense, to run concurrently, he has appealed.

The appellant contends that the verdicts and judgment are not supported by the evidence for the reason that it does not appear he knowingly had in his possession or transported the narcotics contrary to law.

The defendant is thirty-four years of age. He is a carpenter who formerly resided at Los Angeles. He is married to a woman who had been employed as a nurse in Good Samaritan Hospital and also in the office of two physicians in that city. He owned a Nash sedan automobile. In

August he drove his car to Westwood, Lassen County, to obtain employment as a carpenter. His wife did not accompany him. On August 29th, the day of the alleged offenses, his machine was found parked on the paved portion of the highway near Westwood. He was then sitting in the car in a drunken stupor. In his car on the floor behind the front seat a small box was found, containing a labeled bottle of 150 one-fourth grain tablets of morphine, a vial in which there were 18 one-half grain tablets of codeine, a hypodermic syringe and two needles, a bottle of potassium permanganate, a bottle of aromatic spirits of ammonia, and other drugs and apparatus. The morphine and codeine tablets were analyzed and found to contain opium derivatives. It was conceded that neither the defendant nor his wife had procured prescriptions for the narcotics. When the defendant was arrested and charged with the unlawful possession of those narcotics he falsely told the deputy sheriff he was a graduate of the University of Iowa Medical School, and had a right to use the narcotics. He later admitted he was not a graduate physician, and that he had procured no prescriptions for the narcotics. He then admitted his first story was false, but claimed that the kit containing the narcotics belonged to his wife. He admitted he once used one of the drugs in the hypodermic syringe for emergency relief of an injured man at Panemenius, and that he had used them "on a few people" in emergency cases in Los Angeles. When asked if he had ever used the contents of the box he replied, "Yes, I used the merthiolate down to Ackerman's" Boat Company in Newport, where he worked. He carried the kit in his car, and knew it was there. He finally said that his wife put the narcotics in the box, and stated that he first falsely told the officer that he was a registered physician and had a right to use the drugs because he was "scared" and did not wish to involve his wife in the transaction.

Mrs. Gibson, his wife, testified that she was a registered nurse and that she collected the drugs from unused narcotics returned by patients of the physicians by whom she was employed; that she did not procure them with prescriptions. She first told Inspector Hill that she "knew nothing

about the narcotics in his [her husband's] possession" and that he would have no reason for having narcotics in his possession. There is no evidence that the defendant was a narcotic addict.

[1] Upon the foregoing evidence the jury found the defendant guilty of both charges of the information. The findings and judgment are adequately supported by the evidence.

[2, 3] Guilty knowledge and intent to violate the law may be shown by the facts and circumstances of the case, including the conduct of the defendant and any false or misleading statements which he may make to the arresting officers or others with relation to the material facts. *People v. Rose*, 26 Cal.App.2d 513, 79 P.2d 737; *People v. Singh*, 136 Cal.App. 233, 240, 28 P.2d 416; 8 Cal.Jur. 33, secs. 151-157; Sec. 21, Penal Code. The false statements made by the defendant to the deputy sheriff regarding his right as a licensed physician to use the narcotics furnish some evidence of his consciousness of guilt of the crime with which he was charged. In 8 California Jurisprudence, section 157, it is said in that regard:

"Any conduct of a defendant subsequent to the commission of the crime with which he is charged which indicates a consciousness of guilt is relevant and admissible against him. It is elementary that efforts to manufacture testimony, or to suppress testimony against himself, are properly proved as indicating a consciousness of guilt. Thus it may be shown that the defendant made false statements for the purpose of misleading or warding off suspicion."

[4] The evidence in this case shows possession, transportation and use of the narcotics by the defendant. It was the sole province of the jury to determine the weight and sufficiency of the evidence and the credibility of the witnesses and to apply any reasonable inferences which may be drawn from the facts and circumstances of the case. With that province we may not interfere. *People v. Latona*, 2 Cal. 2d 714, 725, 43 P.2d 260.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

64 Cal.App.2d 564

PEOPLE v. LEWIS.
Cr. 1863.

District Court of Appeal, Third District,
California.
May 26, 1944.

1. Criminal law §997

Writ of error coram nobis will not be issued unless defendant establishes by preponderance of substantial and credible evidence that error of which he complains was such that he was deprived of legal right by extrinsic causes amounting to deprivation of trial on the merits.

2. Criminal law §997

Where matters complained about on petition for writ of error coram nobis constituted mere irregularities occurring in course of trial, subject to remedial action by motion for new trial or by a direct appeal, the writ would not lie, notwithstanding defendant's contention he was prevented from taking an appeal because of being kept under confinement and observation.

3. Criminal law §997

Writ of error coram nobis did not lie where prisoner made no showing that conviction was predicated upon assumed fact or condition which did not in truth exist, and that nonexistence thereof would have prevented conviction had it been known.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

W. M. Lewis was convicted of burglary after three prior convictions. From an order denying a petition for a writ of error coram nobis, he appeals.

Affirmed.

W. M. Lewis, in pro. per.

Robt. W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

PEEK, Justice.

This is an appeal by the defendant from an order denying his application and motion to "vacate, annul, set aside and modify" the judgment of conviction previously entered by the court.

The record discloses that on June 1, 1936, an information was filed by the district

attorney of San Joaquin county, charging the defendant with the commission of the crime of burglary, a felony, and three prior convictions and imprisonments for crimes amounting to felonies. To all of these charges the defendant entered a plea of not guilty and not guilty by reason of insanity. The jury by its verdict found defendant guilty of burglary in the second degree and further found that he had suffered the three prior convictions and imprisonments as alleged. Upon the plea of not guilty by reason of insanity the jury likewise found against the defendant. A motion for a new trial was made but was denied. The court then decreed the defendant to be an habitual criminal and sentenced him to life imprisonment. On January 11, 1943, nearly six and one-half years after his conviction the defendant filed his motion to vacate and set aside the judgment previously entered, which motion was denied by the trial court. It is from the order denying such motion that he has appealed.

[1] The original proceeding, although entitled a motion to vacate judgment, etc., is for all purposes and intent an application for the common-law writ of coram nobis. Under the well-established rules governing the issuance of such writ it is incumbent upon the defendant to establish by a preponderance of substantial and credible evidence that the error of which he complains was such that he was deprived of legal rights by extrinsic causes amounting to a deprivation of a trial on the merits. *People v. Schwarz*, 201 Cal. 309, 257 P. 71; *People v. Reid*, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435; *People v. Deutsch*, 16 Cal.App.2d 121, 60 P.2d 155.

[2] An examination of defendant's petition discloses (1) allegations of error in the offer of what he charges were known to the district attorney to have been improperly authenticated copies of prior convictions, and the admission thereof in evidence, and (2) allegations of variance between the charges contained in the information and the proof and verdict of the jury as regards the prior conviction alleged to have been suffered in Imperial county. No charge is made that defendant did not suffer the prior convictions or that he was denied a trial on the merits.

He was represented by counsel at the time of trial and if any of the evidence produced by the prosecution was improper, timely objection to the admission thereof could have been made, or waived, at the

pleasure of the defendant. *People v. Lawyer*, 11 Cal.App.2d 718, 54 P.2d 747.

In any event the matters so attacked constitute at best irregularities occurring in the course of the trial, and if improperly introduced were subject to additional remedial action by a motion for a new trial or by a direct appeal. *People v. Reid*, supra; *People v. Mooney*, 178 Cal. 525, 174 P. 325. However, no appeal was taken either from the order denying his motion for a new trial or from the judgment.

It is conceded by defendant that such irregularities ordinarily should be attacked on a direct appeal from the judgment but he argues that because of his confinement the time for appeal passed, and therefore as the statutory remedy was not available to him, recourse must be had to the common law.

In further explanation of his failure to so appeal, defendant alleges generally that in addition to having been kept under close confinement and observation after being received at Folsom Prison until the time for appeal had expired, he thereafter was committed to the Mendocino State Hospital, and it was not until he was returned to Folsom that he was able to take any steps to correct the alleged errors. Neither the date of his commitment to Mendocino or the circumstances surrounding such commitment, nor the date of his return to Folsom appear in his petition in substantiation of the inference that from the date of his original incarceration in Folsom to the filing of the petition such disabilities were continuous or of such a degree as to thereby preclude him from perfecting an appeal. Recourse to the record is of no avail to clarify this and other inferences and omissions in the petition for the reasons as stated by the trial judge and confirmed by the district attorney, that in all cases after a lapse of five years all original records and evidence are destroyed by the county clerk.

A somewhat comparable situation is found in the case of *People v. Reid*, supra [195 Cal. 249, 232 P. 461, 36 A.L.R. 1435], where the court dismissed a contention similar to that advanced by the defendant herein, with the statement that such conclusion "is not sound. * * * To hold in such case that after the expiration of the statutory limit the common-law remedy could still be availed of would be to hold in effect that in case of conflict between the two the common law prevails over the stat-

ute. * * * the existence of a statutory remedy * * * precludes a resort to the common law * * *."

[3] Apart from that fact, however, no showing whatever has been made, either before the trial court or before this court, that the judgment was predicated upon an assumed fact or a condition which did not, in truth, exist, and that the nonexistence thereof would have prevented the rendition of the judgment had it been known.

The order is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.



64 Cal.App.2d 443.

LUCIENTES v. BARTHOLOMAE OIL CORPORATION (ROOT et al., Interveners).

No. 12576.

District Court of Appeal, First District,
Division 2, California.

May 22, 1944.

Rehearing Denied June 21, 1944.

Hearing Denied July 20, 1944.

1. Trusts ⇨305

In broker's action for accounting under trust agreement providing for payment of portion of net profits from mining venture to plaintiff as compensation for services and prohibiting assignment of interests in trust by plaintiff, who subsequently entered into agreement with defendant for settlement of plaintiff's claims, interveners, who were neither parties to nor mentioned in trust agreement, could not recover any portion of such profits as assignees of interests in such claims, in absence of evidence supporting interveners' allegations of fraud in connection with execution of trust agreement and settlement agreement.

2. Brokers ⇨42

A beneficiary of trust agreement, providing for payment to him of portion of settlor's net profits from mining venture as compensation for services in procuring execution of contracts for sale of mining claims to settlor's assignor, and assignees of interests in beneficiary's claims against settlor under such agreement could not recover from settlor for services performed

by them, in absence of pleading and proof that they were licensed under Real Estate Act of California, wherein such contracts and trust agreement were negotiated and executed. Gen.Laws 1937, Act 112, §§ 2, 20.

3. Brokers 42

A broker and persons aiding him in procuring execution of contracts for sale of mining claims to one who assigned contracts to corporation, which executed trust agreement for payment of portion of net profits from mining venture to such broker as compensation for his services, could not recover any portion of such profits from corporation without having been licensed under state Real Estate Act, though they and broker were interested in prior option, transferred to corporation's assignor, to purchase claims, in absence of evidence of any other consideration for trust agreement than services performed. Gen.Laws 1937, Act 112, §§ 2, 20.

Appeal from Superior Court, San Francisco County; Everett C. McKeage, Judge.

Action by Jose Lucientes against the Bartholomae Oil Corporation to obtain an accounting for a portion of the net profits of a mining venture under the terms of a trust agreement, in which Lloyd Root and another intervened as claimants of interests in such agreement. From a judgment for interveners, defendant appeals.

Reversed.

Earl D. Killion, of Los Angeles, for appellant.

Vincent W. Hallinan, Carey Van Fleet, and Emmett R. Burns, all of San Francisco (James A. Himmel, of San Francisco, of counsel), for respondents.

SPENCE, Justice.

This action was brought by Jose Lucientes, hereinafter called plaintiff, to obtain an accounting from Bartholomae Oil Corporation, hereinafter called appellant, under the terms of a certain trust agreement dated April 30, 1934. This trust agreement covered ten percent of the net profits of a certain mining venture of appellant for a period of ten years commencing on January 1, 1935. During the pendency of said action and on October 4, 1938, plaintiff and appellant entered into a written agreement settling all claims and demands of plain-

tiff against appellant for the sum of \$1000, and providing for the dismissal of this action. Said sum was paid by appellant and accepted by plaintiff and the validity of said agreement, as between the parties thereto, has never been questioned. On December 8, 1938, and prior to any dismissal of said action, Lloyd Root and William Dalziel, hereinafter called respondents, were granted leave to file a complaint in intervention in said action upon their claim that they had an interest in said trust agreement dated April 30, 1934; that the action had been brought by plaintiff on behalf of himself and as a representative of respondents; and that after the filing of said complaint, plaintiff had taken a position hostile to said respondents. Despite these claims of hostility between plaintiff and respondents, the same counsel who acted for plaintiff in filing his complaint also acted for respondents in filing their complaint in intervention and the record discloses that the same counsel continued to act for both plaintiff and respondents throughout the trial. The complaint in intervention contained substantially the same allegations as did the complaint and also certain additional allegations which will be hereinafter discussed. Appellant's answer denied many of the allegations of said complaint in intervention and also set up numerous affirmative defenses. A trial was had, followed by an accounting, and judgment was finally entered on January 2, 1943.

In said judgment, it was decreed that plaintiff should recover nothing against appellant; that respondents should recover nothing against plaintiff; that no profits had been realized from said mining venture but on the contrary, appellant had suffered a net loss of \$116,054.61 during the period covered by the accounting and that therefore respondents were not entitled to judgment for any alleged profits. No appeal was taken by any party from the above-mentioned portions of the judgment.

It was further decreed, however, "That the plaintiff in intervention, Lloyd Root, is the owner of, and entitled to receive, an undivided forty percent of ten percent, and the plaintiff in intervention, William Dalziel, is entitled to receive an undivided twenty percent of ten percent of the net profits realized by the defendant Bartholomae Oil Corporation in the operation of said mining properties mentioned and contained in the said two contracts of March

7, 1934, and which are mentioned and referred to in said agreement of April 30, 1934, being Exhibit 'A' in the complaint in intervention, subject, however, to all of the terms and conditions of said two contracts of March 7, 1934, for the period of ten years from the 1st day of January, 1935."

This appeal was taken by appellant solely from that portion of the judgment which is quoted in the preceding paragraph.

There is no dispute concerning the making of the agreements to which reference is made in the above-quoted portion of the judgment. Plaintiff, with the assistance of respondents, was instrumental in bringing together the parties and in assisting to procure the execution of the two agreements dated March 7, 1934. One of said agreements of March 7, 1934, was entered into by Martin Corliss and other persons, who were owners of certain mining claims in Alaska, with William A. Bartholomae, Jr. The other of said agreements of March 7, 1934, was entered into by James Frawley, who was likewise the owner of certain mining claims in Alaska, with said William A. Bartholomae, Jr. Said agreements provided for the sale of said mining claims to William A. Bartholomae, Jr. Plaintiff, respondents and William A. Bartholomae, Jr., were residents of California and said agreements were negotiated in this state and were executed in the City and County of San Francisco. Thereafter William A. Bartholomae, Jr., assigned said agreements to Bartholomae Oil Corporation, the appellant herein.

In the following month under date of April 30, 1934, the trust agreement referred to in the quoted portion of the judgment was executed in the City and County of San Francisco by appellant Bartholomae Oil Corporation, as trustor, and Joseph Bien, as trustee, and plaintiff Jose Lucientes and his wife, as beneficiaries. Respondents were not parties to said agreement nor were they mentioned therein. After reciting the execution of the two agreements of March 7, 1934 and that "in consideration of services rendered by Jose Lucientes in and about the making and obtaining of said contracts, the party of the first part (appellant) is desirous of compensating the said Jose Lucientes to the extent and in the manner hereinafter set forth", it provided for the transfer in trust to the trustee of "Ten percent of the net profits realized by the party of the first part in the operation of the properties contained in the two con-

tracts above referred to made by the said William A. Bartholomae, Jr. and assigned to the party of the first part, all subject, however, to the terms and conditions of the said two contracts, to continue for a period of ten years from the 1st day of January 1935." The terms of the trust provided for the payment of the sums received by the trustee to plaintiff and, under certain conditions, to plaintiff's wife. There were also certain terms giving the trust the nature of a so-called spendthrift trust by prohibiting the transfer or assignment by plaintiff of any interest in the trust.

Respondents knew of the terms of said trust agreement shortly after the execution thereof but nevertheless made no objection thereto until after appellant had made the settlement with plaintiff on October 4, 1938. On the contrary, respondents had previously accepted from plaintiff purported "assignments" of interests in plaintiff's claim against appellant. The purported "assignment" from plaintiff to respondent Dalziel was executed on June 12, 1934 and made specific reference to the trust agreement of April 30, 1934. The instrument was in the nature of an order for the trustee to pay a portion "of said ten percent" to respondent Dalziel. The purported "assignment" from plaintiff to respondent Root was dated May 11, 1937. It did not make specific reference to the trust agreement but was in the form of an agreement that "any and all claims which said Jose Lucientes may have against the Bartholomae Oil Corporation" in connection with said mining claims "shall be litigated solely and alone by said Jose Lucientes and said Jose Lucientes hereby assigns to Lloyd Root one-half of any sum which he may recover, attorneys fees and costs of suit having been first deducted." The trial court found that these instruments dated June 12, 1934 and May 11, 1937 had been executed by plaintiff and that pursuant thereto plaintiffs in intervention were the owners of and were entitled respectively to twenty percent and forty percent of the ten percent of the net profits to be paid to plaintiff under the trust agreement of April 30, 1934.

Appellant makes numerous contentions on this appeal including the contentions that the complaint in intervention did not state facts sufficient to constitute a cause of action against appellant; that the evidence was insufficient to support the findings; that the findings were insufficient to

support the judgment; that respondents' cause of action, if any, was barred by the statute of limitations; that the trial court failed to make findings on certain material issues including the statute of limitations; that the settlement made by plaintiff and appellant discharged all claims and demands of respondents against appellant; and that in any event, no recovery could be had by plaintiff or respondents for the services performed by them without pleading and proving that they were licensed under the California Real Estate Act. Deering's General Laws 1937, Act 112. We deem it unnecessary to discuss each of said contentions separately as we are satisfied that the judgment must be reversed for the reasons hereinafter stated.

[1] It is difficult to ascertain the theory upon which respondents' complaint in intervention was drawn or the theory upon which the trial court entered the challenged portion of the judgment. As above stated, respondents' complaint in intervention contained practically all the allegations of plaintiffs' complaint in seeking an accounting under the terms of the trust agreement of April 30, 1934. But respondents were not entitled to recover under the terms of said trust agreement as they were neither parties to said agreement nor mentioned therein and the terms of said trust agreement expressly prohibited any assignment by plaintiff. Furthermore the rights of plaintiff and appellant, who were the only parties to said trust agreement, had been fully settled by the settlement agreement of October 4, 1938. Apparently realizing that their complaint in intervention could not stand solely upon the terms of the trust agreement and of the purported assignments thereof, respondents made certain general allegations of fraud on the part of plaintiff and appellant in connection with the execution of the trust agreement and the execution of the settlement agreement. While the trial court found these allegations were true, respondents have not directed our attention to any evidence supporting these allegations and we have found none. We therefore find no support for the challenged portion of the judgment either under the terms of the written instruments or independently of said terms.

[2] In any event, we are of the opinion that the judgment must be reversed for the further reason that no recovery could be had for any services performed by plaintiff or respondents in the absence of plead-

ing and proof that they were licensed under the California Real Estate Act. Deering's General Laws 1937, Act 112, sections 2 and 20. The two agreements of March 7, 1934, were negotiated and executed in California and the trust agreement of April 30, 1934 was likewise executed in California. The consideration for the trust agreement was expressly recited to be the "services rendered by Jose Lucientes in and about the making and obtaining of said contracts", the contracts referred to being the agreements for the sale of the mining claims. It is apparently conceded that neither plaintiff nor respondents had been licensed under the above-mentioned act.

[3] Respondents claim, however, that plaintiff and respondents were interested in a prior option which they transferred to William A. Bartholomae, Jr., and that it was therefore unnecessary for them to be licensed under the act in order to recover for the services performed. They alleged in their complaint in intervention "that on or about the 7th day of March, 1934, the plaintiff Jose Lucientes sold, transferred and set over, for a valuable consideration to William A. Bartholomae, Jr., all his right, title, and interest and all of the right, title and interest of plaintiffs in intervention, in and to a lease and option of certain mining properties" and that the trust agreement of April 30, 1934 was executed by appellant "in order to protect the said plaintiff Jose Lucientes in his interest in said properties and to compensate him therefor." The trial court found said allegations to be true but here again respondents have pointed to no evidence to sustain said findings and we have found none. It does not appear that plaintiff or respondents ever transferred anything to appellant or that they ever purported to do anything or to seek compensation for anything other than the services rendered in bringing the parties together and assisting in the negotiations for the sale from the owners of the mining claims to William A. Bartholomae, Jr., as evidenced by the two agreements of March 7, 1934. This seems to be conceded by respondents in one portion of their brief where, in endeavoring to explain the "theory of this case," they say "The facts upon which this case is based are very simple. The original plaintiff, Jose Lucientes, was instrumental in bringing together these certain parties interested in this mining venture in Alaska. In order to accomplish and consummate this deal it was

necessary that the said Jose Lucientes have the assistance and aid of respondents * * *". Our search of the record discloses no evidence to show that the consideration for the trust agreement was or was ever intended to be anything other than the services performed as recited in said trust agreement.

The portion of the judgment from which this appeal was taken is reversed.

NOURSE, P. J., and STURTEVANT, J., concur.



64 Cal.App.2d 532

BOOGE v. FIRST TRUST & SAVINGS BANK OF PASADENA et al.

FIRST TRUST & SAVINGS BANK OF PASADENA v. BOOGE et al.

Civ. 14167.

District Court of Appeal, Second District,
Division 3, California.

May 25, 1944.

1. Trusts ⇨273

Under a trust indenture providing that upon death of trustor, the trustee should pay all of trustor's debts and expenses of last illness and burial and all estate, inheritance or succession taxes, and thereafter to pay a certain amount to a named beneficiary, the amount payable to beneficiary was not due until all debts, expenses and taxes had been ascertained and paid, and until the happening of such event nothing was due beneficiary which could be reached by his judgment creditors.

2. Trusts ⇨112

The activities of a trustee, not participated in or known to the trustor, constituted no evidence of trustor's intention.

3. Trusts ⇨273

Where a trust indenture directed that upon trustor's death, all trustor's debts, burial expenses, taxes, including inheritance taxes, should be paid by trustee and thereafter a fixed amount paid to named bene-

ficiary, that trustee immediately upon trustor's death and before payment of all debts, expenses and taxes set aside in a separate fund the amount to be paid to beneficiary did not change provisions of trust as to time when such amount should be paid or estop trustee from contending, in suit brought by beneficiary's judgment creditor, that nothing was yet due to beneficiary thereunder.

4. Trusts ⇨151(1)

Where the amount payable to a beneficiary under a trust was not due until the happening of certain events, and beneficiary could not successfully sue trustee to recover such amount, the beneficiary's judgment creditor was in no better position to succeed in judgment creditor's action against trustee.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Judgment creditor's suit by J. H. Booge, trustee, against the First Trust & Savings Bank of Pasadena and George R. Reinicke, wherein plaintiff obtained judgment against the defendant Reinicke and brought in the defendant bank, as trustee under a certain trust indenture to reach certain funds allegedly held by the bank as trustee for the defendant Reinicke. Plaintiff obtained judgment against the bank as trustee, and both defendants appeal.

Reversed.

Riccardi, Webster & Donahue, of Pasadena, for appellant First Trust & Savings Bank of Pasadena, as trustee.

Laurence B. Martin and Samuel Reisman, both of Los Angeles, for appellant George R. Reinicke.

G. M. Cuthbertson, of Los Angeles, for respondent J. H. Booge, trustee.

BISHOP, Justice pro tem.

In this creditor's suit the plaintiff sought and obtained a \$2,000 judgment, against the defendant First Trust and Savings Bank of Pasadena, on the theory that that sum was due to defendant Reinicke from the defendant bank. Both the defendants have appealed from the judgment, and we are reversing it because the pleadings and the evidence both fail to show that any sum was yet due Reinicke.

The plaintiff had recovered a judgment against defendant Reinicke for over \$5,700. Execution was issued and served upon the defendant bank on September 6, 1940. The

bank responded that it had in its possession \$2,000, which, as the trustee named in a certain trust indenture executed by Nannie Lackner (now deceased), it owed to defendant Reinicke, but, it contended, by virtue of a spendthrift provision in the trust indenture the \$2,000 was not to be paid into creditor's hands. Supplemental proceedings brought the bank into court for examination as a debtor of plaintiff's judgment debtor, Reinicke, resulting in an order that this action might be brought, and that in the meantime the defendant bank make no transfer of the \$2,000.

This action went to trial upon an amended complaint to which was annexed as an exhibit an admitted copy of the trust indenture. We shall not set forth in full its lengthy and somewhat intricate provisions. The net income of the trust was to be paid to the trustor, together with part of the principal, if that became necessary, and from the same sources sums up to \$3,500 were to be paid the trustor's grandson for his college education. Then followed these provisions: "(2) Upon the death of the Trustor, the Trustee shall pay all of her just debts and the expense of her last illness, funeral and burial, and estate, inheritance or succession taxes, either directly or as the Trustee may be thereunto requested by any Executor or Trustor's last will and testament; and *thereafter* the Trustee shall administer and dispose of the trust estate as hereinafter provided;

"(3) The Trustee shall pay the sum of Two Thousand Dollars (\$2,000.00) to George R. Reinicke, husband of Trustor's deceased daughter, Else Lackner Reinicke, if he be living to receive the same, as my gift to him in memory of my said daughter;

"(4) In the event that Trustor's grandson, Francis L. Bryan (born September 1, 1917), shall survive the Trustor and shall not have attained the age of twenty-six (26) years, at the date of the death of the Trustor, the Trustee shall set aside in a separate fund a sum of money, the amount of which shall be determined by deducting from the sum of Four Thousand Dollars (\$4,000.00) such sums as during Trustor's lifetime shall have been paid by the Trustee to said Francis L. Bryan to apply toward the cost of his education. * * *

"(5) After making the payments and setting aside the fund authorized by the provisions of the immediately preceding sections (2), (3), and (4), the Trustee shall

divide the trust estate then remaining, including accumulated income, if any, as well as principal, into four equal portions * * *."

Nowhere in the amended complaint is there any allegation to the effect that the "thereafter" to which we gave emphasis as we quoted from the trust agreement, had arrived. There was no averment that there were no debts or funeral expenses to be paid, or that the usual bills attendant upon one's last illness and death had been met. The defendant bank, at the opening of the trial, stated its position to be "that the payment to the beneficiaries shall be made after certain other things had been done, and those things, some of them, have not yet been done" and added later: "In other words * * * Mr. Reinicke was not entitled to any money when the suit was filed or the levy made." This position was foreshadowed by allegations in the bank's amended answer, filed almost five months before the trial. From the colloquy which followed the statement of the bank's position before any evidence was taken, it appears that the construction to be placed upon the provisions which we have quoted had been considered and passed upon by the trial judge earlier in the case's history. At the trial there was no evidence that all of the just debts, or all of the expenses of the trustor's last illness, funeral and burial, or all of the estate, inheritance or succession taxes, which were to be paid by the trustee, had been paid. There was evidence that since the suit was commenced, December 21, 1940, various taxes totalling \$2,410, had been paid, at least one on account. Indeed, counsel for the plaintiff and counsel for the bank both stated that there were some taxes remaining unpaid at the time of the trial.

[1] It is evident that the learned trial judge continued up to the entry of judgment to hold to the opinion which he had reached after the argument upon some law question which preceded the trial, that the payment of the \$2,000 to Reinicke became due and payable upon the death of the trustor. We do not so interpret the trust indenture. Its provisions, in our opinion, require the conclusion that after the death of the trustor the trustee was first of all to pay the debts and taxes, as directed by subdivision (2) which we have quoted, and *thereafter* to pay the \$2,000 to the trustor's son-in-law, defendant Reinicke, "if he be living to receive the same." The "gift"

was contingent not only upon his outliving the trustor, but upon his living until her debts and the taxes had been paid. *San Diego Trust, etc., Bank v. Heustis*, 1932, 121 Cal.App. 675, 694-697, 10 P.2d 158.

[2] Plaintiff suggests, we cannot fairly use a stronger word, that the contemporaneous construction put upon the trust by the trustee should be given weight in construing the trust agreement. No case was cited in support of this rule of construction, and we know of none that could be cited. It is the intent of the trustor, not of the trustee, that is to be given effect (*In re Gump's Estate*, 1940, 16 Cal.2d 535, 548, 107 P.2d 17, 24; *Title Ins. & Tr. Co. v. Duffill*, 1923, 191 Cal. 629, 642, 218 P. 14, 18), and we are unable to see in the activities of a trustee, not participated in or known to the trustor, any evidence of the intention of the trustor.

There is the further suggestion that it is not reasonable to interpret the trust agreement as postponing the payment of the \$2,000 to Reinicke until after the payment of the debts and taxes because that interpretation would cause the payment of sums left for the maintenance and support of the trustor's children to be likewise postponed. We find the plaintiff much more solicitous that the trustor's children shall not long await the benefits of the trust, than was she. In three distinct places in the trust indenture it is expressly stated that the sum provided for the children shall be paid "after making the payments * * * authorized by the provisions of sections (2) [and] (3) * * * hereof," that is, after the debts and taxes were paid and after Reinicke received his \$2,000. If these provisions result in delaying the disbursement to the children, and to Reinicke, for the "many months" which "it is well known" that it "frequently takes" to determine the amount of taxes to be paid, as plaintiff argues, it is a result directly attributable to the language chosen by the trustor in her last amendment to the indenture which she executed. In an earlier amendment the trustee was authorized to pay, not taxes, but only "the funeral expenses, expenses of the

last illness, and such other just debts of the Trustor as may be presented to the Trustee within a period of sixty days immediately following the death of the Trustor.
* * *

[3] After the sheriff served the garnishment upon the defendant bank, it, in harmony with the construction it had been placing upon the trust indenture, set \$2,000 aside in a separate fund and credited itself with having discharged that amount of its trust. The trustee's misinterpretation of the provisions of the trust did not change those provisions, nor estop it now from relying upon them as properly understood. It may have been that but for plaintiff's garnishment a premature payment of the sum coming to Reinicke would have been made. As pointed out in a case having many parallels to this one, *Walker v. Doak*, 1930, 210 Cal. 30, 34, 290 P. 290, 292, a payment, even if premature, leaves the beneficiary with no claim against the trustee, and a creditor is in no better position. In our case the bank has not made a premature payment, it has only made entries on its records, which it can remake.

[4] Reinicke, it seems plain, could not on December 21, 1940, have successfully sued the bank for the \$2,000 he hoped someday to receive. This being so, the plaintiff, who has no better standing than Reinicke had, cannot succeed in this action. *Walker v. Doak*, supra, 210 Cal. 30, 34, 290 P. 290, 292; *In re Estate of Bennett*, 1939, 13 Cal. 2d 354, 364, 90 P.2d 84, 126 A.L.R. 771; *Depner v. Joseph Zukin Blouses*, 1936, 13 Cal.App.2d 124, 129, 56 P.2d 574, 576.

We do not deem it proper, on this appeal, where we are reversing the judgment because we are of the opinion that when the action was filed and tried the defendant bank was not indebted to Reinicke, to discuss the contention that if the bank had owed the \$2,000 to him, the sum was protected, by provisions of the trust indenture, from the reach of his creditors.

The judgment is reversed.

DESMOND, P. J., and PARKER WOOD, J., concur.

64 Cal.App.2d 516

GREENWOOD v. SUMMERS et al.

Civ. No. 14140.

District Court of Appeal, Second District,
Division 3, California.

May 25, 1944.

1. Automobiles ⇨245(40)

Ordinarily, question whether the basic speed law has been violated is for trier of facts. Vehicle Code, § 510, St.1935, p. 176.

2. Negligence ⇨4

Where a higher degree of diligence is not fixed by contract or by statute, the law has fixed no standard of care other than the general one that it must be such as a person of ordinary reason, prudence and caution would use under the same circumstances.

3. Negligence ⇨136(14)

Whether a party has exercised such care as men of common prudence usually exercise in like circumstances ordinarily should be submitted to jury.

4. Negligence ⇨136(8)

Where it appears from undisputed facts, judged in light of common knowledge and experience, that a party has not exercised such care as men of ordinary prudence usually exercise in like positions, negligence may be declared as a matter of law.

5. Negligence ⇨68

Generally, every person who is himself exercising ordinary care has right to presume that every other person will perform his duty and obey the law, and in absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person.

6. Automobiles ⇨245(3)

Under evidence that automobile sideswiped motortruck traveling two feet left of center line of highway and caused truck to swerve across highway and collide with oncoming motorist, negligence of truck driver was question for trier of facts. Vehicle Code, § 510, St.1935, p. 176; Vehicle Code, § 527(a), St.1935, p. 182.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Mabel Greenwood against Ensley A. Summers, Fred F. Misko, and others for personal injuries and property damage, wherein defendant Misko filed a cross-complaint against defendant Summers. From a judgment for Fred F. Misko, plaintiff appeals.

Affirmed.

Jack Carl Greenburg and Phillip W. Silver, both of Los Angeles, for appellant.

Parker & Stanbury and Harry D. Parker, all of Los Angeles, for respondent.

DESMOND, Presiding Justice.

The appellant in this case was injured and the automobile which she was driving was damaged in a collision which occurred on Alameda Street, a north and south thoroughfare, in the southerly district of Los Angeles. She was driving north on Alameda Street at about 6:10 a. m., when the accident happened. The paved highway upon which she was driving was about 37 feet wide. There was a heavy fog prevailing at the time; it was quite dark and the pavement was moist. The defendant Summers also was driving his Terraplane sedan north on Alameda and, immediately after passing the appellant's car, sideswiped the defendant Misko's truck, which was traveling south on Alameda Street, knocking its dual rear wheels out from under the truck. This collision threw the truck out of control and after skidding in a southerly direction for 192 feet it collided with the plaintiff's car.

Plaintiff, the appellant here, joined Summers and Misko as defendants. Summers answered, denying the allegations of negligence charged against him and any liability for the damage resulting from the collision. As an affirmative defense he charged that the injuries and damages were proximately caused by the negligence of the plaintiff and of defendant Misko. Defendant Misko in his answer denied negligence or liability on his part. In a cross-complaint Misko sought damages from Summers, his co-defendant, in the sum of \$273.62.

The case opened as a jury trial, but after the first day's hearing the parties all stipulated that it might be completed by the trial judge sitting without a jury. After hearing the arguments of counsel at the

conclusion of the hearing, the judge, by agreement of the parties, went to the scene of the accident and shortly thereafter entered findings and judgment.

According to the findings, defendant Misko was not negligent in the operation of his truck and no act on his part "proximately contributed to the accident in question or to the injury or damage suffered by any party." The court further found that the sole proximate cause of the accident and collision was negligence on the part of defendant Summers. As a result of his findings the court concluded as a matter of law that the plaintiff was entitled to judgment against Summers in the sum of \$1,500.45; further, that she was not entitled to recover anything from the defendant Misko, but that Misko was entitled to his costs of action from the plaintiff and judgment for damages in the sum of \$273.62 against Summers "together with his costs of action." Judgment followed accordingly, awarding Misko, as his costs against the appellant, the sum of \$145.70, adjudging that Misko should recover from Summers "the sum of \$273.62, together with his costs of action incurred herein in the sum of \$——."

The plaintiff appeals from the judgment in favor of the defendant Misko and against the plaintiff. She states, as her sole contention, that Misko was guilty of concurrent negligence as a matter of law by reason of the fact that he attempted to overtake an automobile on a narrow thirty-seven foot highway, in the nighttime when there was a heavy fog and visibility was poor, while driving at a speed of thirty miles per hour in the center of the highway over a moist pavement, and after colliding with an oncoming automobile, then skidding 192 feet into appellant's car. The testimony given by Mr. Misko was to the effect that he first saw Summers' oncoming automobile when it was about 150 feet away while he, Misko, was traveling at 25 miles per hour and Summers' car was traveling from 40 to 50 miles per hour, with his car straddling the white line or riding over the white line approximately two feet to the west of it; that his rear wheels were then even with the front wheels of a small pick-up truck, which was running beside him at his right and which he had been overtaking; that the pick-up truck was close to the west edge of the highway and two feet west of his own truck; that the left side of his truck was about two feet west of

the white center line of the highway; that after seeing Summers' automobile approaching he did not have time to do anything prior to the actual collision. Mr. Summers testified that when he first saw the Misko truck it was about 10 feet in front of him; that the truck did not swerve to the right or left within that 10 feet; that after the impact of the two vehicles, his left front wheel struck the left rear wheel of the truck and at that time the left rear axle and the dual rear wheels of that truck were thrown on the highway and onto the ground and when that occurred the steel body of the truck went to the ground, leaving a mark on the pavement about 7 feet to the west of the center line. He testified also that when the police officers arrived they took measurements of the marks on the pavement and that the officer made a remark that he (Summers) was over the white line. However, at the trial Mr. Summers was asked to state where he was at the time of the impact and answered that he was on the east side of the highway.

"Q. Was any portion of your car on the west side of the highway? A. No; definitely not."

[1-4] The trial court, therefore, was called upon to decide, upon conflicting evidence and as a matter of fact, whether Summers crossed the white line at the time he struck Misko's truck and, in so doing, was guilty of an act of negligence proximately causing appellant's damage. Its decision on that subject is not questioned by appellant. Her objection goes to the point that the court found that Summers' negligence was the sole proximate cause, thereby relieving Misko of all blame. We are asked to cancel the effect of the finding that Misko was not negligent and that no act on his part proximately contributed to the accident in question. This, on the theory that proper consideration of section 510 of the Vehicle Code, St.1935, p. 176, in connection with this accident, should have compelled a contrary finding as a matter of law. We cannot accept this reasoning. Section 510 of the Vehicle Code, under the caption, "Basic Speed Law," reads as follows: "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property." The very phrase-

ology of this statute calls for a trier of facts, who must give consideration to all the pertinent circumstances surrounding the case which comes before him. The precept applicable to the situation is discussed, with authorities cited, in 19 Cal. Jur., in the article on "Negligence," at the following points: Sec. 22. "* * * since negligence is a relative term, no precise rule can be formulated which adequately defines the quantum of care to be used in a particular case; that question depends upon particular facts and circumstances." Sec. 23. "* * * In those cases in which a higher degree of diligence is not fixed by contract or by statute, the law has fixed no standard of care other than the general one that it must be such as a person of ordinary reason, prudence and caution would use under the same circumstances. * * * In determining whether one's actions measure up to the conduct of a reasonably prudent man, it is obvious that all of the circumstances attending the transaction must be taken into consideration." Sec. 24. "* * * The term 'ordinary care' is a relative one, and the standard by which it is to be measured varies, as we have seen, with the circumstances attending each particular case. A quantum of care which might be sufficient for one set of circumstances may be wholly inadequate under changed conditions." Sec. 138. "Ordinary Care. In most cases the law has fixed no standard of care other than the general one that it must be such as a reasonably prudent man would exercise under the particular circumstances. Whether a party's conduct measures up to this standard presents a question of fact which ordinarily should be submitted to the jury under proper instructions as to the law. * * * However, if it appears from the undisputed facts, judged in the light of common knowledge and experience, that a party has not exercised such care as men of common prudence usually exercise in like positions, * * * negligence may be declared as a matter of law."

[5] In determining, in the present case, whether Misko exercised the care which a man of common prudence would have

exercised, the trial court undoubtedly relied upon the law and the evidence. So far as the law is concerned, section 527(a) of the Vehicle Code, St.1935, p. 182, states it as follows: "Drivers of vehicles proceeding in opposite directions shall pass each other to the right, and, except when a roadway has been divided into traffic lanes, each driver shall give to the other at least one-half of the main traveled portion of the roadway whenever possible." So far as the evidence is concerned, the court would have been warranted in finding that Summers violated this statute and trespassed on territory reserved for traffic going south. Misko, running generally at a distance of approximately two feet west of the center white line, in our opinion, might justly have considered that he was safe from a collision with northbound traffic. Under those circumstances, it is understandable that the trial court would fail to find him guilty of negligence. The general rule is that every person who is himself exercising ordinary care has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person. See *Harris v. Johnson*, 1916, 174 Cal. 55, 58, 161 P. 1155, L.R.A.1917C, 477, Ann.Cas.1918E, 560; *Pinello v. Taylor*, 1933, 128 Cal.App. 508, 512, 17 P.2d 1039.

[6] We believe that under the circumstances of the present case and, particularly in view of the provisions of section 510, Vehicle Code, there is no foundation for appellant's claim that Misko should have been found negligent as a matter of law. In our opinion, the matter of his liability was properly treated by the trial court as a question of fact. *Gayton v. Pacific Fruit Express Co.*, 1932, 127 Cal.App. 50 [3], page 57, 15 P.2d 217[5], page 220; see also 2 Cal.Jur.Supp. 272-3, sec. 180.

Judgment affirmed.

SHINN and PARKER WOOD, JJ., concur.

64 Cal.App.2d 576

JOHNSON v. FRESNO COUNTY et al.
Civ. 3123.

District Court of Appeal, Fourth District,
California.

May 27, 1944.

1. Counties Ⓒ146

Municipal corporations Ⓒ745½
States Ⓒ112

At common law, no right of action existed against state or any of its political subdivisions for damages resulting from negligence of its employees while performing governmental functions, and the right exists only when authorized by statute. St. 1923, p. 675.

2. Counties Ⓒ213

Municipal corporations Ⓒ1021
States Ⓒ197

The filing of a statutory claim is a necessary prerequisite to bringing an action for damages against a public agency. St.1931, p. 2476, as amended; Pol.Code, § 4075.

3. Limitation of actions Ⓒ1

Where right of action is created by statute, and a limitation is placed on the time in which the right is to be exercised, the right must be asserted within the time limited or it ceases to exist and cannot be thereafter enforced in any form.

4. Counties Ⓒ213

Where no statutory claim was ever presented to or filed with county or its employee for injuries sustained by plaintiff in a collision between an automobile in which he was riding and a county vehicle driven by county employee, plaintiff was not entitled to maintain an action against the county and employee, regardless whether, during the statutory period for filing the claim, plaintiff was totally incapacitated or induced by fraud to fail to file the claim. St.1931, p. 2476, as amended; Pol.Code, § 4075.

5. Constitutional law Ⓒ305

Counties Ⓒ209
Municipal corporations Ⓒ1021
States Ⓒ197

Statute requiring person injured to file claim within 90 days, with public agency and public officer, is not unconstitutional on ground that it deprives an injured person

of due process of law. St.1931, p. 2476, as amended.

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Action by William L. Johnson against County of Fresno and another for injuries sustained in an automobile collision. From a judgment dismissing the action after a demurrer to plaintiff's second amended complaint had been sustained without leave to amend, plaintiff appeals.

Judgment affirmed.

Claude L. Rowe, of Fresno, for appellant.

W. H. Stammer and Galen McKnight, both of Fresno, for respondents.

MARKS, Justice.

This is an appeal from a judgment dismissing the action after a demurrer to plaintiff's second amended complaint had been sustained without leave to amend.

Plaintiff was injured on April 12, 1942, in a collision between an automobile in which he was riding and a station wagon belonging to the County of Fresno and driven by Melvin A. Willmirth, its employee.

The complaint was filed on November 13, 1942. It contained no allegation concerning the filing of any claim for damages with either defendant, the County of Fresno or Willmirth. A demurrer was sustained with leave to amend.

An amended complaint was filed on January 16, 1943. This pleading contained the allegation that "plaintiff was physically and mentally unable to file any verified or other claim against any of the defendants until more than ninety days after the accident and injury hereinabove referred to." In the same paragraph it was alleged that the agents of the County of Fresno and the agents of the insurance carrier for defendants falsely and fraudulently represented to plaintiff that it was unnecessary for him to employ an attorney because the insurance carrier for defendants "was making an immediate cash settlement of plaintiff's claim"; that they continued to make such representations for more than ninety days after the accident, and furnished him with free medical care during such time; that after the ninety days had

elapsed they refused to talk to plaintiff and refused to make any settlement with him.

A demurrer was sustained with leave to amend and a second amended complaint was filed on May 17, 1943, which, in effect, repeated the allegations we have just referred to. A demurrer was sustained without leave to amend and this appeal followed from the judgment subsequently entered. It is admitted that no claim of any kind was ever presented to or filed with the defendant Willmirth or the County of Fresno. The sole question presented is the necessity for filing such a claim before an action for damages can be maintained against a county or its employee.

[1] At the common law no right of action existed against the state or any of its political subdivisions for damages resulting from negligence of its employees while performing governmental functions. Such right of action exists only when authorized by statute. *Chafor v. City of Long Beach*, 174 Cal. 478, 163 P. 670, L.R.A.1917E, 685, Ann.Cas.1918D, 106; *Kellar v. City of Los Angeles*, 179 Cal. 605, 178 P. 505; *Miller v. City of Palo Alto*, 208 Cal. 74, 280 P. 108; *Redlands High School Dist. v. Superior Court*, 20 Cal.2d 348, 125 P.2d 490; *Pittam v. City of Riverside*, 128 Cal. App. 57, 16 P.2d 768. Such a right of action for damages resulting from dangerous or defective conditions of public property was given by the public liability act. Stats. 1923, p. 675. Now political subdivisions are liable by statute for certain acts of negligence of their officers and employees.

In 1931 the legislature passed an act, St. 1931, p. 2476, as amended, requiring the person injured to file within ninety days his verified claim for damages with the public agency and public officer or employee sought to be held liable. Section 4075 of the Political Code requires such claim to be filed within one year.

[2] It has been held without deviation that the filing of a claim is a necessary prerequisite to bringing an action for damages. *Douglass v. City of Los Angeles*, 5 Cal.2d 123, 53 P.2d 353; *Hall v. City of Los Angeles*, 19 Cal.2d 198, 120 P.2d 13; *Redlands High School Dist. v. Superior Court*, supra; *Artukovich v. Astendorf*, 21 Cal.2d 329, 131 P.2d 831.

Plaintiff maintains that the recent case of *Farrell v. County of Placer*, 23 Cal.2d 624, 145 P.2d 570, 573, has modified this

rule and that the fraud of the public agency, such as is alleged here, will estop it from pleading the defense of plaintiff having failed to file the claim. The *Farrell* case did relax the rigor of the rule formerly prevailing here but not to the extent claimed by the plaintiff. The reason for its holding is summed up in the following quotation: "Although it has been repeatedly held that compliance with the appropriate claim statute is mandatory and an essential requisite to plaintiff's cause of action, nevertheless the time element with respect to the filing of the claim is essentially procedural in nature."

In the *Farrell* case the plaintiff pleaded estoppel in much the same form as we have here. A claim was filed, but it was after the expiration of ninety days. The court concluded that the County of Placer might be estopped by the fraud of its agents only so far as filing the claim within the time prescribed by the statute was concerned. It did not hold that no claim need be filed. A claim was filed in that case so that question was not presented to the Supreme Court.

The second amended complaint in this action alleged that the fraud ended after the expiration of ninety days after the accident when the agents of the County of Fresno and Willmirth refused to see or talk to plaintiff. It must have appeared to plaintiff at that time that the representations concerning a settlement were fraudulent. If plaintiff had filed a claim within a reasonable time thereafter he would have brought himself within the rule of the *Farrell* case. This he did not do. This leaves him within the rule of the cases of *Douglass v. City of Los Angeles*, supra, and *First Trust & Savings Bank of Pasadena v. City of Pasadena*, 21 Cal.2d 220, 130 P.2d 702, where it was held that as no claims were filed, the plaintiffs could not maintain their actions.

Plaintiff maintains that the allegation of his total incapacity for ninety days excused him from filing his claim. In this connection it might be observed that while plaintiff did allege his total mental and physical incapacity for ninety days he also alleged in the same paragraph that he was misled by the fraudulent representations during those same ninety days. However, as we have already observed, under the rule in the *Farrell* case he could have filed his claim, had he acted promptly, after he

had recovered and realized that the representations concerning a settlement of his claim were false.

Plaintiff argues that the provision giving him ninety days in which to file a claim is so arbitrary, capricious and unreasonable as to deprive him of his right to a remedy without due process of law, especially as he was mentally and physically unable to file his claim within that time. As the law is construed in the Farrell case he could have filed his claim after he had recovered and discovered the fraud which removes the question of his incapacity from necessary consideration *inure*.

[3] As we have already seen there was no common-law right of action against a governmental agency for the torts of its agents when acting in a governmental capacity. The right of action is strictly a creature of statute. It is very generally held that where a right of action is created by statute, and a limitation is placed on the time in which the right is to be exercised, the right must be asserted within the time limited or it ceases to exist and cannot be thereafter enforced in any form. *Walsh v. Mayer*, 111 U.S. 31, 4 S.Ct. 260, 28 L.Ed. 338; *The Harrisburg (Lewis v. Rickards)*, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358; *Davis v. Mills*, 194 U.S. 451, 24 S.Ct. 692, 48 L.Ed. 1067; *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 34 S.Ct. 550, 58 L.Ed. 893.

This rule was recognized in *Redlands High School Dist. v. Superior Court*, *supra*, involving an action to recover damages for personal injuries from a high school district, where it was said [20 Cal. 2d 348, 125 P.2d 495]: "Cases have established that the liability of municipalities, counties, and school districts for the negligent acts of their officers and employees is derived solely from statutory provisions in this state. Any plaintiff, therefore, must fulfill the mandatory requirement that a verified claim be filed as a prerequisite to maintaining a suit under the statute and failure to file such a claim is fatal to the cause of action."

The foregoing was quoted with approval in *Artukovich v. Astendorf* *supra*, and the following remarks were added [21 Cal.2d 399, 131 P.2d 833]: "The underlying principles upon which the authorities are

based are (1) that neither the State nor any of its political subdivisions may be sued in the absence of specific statutory permission; (2) that where a right of action against the State or any of its political subdivisions is created by statute, such right may be circumscribed by any conditions that the Legislature may see fit to impose; and (3) that when the Legislature enacts a mandatory provision requiring in general terms that all claims must be presented before any action may be brought thereon, compliance with such condition is an indispensable prerequisite to the bringing of any such action by any person, regardless of his age or his physical or mental condition."

[4] As we understand the Farrell case it does not modify the foregoing rule as it is held that the time limit on filing the claim was directory under the circumstances there shown and that the County of Placer might be estopped by the fraud of its agents from urging that the claim was not filed in time. It did not hold that the action could be maintained without filing any claim and we have found no case so holding. As there was no right to bring this action at common law and as no such right exists independent of statute, plaintiff had no constitutional right to sue a public agency and its employee to recover his damages. He only had the right of action given by the statute and should have conformed to the requirements of the statute in bringing it.

[5] The argument on the question of the constitutionality of the act is answered in *Young v. County of Ventura*, 39 Cal. App.2d 732, 104 P.2d 102, 106, where it is said: "Plaintiffs cannot successfully argue that by the statutory requirement of filing a claim they were deprived of due process of law. The legislature has furnished due process to them but they did not avail themselves of it."

In view of the many cases holding that the filing of a claim is a necessary prerequisite to bringing an action for damages such as this we cannot hold that the second amended complaint stated a cause of action in the absence of an allegation that some claim had been filed.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

64 Cal.App.2d 581

FLORINE v. MARKET ST. RY. CO. et al.
Civ. 12586.

District Court of Appeal, First District,
Division 1, California.

May 29, 1944.

• As Modified on Denial of Rehearing
June 28, 1944.

Hearing Denied July 27, 1944.

1. Appeal and error ⇨1170(9)

The fact that there was a conflict in the evidence does not mean that any error in instructions was necessarily prejudicial, but each case must turn on its own facts, and the record as a whole, including the charge, must be considered. Const. art. 6, § 4½.

2. Appeal and error ⇨1170(9)

Trial ⇨295(1)

Where the weight of the evidence favors respondent, and the charge, when read as a whole, fully, fairly and correctly charged on all the basic issues, any minor error in the instructions could not be held prejudicial. Const. art. 6, § 4½.

3. Trial ⇨253(4)

In action by motorist for injuries sustained in collision with trackless trolley, instruction that if motorist was free from negligence she had right to assume and rely on presumption that defendants would not violate the law was not subject to criticism that court erred in omitting qualification that motorist could not rely on presumption after knowing or having opportunity by use of reasonable care to know that law was not being observed, where court included in the instruction statement that if jury found by a preponderance of the evidence that motorist was herself free from negligence at time and place of the accident in this case, etc.

4. Street railroads ⇨118(7)

In action by motorist for injuries resulting from collision with trackless trolley, instruction that even though a vehicle was being driven at a rate of speed not in excess of the limit of speed fixed by law, such speed might constitute negligence dependent upon the existing conditions and circumstances correctly stated law. Vehicle Code, § 510, St.1935, p. 176.

5. Trial ⇨296(3)

In action by motorist for injuries resulting from collision with trackless trolley, an instruction that even though vehicle was

being driven at a rate of speed not in excess of limit of speed fixed by law such speed might constitute negligence depending upon existing conditions, immediately followed by instruction that Vehicle Code provided that no person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for traffic, etc., and in no event at speed which endangers the safety of persons or property, was not misleading or confusing. Vehicle Code, § 510, St.1935, p. 176.

6. Appeal and error ⇨1170(9)

Trial ⇨295(6)

In action by motorist for injuries resulting from collision with trackless trolley, erroneous use of the word "lawfully" in instruction that if jury found from the evidence that trolley entered intersection before or at the same time as motorist, trolley had the right of way, was not prejudicial in view of instruction as a whole. Vehicle Code, § 550(b), St.1937, p. 619; Const. art. 6, § 4½.

7. Trial ⇨296(3)

In action by motorist for injuries resulting from collision with trackless trolley, instruction that if jury found by preponderance of evidence that defendant disregarded the law as just read by the court and that such disregard of the law was sole proximate cause of injuries, verdict must be for motorist, correctly stated the law and was not subject to criticism that court failed to tell jury that the doctrine enunciated was applicable only if motorist was free from negligence, in view of other instructions on proximate cause and contributory negligence. Vehicle Code, § 550(a), St.1937, p. 619.

8. Trial ⇨296(4)

In action by motorist for injuries resulting from intersection collision with trackless trolley, instruction that contributory negligence which would bar recovery must consist of some act or omission on motorist's part which was "the" proximate cause of the injury would have been better if "a" rather than "the" had been used, but was not prejudicial in view of other instructions.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Lorraine Florinè against Market Street Railway Company and Edward Daw for injuries sustained in collision between automobile driven by plaintiff and trackless trolley operated by defendant company and driven by individual defendant. From a judgment for plaintiff for \$5,794, the defendants appeal.

Judgment affirmed.

Cyril Appel, Ivores R. Dains, George Liebermann, and George E. Baglin, all of San Francisco, for appellants.

Walter McGovern, of San Francisco, for respondent.

PETERS, Presiding Justice.

On Sunday afternoon, October 12, 1941, at the intersection of Shotwell and 18th Streets in San Francisco, a collision occurred between the Ford coupe driven by plaintiff and the trackless trolley operated by the defendant Market Street Railway Company and driven by defendant Daw. Plaintiff suffered a brain concussion, broken ribs, shock and multiple bruises and contusions. The injuries have brought on a neurotic condition not theretofore existing, and have lit up a quiescent hypertrophic arthritic condition. For these injuries this action was instituted. The jury unanimously brought in a verdict for plaintiff for \$5,794. From the judgment entered on this verdict defendants appeal.

The accident happened between 2:30 and 3 P.M. The day was clear, the streets were dry, the traffic was light. Respondent, just prior to the accident, was driving south on Shotwell Street. About the middle of the block between 17th and 18th Streets she observed two boys playing football. She slowed down to about ten miles per hour in passing the boys, and then increased her speed to about fifteen miles per hour. As she approached the intersection of Shotwell and 18th Streets, she took her foot off the gas. The intersecting streets are level and neither street is a "stop" street. There are buildings on all four corners. Shotwell Street is thirty feet wide from curb to curb, while 18th Street is thirty-four feet wide. Three of the sidewalks at the intersection are fifteen feet wide, and the fourth sidewalk, on the west side of Shotwell Street, is thirteen feet six inches wide. As respondent entered, or was about to enter

the intersection, she looked to her left and observed an automobile coming west on 18th Street, which was then in about the middle of the block between Shotwell and Folsom Streets. She then looked to her right and observed the trolley coach about halfway between South Van Ness and Shotwell Streets. That block is 245 feet long, so that at that moment the trolley coach was over 120 feet from the west property line of Shotwell Street. Respondent testified that when she first observed the trolley coach she was unable to estimate its speed. The evidence of appellant Daw and of two other witnesses fix its speed at that point at twenty miles per hour. Respondent testified that, after observing the trolley coach she entered the intersection increasing her speed to fifteen miles per hour. She then again looked to her left, then looked ahead to observe conditions in the intersection, and then looked to her right for a second time. She then observed the trolley coach at about the west property line of Shotwell Street. At that moment the front of respondent's car was just about at the south curb line of 18th Street. Respondent estimated the speed of the trolley coach at that moment at between forty to fifty miles per hour. She thereupon increased her speed in an attempt to avoid the collision. The front of the trolley coach hit the Ford coupe about in the middle and slightly towards the rear. The Ford was pushed sideways from about the center of the street to the southeast corner and up on the sidewalk and against a telephone pole.

Peter Bruhn, whose car it was that respondent saw driving west on 18th Street, testified that when respondent's car was about to enter the intersection the trolley coach was about halfway between South Van Ness and Shotwell Streets.

Appellant Daw, the operator of the trolley coach, stated that he did not see the Ford until the front end of his bus was within two or three or three and a half feet of the westerly property line on Shotwell Street; that at that time respondent's car was about twenty-five feet from the north property line of 18th Street; that he thought that he had plenty of time to cross the intersection safely; that between South Van Ness and Shotwell Streets he was going about twenty miles per hour. The testimony of Daw as to the speed of the trolley coach was corroborated by the witness

Rosemont, who was operating a truck about 100 feet behind the trolley coach, and by the witness Moore, a passenger in the bus.

Daw testified that he was looking straight ahead; that he did not see any cars pass across the intersection along Shotwell Street ahead of the Ford, and that he observed no cars at all on 18th Street. As already pointed out, the witness Bruhn was driving on 18th Street toward the coach and about a block away. The fact that at least two cars crossed the intersection immediately ahead of respondent was established by the testimony of respondent, of Bruhn, and of the two boys who were playing football on Shotwell Street.

It is obvious that the above evidence amply supports the judgment, and appellants make no contention to the contrary. They do contend that certain erroneous and prejudicial instructions were given the jury. It is urged that the evidence was conflicting, and would have supported a verdict for appellants, and that for this reason any error in the instructions was serious and prejudicial. Appellants argue that their testimony shows that the coach was traveling at a moderate rate of speed and entered the intersection at the same time or before the car of respondent. They also contend that, even if the Ford entered the intersection first, the jury would have been justified in finding respondent guilty of contributory negligence inasmuch as she observed the coach a half block away, and the jury could have found that she should not have rushed into the path of the swiftly moving trolley coach.

[1,2] It is true that there is a conflict in the evidence. It is probably true that a verdict for appellants, had the jury believed the testimony produced by them, would have been supported. This does not mean, however, that any error in the instructions was necessarily prejudicial. Each case must turn upon its own facts. The record as a whole must be considered, and the entire charge to the jury studied before a particular error in the instructions can or should be held to be prejudicial. Art. VI, § 4½ of the Constitution provides that: "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury * * * unless, after an examination of the entire cause, including the evidence, the court

shall be of the opinion that the error complained of has resulted in a miscarriage of justice." This record demonstrates the efficacy of this constitutional provision. The case is one where the weight of the evidence favors respondent. When the charge is read as a whole it is obvious that the jury was fully, fairly and correctly charged on all of the basic issues. Under such circumstances any minor error that may have occurred in the instructions cannot and should not be held to have been prejudicial.

[3] The first instruction complained of is one in which the jury was told that the respondent, if herself free from negligence, had the right to assume and rely on the presumption that appellants would not violate the law. It is argued that the instruction erred in omitting the qualification that respondent could not rely on the assumption, after knowing, or having an opportunity by the use of reasonable care, to know that the law was not being observed. The instruction in question is three short paragraphs in length. The first paragraph starts: "A person who is herself free from negligence" and continues that such a person has a right to rely on the assumption that others will not be guilty of negligence. The third paragraph starts: "Therefore, if you find by a preponderance of the evidence that the plaintiff, Miss Florine, was herself free from negligence at the time and place of the accident in this case," then she had the right to assume that appellant Daw would act as a reasonably prudent person in the operation of the coach. Appellants urge that the evidence shows that respondent observed the trolley coach when it was a half block away; that, although the respondent testified that she could not then observe its speed, the jury could have disbelieved her; that the jury could have inferred from the testimony that the coach was going between forty to fifty miles per hour when it entered the intersection that it was going in excess of the speed limit a half block away, and that respondent should have noticed that fact. In other words, it is appellants' thought that the challenged instruction excluded the defense of contributory negligence. The instruction is not subject to the criticism offered. While the first paragraph used the phrase "A person who is herself free from negligence" has the right to assume that others will obey the law,

and may be subject to the criticism that it fails to tell the jury that a person who, up to that moment, is free from negligence, may not assume the defendant will obey the law when the plaintiff knows or should know the defendant is not obeying the law, the third paragraph is much more explicit. After stating the general rule in the first two paragraphs of the instruction, the court then summarized as follows: "Therefore, if you find by a preponderance of the evidence that the plaintiff, Miss Florine, was herself free from negligence *at the time and place of the accident in this case*" (italics added) then she had the right to assume Daw would obey the law. Thus the jury was told not only that respondent must be free of negligence when she first observed the trolley coach, but also that she must be free of negligence at the very "time and place of the accident," before she could rely on the assumption that the trolley coach would obey the law. As so limited, the instruction was justified by the facts and correctly states the law. Moreover, there was no direct evidence that the coach was exceeding the speed limit when first observed by respondent, or, that if it was, respondent should have observed its illegal speed. Respondent testified that when she first observed the trolley coach she could not estimate its speed. On cross examination she stuck to her story that she had no idea how fast the coach was going when first observed. Appellants' witnesses all testified that the bus was going about twenty miles per hour at that spot. Respondent did testify that the bus was going between forty to fifty miles an hour when it entered the intersection. Under the facts disclosed by the record the instruction was proper. *Forrest v. Pickwick Stages System*, 101 Cal.App. 426, 281 P. 723.

Appellants, in contending the challenged instruction was erroneous, place their main reliance on the case of *Angier v. Bruck*, 56 Cal.App.2d 55, 131 P.2d 876. That case, both factually and legally, is distinguishable from the instant case. There the driver for plaintiff testified that as he approached the intersection he observed the defendants' automobile 100 to 125 feet away approaching at fifty to fifty-five miles per hour, and that he did not slow up but proceeded into the intersection. The court instructed that if you find that Raymond Angier "was at all times pertinent to this

case driving plaintiff's automobile in a careful and prudent manner" then he had a right to assume that defendant would drive lawfully. The court properly held that the instruction should have been qualified by the statement that one cannot assume the law is being observed after he knows or should know it is being violated. *Edlund v. Los Angeles Ry. Co.*, 14 Cal. App.2d 673, 58 P.2d 928; *Donat v. Dillon*, 192 Cal. 426, 221 P. 193. The court held that the failure to give this qualifying instruction was reversible error. But in the present case there is no direct evidence that the coach was in fact violating the law when first observed by respondent—in fact, the evidence is quite uncontradicted that it was not. In the second place, the instruction in the instant case is quite different from that in the cited case. In the instant case the jury was told that before the respondent could rely on the assumption the jury must find that at the very "time and place of the accident" she must be "free from negligence." Obviously, if she knew or should have known the speed of the coach a half block away she would not be free of negligence at the "time" of the accident. Incidentally, our attention has not been called to any more explicit instruction offered by appellants on this subject. Under the circumstances, the instruction correctly stated the law.

[4,5] The appellants next complain of an instruction given at the request of respondents, and of another given at the request of both parties, dealing with rates of speed. The first instruction, given at the request of respondents, is in two paragraphs and told the jury in proper language that even though a vehicle was being driven at a rate of speed not in excess of the limit of speed fixed by law, such speed might constitute negligence dependent upon the existing conditions and circumstances. The instruction correctly states the law. *Dam v. Bond*, 80 Cal.App. 342, 251 P. 818; *Griffith v. Oak Ridge Oil Co.*, 190 Cal. 389, 212 P. 913. Appellants do not contend that the instruction does not correctly state the law, but urge that the very next instruction, when read with the above instruction, must have misled the jury. The next instruction, given at the request of both parties, told the jury that the Vehicle Code provides: "No person shall drive a vehicle upon a highway at a speed

greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property." The instruction correctly quotes § 510 of the Vehicle Code, St.1935, p. 176. The theory of the appellants is that by the second instruction the jury was told that the limit of speed fixed by the Vehicle Code is a speed that is reasonable and prudent under the circumstances, and that by the first instruction the jury was told that, although defendants' speed did not exceed that limit, such speed, under proper circumstances, might be negligence. This is a strained construction of the instructions. Appellants requested no instruction on the fixed speed limits contained in the Vehicle Code, nor did respondent. The two instructions, when read together, simply tell the jury that the fact that a vehicle is being driven at a speed not in excess of that fixed by the Code does not disprove negligence, and that under all circumstances speed must not exceed what is reasonable under existing conditions. Both instructions thus dealt with the same subject matter. The two instructions correctly and properly stated the law. If appellants wanted the court to elaborate on the instructions they should have offered one setting forth the fixed speed limit at that intersection. This they failed to do, apparently because they admitted in their opening statement that respondent was not driving at an excessive rate of speed. The instructions could not possibly have misled anyone.

[6] The appellants next contend that prejudicial error was committed by the trial court in inserting the word "lawfully" in the following instruction which was proposed by appellants: "If you find from the evidence that the trolley coach *lawfully* entered the intersection of Shotwell and 18th Streets at the time and place in question before, or at the same time as, the automobile driven by Miss Florine entered said intersection, the defendant Market Street Railway Company's trolley coach had the right of way." It is conceded by respondent that the word "lawfully" should not have been used. However, after reading the record, including the full charge to the jury, we are convinced that this minor error could not possibly have been

prejudicial to appellants. Preceding this instruction the jury was correctly instructed in the exact terms of § 550, subd. (b) of the Vehicle Code, St.1937, p. 619, as to what the law provides as to right of way as to vehicles approaching an intersection, and were also fully instructed on this issue by another full and correct instruction offered by appellants on this same subject. Under the circumstances the error was not prejudicial.

[7] Appellants also complain of an instruction proposed by respondent and given by the trial court which, after correctly quoting § 550, subd. (a) of the Vehicle Code, dealing with right of way, stated: "If you find by a preponderance of the evidence that the defendants, at the time and place of the accident in question, disregarded the law as I have just read it to you, and that their disregard of such law was the sole proximate cause of the injuries inflicted on the plaintiff, Miss Florine, and on her automobile, then I instruct you that a verdict must be rendered for said plaintiff and against the defendants." Appellants urge that this so-called formula instruction is defective in that it fails to tell the jury that the doctrine there enunciated is applicable only if the plaintiff herself is free of negligence. It is somewhat difficult to follow this argument. The instruction states that it is only if they find that the defendants disregarded the right of way provision and if they find that such disregard was "the sole proximate cause of the injuries inflicted on the plaintiff" that it was to decide for plaintiff. When that instruction is read with the many other instructions on proximate cause and contributory negligence it seems obvious to us that the allegedly omitted element was in fact included. Appellants place their sole reliance, so far as this point is concerned, on Davis v. San Francisco, 45 Cal.App.2d 443, 114 P.2d 359; where the trial court refused to give a somewhat similar instruction. The appellate court held, under the circumstances there existing, that it was not error to refuse to give the instruction. The reason given by the court was that the instruction was incomplete in that it failed to state that the person first entering the intersection must himself be free from negligence. The instruction in the present case, particularly when read with the other complete and de-

tailed instructions given, is not fairly susceptible of this criticism.

[8] The last objection of appellants is to an instruction on contributory negligence. The instruction reads as follows: "The defense of contributory negligence is an affirmative defense and, unless it appears from the evidence offered on behalf of the plaintiff, it must be established by the defendants by a preponderance of the evidence. Such contributory negligence on the part of a plaintiff which will bar a recovery must consist of some act or omission on her part which is the proximate cause of the injury, and such an act or omission as a person of ordinary prudence and care would not have done or omitted to do." Appellants urge that this instruction erroneously imposed on them the burden of proof and urge that it was not incumbent upon them to show by a preponderance of the evidence that respondent's contributory negligence was "the" proximate cause of her injuries, citing *Dicken v. Souther*, 59 Cal.App.2d 203, 138 P.2d 408. The objection is to the statement that it was incumbent upon the defendants to show that the contributory negligence was "the proximate cause of the injury." That phrase may be somewhat misleading. If it means that the burden was on appellants to show that the contributory negligence was the sole and only cause of the accident it would be incorrect. That was what was held in the *Dicken* case, relied upon by appellants. It was there held that since contributory negligence was involved, an instruction which purported to state that such contributory negligence was a defense only if it were the sole and only negligent act without which the accident would not have occurred was erroneous. That is undoubtedly correct. But the phrase here involved is not subject to that criticism. It would have been much better to have used "a" rather than "the," before "proximate cause," but under the circumstances the jury could not have been misled. Some eighteen correct instructions were given on the doctrine of contributory negligence and several instructions properly defined proximate cause. So far as the burden of proof is concerned, the case of *Rush v. Lagomarsino*, 196 Cal. 308, 237 P. 1066, is a complete answer to appellants' contention.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concur.

64 Cal.App.2d 540

STEWART v. NORSIGIAN et al.

Civ. 3126.

District Court of Appeal, Fourth District,
California.

May 25, 1944.

Rehearing Denied June 19, 1944.

See 150 P.2d 554.

1. Appeal and error ⇐931(1), 1011(1)

All conflicts in evidence are settled in trial court, and on appeal all reasonable inferences must be drawn in favor of the verdict and judgment.

2. Evidence ⇐54

An inference may be based on another inference when first inference is the only one which a reasonable mind could draw from facts proven. Code Civ.Proc. § 1960

3. Trial ⇐142

Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference should be drawn in any given case is a question of fact for jury.

4. Trial ⇐139(1)

Where evidence contrary to existence of the facts in issue is clear, positive, and uncontradicted, and of such a nature that it cannot rationally be disbelieved, the court must instruct jury that nonexistence of the fact has been established as a matter of law.

5. Evidence ⇐588, 594

The jury is sole judge of credibility of witnesses and is free to disbelieve them even though they are uncontradicted if there is any rational ground for doing so. Code Civ.Proc. § 1847.

6. Automobiles ⇐242(6)

Where the only evidence showed that automobile was being driven by automobile dealer's employee at time it struck plaintiff's decedent, it could not be inferred that driver was an employee of finance company which became owner of the automobile upon its repossession by dealer on behalf of finance company, and hence finance company could not be liable for driver's negligence under doctrine of "respondeat superior".

See Words and Phrases, Permanent Edition, for all other definitions of "Respondeat Superior".

7. Automobiles ⇐192(7)

Where automobile dealer repossessed automobile which had been sold by him un-

der conditional sales contract on behalf of finance company to whom the contract had been assigned, and thereafter dealer consented to one of his employees who was interested in buying the automobile driving it home, finance company could be held liable for driver's negligence under statute making owner liable up to \$5,000 for negligence of one driving automobile with his consent. Vehicle Code, § 402 and 402(f), St. 1937, pp. 2353, 2354.

8. Automobiles — 192(8)

Where automobile dealer repossessed automobile which had been sold by him under conditional sales contract on behalf of finance company to whom the contract had been assigned, finance company, and not dealer, was owner of the automobile after its repossession, and hence dealer could not be held liable for negligence of one driving automobile with dealer's consent under statute making owner liable up to \$5,000 for negligence of one driving automobile with his consent. Vehicle Code, § 402 and 402(f), St. 1937, pp. 2353, 2354.

Appeals from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Angelina Stewart, as administratrix of the estate of James E. Stewart, deceased, against John Norsigian, B. J. LaFontaine, and Pacific Finance Corporation of California, to recover for death of plaintiff's decedent as result of a collision between a motorcycle which he was riding and an automobile being driven by defendant John Norsigian. From a judgment in favor of the plaintiff against the defendants Norsigian and Pacific Finance Corporation of California, the defendant Pacific Finance Corporation of California and the plaintiff appeal.

Affirmed in part, and modified and affirmed in part.

Rae B. Carter and Edmond A. Chevalier, both of Fresno, for plaintiff and appellant.

Crider, Runkle & Tilson, of Los Angeles, for defendant and appellant.

Chester O. Hansen, of Fresno, for defendant and respondent.

MARKS, Justice.

This is an action by the administratrix of the estate of James E. Stewart, deceased, to recover damages resulting from his being killed in a collision between a

motor cycle which he was riding and an automobile being driven by John Norsigian. The collision occurred in the early morning of either January 21 or January 22, 1942.

Plaintiff recovered judgment against Norsigian and Pacific Finance Corporation for \$25,000 and judgment went in favor of B. J. LaFontaine for his costs. Pacific Finance Corporation has appealed from the judgment against it, and, as a matter of precaution, plaintiff has appealed from the portion of the judgment in favor of LaFontaine. Norsigian has not appealed. Both appeals are presented on the same transcripts so we will dispose of both of them in this opinion.

Pacific Finance Corporation urges that it was not the owner of the car driven by Norsigian and that he was not its agent, servant nor employee and was not driving the car on its business so no recovery could be had against it. As an alternative it argues that if it be held to be the owner of the car in question, and if Norsigian be held to have been driving it with the Corporation's implied consent, its liability is limited to \$5000 by section 402 of the Vehicle Code, St. 1937, p. 2353.

Plaintiff argues that Pacific Finance Corporation was the owner of the car and that its liability arises under the doctrine of respondeat superior; that if this doctrine does not apply, then it must be held that Pacific Finance Corporation was the owner of the car which Norsigian was driving, with its implied consent, so that its liability is fixed by section 402 of the Vehicle Code.

Plaintiff assumes the same position in her appeal from the judgment in favor of LaFontaine, but states that if it be held that the Pacific Finance Corporation was not the owner of the car, and, that it is not liable under the doctrine of respondeat superior, then it must be held that LaFontaine was its owner and that his liability should be determined at a second trial.

LaFontaine was a dealer in new and used automobiles. He was doing business in the city of Selma in Fresno County under the name of Selma Auto Electric Company.

On August 30, 1941, LaFontaine sold the car in question, a Ford sedan, to Ray R. Blair on a conditional sales contract providing for monthly payments. LaFontaine assigned this contract and his interest in the car to Pacific Finance Corporation and

guaranteed payment of the balance due. A registration certificate (pink slip) was issued showing Pacific Finance Corporation as the legal owner and Blair as the registered owner.

A very few days before the accident here in question, two or three according to the witnesses, Blair drove the car into the place of business of LaFontaine and told him that he was going into the Army or the Navy and he could not continue the payments on the contract and wanted to turn the car back. LaFontaine told him that he should notify the Pacific Finance Corporation at its office in Fresno that he had surrendered the car and had abandoned the contract. Blair replied that he would try to do so as the office did not close until five o'clock. There is no evidence that Pacific Finance Corporation received any notice of the surrender of the car other than the inference which might be drawn from an affidavit made by its representative to which we will later refer.

LaFontaine testified that when Blair surrendered the car, he, LaFontaine, became obligated to pay the unpaid balance on the contract; that he could either pay the balance out of his own funds or resell the car and pay the amount due out of the selling price. After the accident LaFontaine paid the balance due Pacific Finance Corporation and became the owner of the Ford. LaFontaine sold the Ford to a Mr. Woodward on March 31, 1942. There was no change in the record of ownership of the car between the time of the issuance of the pink slip when the sale was made to Blair and the time of the accident.

Norsigian was in the employ of LaFontaine as a mechanic. On the afternoon of January 20 or 21, 1942, he told LaFontaine that he wanted to buy a car and was interested in the purchase of this Ford; that before buying it he wanted to drive it. LaFontaine consented and Norsigian drove it home that evening. He then drove it to Fresno, returning towards Selma on Highway 99 early next morning. The collision which resulted in the death of Stewart occurred about two o'clock on that morning. There is no contention made that the accident was not proximately caused by the negligence of Norsigian.

We will first consider the liability of Pacific Finance Corporation under the doctrine of respondeat superior.

There is no evidence that Norsigian was ever employed by Pacific Finance Corpo-

ration or that any of its representatives had ever heard of him prior to the accident. The only evidence in the record on that subject is to the effect that Norsigian was employed by LaFontaine.

[1] Plaintiff calls our attention to the well established rules that all conflicts in the evidence are settled in the trial court and that on appeal all reasonable inferences must be drawn in favor of the verdict and judgment. *Juchert v. California Water Service Co.*, 16 Cal.2d 500, 106 P.2d 886; *Whitechat v. Guyette*, 19 Cal.2d 428, 122 P.2d 47; *Mah See v. North American Acc. Ins. Co.*, 190 Cal. 421, 213 P. 42, 26 A.L.R. 123. She then argues that one inference may be based on another inference (*West Coast Life Ins. Co. v. Crawford*, 58 Cal.App.2d 771, 138 P.2d 384) and maintains that the various inferences that may be drawn from the evidence support the verdict and judgment.

[2] While there is general language in *West Coast Life Ins. Co. v. Crawford*, supra, supporting the argument of plaintiff, a study of that case and others shows the rule to be that an inference may be based on another inference when the first inference is the only one which a reasonable mind could draw from the facts proven. It then becomes a proven fact and a subsequent inference may be drawn from it as an inference must be founded on a fact legally proved. Sec. 1960, Code Civ. Proc. This is recognized in the opinion in the *West Coast Life Insurance Co.* case.

Plaintiff argues that the doctrine of respondeat superior may be invoked here because of the inference of agency which she argues may be drawn where the car, owned by one person, is in the possession of another and is being driven by him. She cites cases in support of this argument such as *Fearn v. Ralph Hamlin, Inc.*, 215 Cal. 211, 8 P.2d 1015; *Ryan v. Farrell*, 208 Cal. 200, 280 P. 945; *Blank v. Coffin*, 20 Cal.2d 457, 126 P.2d 868; and *Souza v. Corti*, 22 Cal.2d 454, 139 P.2d 645, 147 A.L.R. 861.

An examination of these cases and others discloses that such an inference has been drawn under two sets of circumstances: First. Where the operator of the car belonged to the family group of the owner, and second, where the driver was the employee of the owner. Certainly the family group cases cannot apply here. Norsigian was not employed by Pacific Finance Corporation. We have been cited to no case and have found none, permitting the draw-

ing of such an inference, where the driver of the car was not an employee of the owner and was a total stranger to the owner, was not a member of the family group of the owner, and was not operating it under the direction of nor for the benefit of a member of his family.

A search of the record has disclosed no evidence justifying the inference that Norsigian was operating the car as the agent, servant or employee of Pacific Finance Corporation. All of the evidence, and it was all offered by plaintiff, is to the effect that Norsigian was a complete stranger to Pacific Finance Corporation and its representatives, that he was not employed by it and that they did not know he had possession of the car until after the accident.

[3-5] In *Blank v. Coffin*, supra [20 Cal. 2d 457, 126 P.2d 870], it was said:

"Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn, in any given case, is a question of fact for the jury. See cases cited in 10 Cal.Jur. 738-739, § 60.

"Usually, the opposing party introduces evidence as to the nonexistence of the fact in issue, and the jury must then determine the existence or nonexistence of the fact from all the evidence before it. If the evidence contrary to the existence of the fact is clear, positive, uncontradicted, and of such a nature that it can not rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law. (Citing cases.) The jury, however, is the sole judge of the credibility of the witnesses (Cal.Code Civ.Proc., § 1847; see cases cited in 27 Cal.Jur. 182, § 156) and is free to disbelieve them even though they are uncontradicted if there is any rational ground for doing so. (Citing cases.) In most cases, therefore, the jury is free to disbelieve the evidence as to the nonexistence of the fact and to find that it does exist on the basis of the inference."

Plaintiff maintains that the jury was fully justified in disbelieving the evidence of Norsigian and LaFontaine that the former was an employee of the latter and that he was not an employee of the Pacific Finance Corporation. She bases this argument on the fact that Norsigian was contradicted by other witnesses as to some of the circumstances of the accident and, on the further fact that LaFontaine made an

affidavit that the Ford had not been operated on the highways of California after December 1, 1941, which was contradicted by the proven facts of the case.

[6] While this evidence might furnish sufficient reason for disbelieving the testimony of Norsigian and LaFontaine, that fact can not aid the cause of plaintiff. If the evidence of these witnesses as to the employment of Norsigian be rejected as untrue, there is an entire lack of any evidence on the question of his employment by any one. There is no claim that he belonged to the family group of Pacific Finance Corporation, nor to that of any of its representatives, so that question is eliminated from the case. If we eliminate his evidence, and that of LaFontaine, on the subject of employment, there is no evidence on that question and nothing to indicate employment by Pacific Finance Corporation. Under these circumstances there is an entire absence of proof of the fact of employment which must be established in order to support the inference of agency on which plaintiff bases her argument. It follows that we cannot support the judgment against Pacific Finance Corporation under the doctrine of respondeat superior. There is nothing in the record indicating that Norsigian was either its agent, servant or employee and no proven fact to support such an inference.

[7] We must next consider the liability of Pacific Finance Corporation under the provisions of section 402 of the Vehicle Code which makes the owner of a motor vehicle liable up to \$5000 for death or injury to one person resulting from the negligent operation of the vehicle by a person operating it with the express or implied consent of the owner.

Subdivision (f) of that section, in effect at the time of the accident, provided in part as follows:

"If a motor vehicle is sold under a contract of conditional sale whereby the title to such motor vehicle remains in the vendor, such vendor or his assignee shall not be deemed an owner within the provisions of this section, but the vendee, or his assignee shall be deemed the owner notwithstanding the terms of such contract, *until the vendor or his assignee retake possession of such motor vehicle.*" (Emphasis ours.)

In order to fix liability under section 402 of the Vehicle Code, two facts, in addition

to negligence of the operator, must be established: First, that Pacific Finance Corporation was the owner of the Ford at the time of the accident and second, that Norsigian was driving it with the consent of Pacific Finance Corporation. In this connection it must be remembered that at that time Pacific Finance Corporation was shown as the legal owner, and Blair as the registered owner on the records of the Motor Vehicle Department as there had been no change in the registration of the car until after the accident. It must be borne in mind that the car was in the physical possession of LaFontaine on his sales lot in Selma; that he was the original vendor of the automobile with Pacific Finance Corporation as his assignee; that he had an understanding with Pacific Finance Corporation that it would finance new and used cars sold by him on conditional sales contracts and had guaranteed payment of the balance due under the Blair contract.

Under date of January 21, 1941, an agent of Pacific Finance Corporation executed an affidavit for it which contained the following:

"Pacific Finance Corporation of California being first duly sworn, deposes and says: That he is the owner within the meaning of the Vehicle Code of that certain Ford * * *; that as allowed under lease contract dated the 30th day of August 1941, he repossessed said Ford * * * on or about the 15th day of Jan. 1942, from R. R. Blair, whose post office address is/ was 640 Franklin, Fresno, for the following reasons: non-fulfillment of contract. Signed Pacific Finance Corporation of California. Countersigned R. N. Roe, and now has the above described vehicle in his possession."

This affidavit contains the only information in the record of the exact date of the surrender of the car which was regarded as a "repossession" by Pacific Finance Corporation which stated that on January 21, 1942, it had the car in its possession. As the car was then on the LaFontaine sales lot in Selma, where it had been since Blair surrendered it, the only conclusion to be reached is that the possession by LaFontaine was possession by Pacific Finance Corporation and for it.

When the car was repossessed by Pacific Finance Corporation, as stated in its affidavit, Blair's interest was forfeited under the terms of the contract and Pacific Finance Corporation became the owner

of the car as the legal ownership and the registered ownership as shown on the pink slip became merged in it. This conclusion finds some support in subdivision (f) of section 402 of the Vehicle Code, already quoted, which in effect provides that the conditional sales vendor and his assignee shall not be considered the owner of the motor vehicle "until the vendor or his assignee retake possession of such motor vehicle."

Under the circumstances disclosed here we conclude that Pacific Finance Corporation was the owner of the car as that term was used in section 402 of the Vehicle Code in 1942.

We have little difficulty in concluding that the evidence justified the jury in the implied finding that Norsigian was driving the Ford with the implied consent of Pacific Finance Corporation at the time of the accident. As we have observed, LaFontaine had possession of the car for Pacific Finance Corporation and was obligated under his guaranty to pay the balance due on the purchase price. He testified that he could make this payment out of his own funds or by a resale of the car. This stands uncontradicted in the record. He held possession for Pacific Finance Corporation, had the right to sell the car and had it on his sales lot. His right to sell the car would include the use of the usual and ordinary means of effecting a sale which includes a demonstration to a prospective purchaser. The accident happened during such demonstration. It should make little difference whether the driver, during the demonstration, was an employee of LaFontaine or of the owner, or was the prospective purchaser. As LaFontaine had possession of the car for Pacific Finance Corporation, the owner, and had the right to sell it, the consent of the owner to the demonstration must be implied through consent given by LaFontaine.

We therefore conclude that Pacific Finance Corporation is liable under section 402 of the Vehicle Code in the sum of \$5000 damages caused by the negligence of Norsigian while operating the car with its implied consent.

[8] We must next consider the appeal by plaintiff from the portion of the judgment in favor of LaFontaine.

Norsigian was bailee of the car while he was using it. *Baugh v. Rogers*, 24 Cal.2d 200, 148 P.2d 633. The liability of LaFontaine must arise, if at all, under the provi-

sions of section 402 of the Vehicle Code. That section fastens liability only on the "owner of a motor vehicle". As we have concluded that Pacific Finance Corporation, and not LaFontaine, was the owner of the Ford at the time of the accident the judgment in favor of LaFontaine was proper.

The portion of the judgment in favor of B. J. LaFontaine is affirmed.

The judgment against Pacific Finance Corporation is reduced to \$5000 and as so reduced is affirmed. As between plaintiff and Pacific Finance Corporation neither party will recover costs of appeal.

BARNARD, P. J., and GRIFFIN, J., concur.



64 Cal.App.2d 480

In re LEWIS' ESTATE.

FRANC et al. v. BANK OF AMERICA NAT.
TRUST & SAVINGS ASS'N et al.

Civ. No. 14419.

District Court of Appeal, Second District,
Division 1, California.

May 24, 1944.

1. Wills ⇨288(3), 423

Admission to probate of will established prima facie due execution in manner required by law by competent testator free from undue influence and placed burden on contestants to establish invalidity of will.

2. Wills ⇨163(1)

Generally, burden of proof as to fraud or undue influence is on will contestants or person who alleges their existence and exercise, and such burden never shifts, although, where contestants establish a prima facie case, person charged with fraud or undue influence has burden of meeting it.

3. Wills ⇨163(1)

Burden of showing freedom from undue influence in execution of a will is not cast upon a beneficiary who sustained no confidential relationship toward testator and who did not participate in procuring execution of will.

4. Wills ⇨166(7)

Evidence that principal beneficiary of will had opportunity to unduly influence testatrix and suspicions by contestants engendered by knowledge that such opportunity existed were insufficient to establish that will was induced by undue influence.

5. Wills ⇨166(5)

However unnatural will may appear and however much at variance with testator's expressions as to his intentions, it may not be held invalid on ground of undue influence unless there be an actual showing of that sort of pressure which overpowered the mind and mastered volition of testator at very moment of execution.

6. Wills ⇨163(2)

To impose on beneficiary under will burden of proof to show that will was not induced by coercion or fraud, a confidential relation between him and testator is not sufficient, and there must be activity on his part in preparation of will.

7. Wills ⇨326

In contest of will after probate for alleged undue influence exercised by proponent on testatrix, contestants' evidence which failed to show any activity on part of proponent in procurement of will was insufficient as against motion for nonsuit.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Proceedings in the matter of Flora V. Lewis, also known as Flora Vollmer, deceased, by Louis B. Franc and Mary A. Franc, contestants, against Bank of America National Trust & Savings Association, executor, and Sadie Lou Kramer and others, proponents, to revoke probate of decedent's will. From a judgment of dismissal after proponents' motion for nonsuit was granted, contestants appeal.

Affirmed.

Albeck & Albeck, of Los Angeles, for appellants.

Irwin M. Fulop, of Los Angeles, for respondent bank.

S. Ward Sullivan, of Los Angeles, for individual respondent.

YORK, Presiding Justice.

This is an appeal by contestants from an order dismissing their petition for re-

vocation of the probate of the last will and testament of Flora V. Lewis, deceased, after motion for nonsuit made on behalf of respondents was granted by the trial court at the close of contestants' case.

The record herein reveals that on June 5, 1942, immediately following the death of her husband Flora V. Lewis executed a will in which she appointed appellant Louis B. Franc, a friend of long standing, as executor thereof, and after making bequests to relatives and friends, she provided that appellants Louis B. Franc and Mary A. Franc should each receive 25% of her residuary estate. This first will was destroyed at the direction of testatrix by—attorney Edward Hervey, who drew it for her, and on June 15, 1942, Mrs. Lewis executed a new will in which she reduced the disposition to appellants by 2½% respectively, which percentage was added to the disposition made by testatrix to another legatee.

On August 1, 1942, Mrs. Lewis executed another will bequeathing sums of money to relatives and friends, devised her home to respondent Sadie Lou Kramer, who was also made residuary legatee, and appointed respondent Bank of America as executor. No mention was made in said will of contestants and appellants Louis B. Franc and Mary A. Franc.

Mrs. Lewis died on September 28, 1942, and on October 2, 1942, respondent banking association filed its petition for probate of the will of August 1st. Thereafter, Amelia O. Kramer, sister of testatrix, filed her petition in opposition to probate and on December 10, 1942, a stipulation for a dismissal with prejudice of the contest of said Amelia O. Kramer was filed; the said will of August 1, 1942 was admitted to probate, and letters testamentary were issued to respondent bank.

On March 3, 1943, appellants filed the instant petition for revocation of the probate of said will of August 1, 1942, on the ground that the execution thereof was procured by the undue influence of respondent Sadie Lou Kramer.

The answers of respondents admitted that appellants were legatees and devisees under the will of June 15, 1942, denied the allegations of undue influence, and as a separate defense alleged that appellants had actual notice in time to have joined therein of the contest before probate of Amelia O. Kramer.

The motion for nonsuit herein was made by respondents at the close of contestants'

case on the ground that the record contained no direct evidence of undue influence and no evidence from which undue influence could be inferred.

It is urged that in determining the propriety of the order granting the motion for nonsuit, the court must accept the evidence in the light most favorable to appellants, and that the evidence submitted by them herein constituted a prima facie showing of undue influence, thus casting the burden on respondents to show that the will of August 1, 1942 was not induced by undue influence.

[1-3] This point is answered by language in *Re Estate of Baird*, 176 Cal. 381, 384, 168 P. 561, 562, cited by respondents, to-wit:

The admission to probate of the will of August 1, 1942, "established prima facie for all the purposes of the contest, that it was duly executed in the manner required by law by a testator who was competent, free from undue influence, etc. The burden of proof was on the contestants to establish its invalidity. It is plain, therefore, that unless the evidence introduced was of such a nature that it would have sufficed to legally support a conclusion of undue influence * * * there was no error in granting the motion for a nonsuit." See, also, 26 Cal.Jur. 759. Generally, the burden of proof as to the issues of fraud or undue influence is on the contestant or the person who alleges their existence and exercise and such burden never shifts, although where contestants establish a prima facie case, the person charged with fraud or undue influence has the burden of meeting it. In *re Estate of Eackle*, 33 Cal.App.2d 379, 91 P.2d 954. The burden of showing freedom from undue influence in the execution of a will is not cast upon a beneficiary who sustained no confidential relationship toward the deceased, and who did not participate in any way in procuring the execution of the will. In *re Estate of Fleming*, 199 Cal. 750, 251 P. 637. See, also, *In re Shields' Estate*, 49 Cal.App.2d 293, 121 P.2d 795.

[4] Appellants herein made no sufficient showing of undue influence in the procurement of the will of August 1, 1942, and their premise that the execution of said will was induced thereby is based upon nothing more than a present opportunity on the part of Sadie Lou Kramer to unduly influence the testatrix and the suspicions engendered by the knowledge that such opportunity existed.

[5, 6] As stated in *Re Estate of Baird*, supra, 176 Cal. 381, 384, 168 P. 561, 562: "The authorities in this state are numerous to the effect that however unnatural a will may appear to be, and however much at variance with expressions by the testator as to his intention with regard to the natural objects of his bounty, it may not be held invalid on the ground of undue influence unless there be an actual showing of that sort of pressure which overpowered the mind and mastered the volition of the testator at the very moment of execution. (Citation of authorities.) This is the well-settled general rule. There is a well-established exception to this rule upon which contestants rely here, to the effect that where one who unduly profits by the will as a beneficiary thereunder sustains a confidential relation to the testator, and has actually participated in procuring the execution of the will, the burden is on him to show that the will was not induced by coercion or fraud. As suggested in *Estate of Higgins*, 156 Cal. [257] 261, 104 P. [6] 8, a 'presumption of undue influence' arises from proof of the existence of a confidential relation between the testator and such a beneficiary, 'coupled with activity on the part of the latter in the preparation of the will.' The confidential relation alone is not sufficient. There must be activity on the part of the beneficiary in the matter of the preparation of the will. (Citation of authorities.)" See, also, *In re Estate of Arnold*, 16 Cal.2d 573, 581, 107 P.2d 25.

The evidence adduced at the trial herein reveals that testatrix, Mrs. Lewis, was a semi-invalid, suffering from palsy and was estranged from Amelia O. Kramer, her sister and only close living relative in Los Angeles where Mrs. Lewis resided. Respondent Sadie Lou Kramer was not related to Mrs. Lewis, but had been married to Mrs. Lewis' nephew, Vollmer Kramer, and was the mother of Billy Kramer. Mrs. Lewis' husband died on June 4, 1942, and, as hereinbefore stated, she executed three wills between that date and her own death on September 28, 1942, in all of which respondent Sadie Lou Kramer was named as a beneficiary. The first two wills were drawn by Edward Hervey, an attorney at law, who represented Mrs. Lewis in her capacity as administratrix of her husband's estate. Mr. Hervey testified that when Mrs. Lewis executed the first will on June 5, 1942, she stated in the presence of contestant Louis B. Franc that "Sadie Lou

Kramer had been very helpful to her. She was taking care of things to her. She also told me that she (Sadie Lou Kramer) was divorced and she had a boy (Billy Kramer)." Mr. Hervey also testified that respondent Kramer was in the house when he arrived at Mrs. Lewis' home, but that she left very shortly thereafter; that Mrs. Lewis was "very fixed in her impressions and in her mind what she was going to do." Said witness also stated that he went to see Mrs. Lewis at her home between June 10th and June 15th in relation to her will; that a maid and respondent Kramer were there, but that Sadie Lou Kramer was not present at the discussion between him and Mrs. Lewis at which time the latter directed him what to put in the will of June 15th; that he had no discussions with Sadie Lou Kramer regarding either the will of June 5th or the will of June 15th, in which appellant Louis B. Franc was named executor, and in which both Mr. Franc and his wife were bequeathed a substantial portion of Mrs. Lewis' estate.

Shortly after her husband's death, Mrs. Lewis entered Dr. Herzen's sanitarium or rest-home, presumably to rest. She remained there until July 20, or 21, 1942, when she was removed to respondent Sadie Lou Kramer's home and where she resided for a couple of weeks. It was while Mrs. Lewis was residing at respondent Kramer's home that she executed the will of August 1, 1942, which has been admitted to probate.

Mr. Franc testified that he had a conversation with Mrs. Lewis after June 15th at which time "She said that Sadie Lou Kramer had made arrangements for her to go to the hospital or sanitarium to rest. She said she didn't want to go, but she has made the arrangements and 'I have got some valuable papers I would like to have you keep for me, while I am away at the sanitarium or rest-home.' She gave me an envelope containing the second will as it was made a few days before, and gave me some stocks and bonds which I had Mrs. Franc deposit in the safety deposit box." Mr. Franc stated that he visited Mrs. Lewis a few days after she entered the rest-home, and that Mrs. Lewis told him in the presence of Sadie Lou Kramer that she (Mrs. Lewis) wanted to go home. "I said, 'You made arrangements to stay here a month.' She said, 'I didn't make arrangements to stay here a month, Sadie Lou made all the arrangements.'" This

witness also testified that on several occasions during the month of August after Mrs. Lewis had returned to her own home, he attempted to visit her, but on each occasion respondent Kramer told him that Mrs. Lewis was too ill to be seen; also that he knew nothing about the will of August 1, 1942 until the day of Mrs. Lewis' death.

Aside from the testimony of respondent Sadie Lou Kramer, who was called by appellants Franc under section 2055 of the Code of Civil Procedure, the record is silent respecting the circumstances surrounding the execution of the will of August 1, 1942, which omitted any mention of appellants. Respondent Sadie Lou Kramer testified that Mrs. Lewis made her own arrangements with Dr. Herzen when she entered his sanitarium where she remained about one month, after which she stayed at respondent's home a little less than two weeks, because she (Mrs. Lewis) "was unable to get a nurse to take over to her own home." This witness denied that Mrs. Lewis asked her to call the Bank of America in connection with her property, but testified that either on the day or the day after she brought Mrs. Lewis home from the sanitarium, Mrs. Lewis "went to the bank herself and requested the man to come to the house. * * * I took her to the bank, and she asked me to go out to the car and wait for her.

"Q. Then you don't know what transpired there? A. No.

"Q. When did these men from the bank come out there to your house? A. Several days later.

"Q. Who were they? A. One is Mr. Kellerman.

"Q. Who was with him? A. He was alone.

"Q. Were you present at the conversation between them? A. No, I was not. I left the house. She told me there was nothing to do, and I went shopping.

"Q. When was the next time you saw Mr. Kellerman? A. Well, it was several days later.

"Q. Who was with him? A. A Mr. Marvin Glass.

"Q. Did they come to see Mrs. Lewis? A. They asked for Mrs. Lewis. * * *

"Q. Did you inquire of them as to the nature of their business? A. I did not. * * * I let them into the front room and called Mrs. Lewis.

"Q. Did you know Mr. Glass was an attorney? A. No, I did not.

"Q. Did you stay there during the conversation? A. I did not; I left the house again.

"Q. Did Mrs. Lewis ever tell you what conversation she had with these men? A. She did not.

"Q. Did you ever find out as to what her business with these men was? A. I found out since her death. * * *

"Q. When was that? A. The day she died."

Thereafter, on the 2nd or 3rd of August, 1942, respondent Kramer took Mrs. Lewis back to the latter's home with a nurse in attendance. Toward the latter part of August or the first of September, respondent Kramer began staying at Mrs. Lewis' home, but she did not move into said home until after Mrs. Lewis died.

Respondent Sadie Lou Kramer in reply to the question: "You have stated you were a constant visitor at Mrs. Lewis' home before she entered the sanitarium, did you not?", stated, "Every day. * * * When Mr. Lewis passed away there was nobody to be with her, and she asked me to stay until the funeral was over, and she made her own suggestion that this doctor had been caring for her for six months, thought she would go to his home, as the housekeeper she had was quitting and going back East. I couldn't leave my home, I had my obligations regarding my son. I stayed with her until she went to this rest-home at her request." This witness denied that she ever instructed "Dr. Herzen at the sanitarium not to allow any visitors to see Mrs. Lewis." She also denied that she kept the Francs from seeing Mrs. Lewis at her own home.

[7] Since the evidence produced on behalf of appellants failed to show any activity on the part of respondent Sadie Lou Kramer in the procurement of the will of August 1, 1942, it was inadequate to prove undue influence in the execution of the will. In re Estate of Arnold, *supra*. The evidence being insufficient to show that the will of decedent was the result of influence on the part of said respondent, the court properly granted the motion for nonsuit.

For the reasons stated, the order dismissing the petition to revoke the probate of the will is affirmed.

DORAN and WHITE, JJ., concur.

64 Cal.App.2d 468

**McCARTHY v. SUPERIOR COURT FOR
CITY AND COUNTY OF SAN
FRANCISCO et al.**

No. 12640.

District Court of Appeal, First District,
Division 1, California.

May 23, 1944.

Motion to Modify Writ Denied June 22, 1944.

See 149 P.2d 871.

1. Executors and administrators ⇨85(4)

The remedial powers of Probate Court in discovery and accounting proceedings under the Probate Code are limited to remedial powers conferred by section 614, and court in such proceeding cannot determine dispute between person cited and representative of estate as to title to property or amount claimed to be due as result of accounting nor order disposition of property or punish for contempt for failure to obey any order so made. Probate Code, §§ 613-615.

2. Executors and administrators ⇨85(4)

Where probate discovery and accounting proceedings resolved itself into a dispute between executor and petitioner as to credit allowable to petitioner in operation of decedent's business, Probate Court was without jurisdiction to enforce collection of disputed items by execution or contempt proceedings. Probate Code, §§ 613-615.

3. Executors and administrators ⇨85(1)

The purpose of statute providing a method of compelling an accounting under oath by one who has been entrusted with any part of estate of a decedent is to place executor or administrator in possession of such facts as would authorize a civil suit to restore property to estate. Probate Code, § 615.

Special proceeding by Daniel F. McCarthy, petitioner, against Superior Court for the City and County of San Francisco, and T. I. Fitzpatrick, Judge thereof, respondents, for a writ of prohibition to prohibit respondent court, sitting in probate, from enforcing by execution or contempt proceedings an order directing petitioner to turn over certain sums to the executor of the estate of Allie C. M. Osborne, deceased.

Writ issued.

Albert J. McGuire, of San Francisco, for petitioner.

Lloyd J. Cosgrove, of San Francisco, for H. M. S. Osborne.

KNIGHT, Justice.

Petitioner has applied for a writ of prohibition to prohibit the superior court, sitting in probate, from enforcing by execution or contempt proceedings an order made in a proceeding instituted therein under the provisions of sections 613, 614 and 615 of the Probate Code, in the matter of the Estate of Allie C. M. Osborne, deceased.

The facts are as follows: For many years immediately preceding Mrs. Osborne's death, which occurred on March 30, 1942, she conducted a real estate and insurance business on Mission Street in San Francisco under the name of Stewart & Osborne, in connection with which she maintained a commercial account in the name of "Stewart & Osborne, Agent," at the Mission Branch of the American Trust Company. Part of her business consisted of collecting rentals for a great many property owners, which rentals she deposited in her bank account and afterwards drew checks thereon in favor of her clients for the amounts due them. For more than ten years petitioner had been associated with Mrs. Osborne's business in the capacity of a real estate and insurance salesman, working on a commission basis; and he assisted generally in carrying on the business. During such association they bought and sold considerable real property on their own account as joint tenants. Some of the property was income producing, and a few parcels stood in their names as joint tenants at the time of her death. In buying property it often became necessary for them to borrow money on trust deeds and mortgages; and in selling they frequently accepted deeds of trust and mortgages in part payment; so that at the time of Mrs. Osborne's death they were receiving income from real and personal property owned jointly by them, and they were also making payments on outstanding joint obligations. Furthermore at the time of Mrs. Osborne's death certain commissions were due petitioner on unpaid insurance premiums.

About two years prior to Mrs. Osborne's death she executed and delivered to the bank a power of attorney in the usual

form required by banks, authorizing petitioner to draw checks on the bank account, and when she became ill and was about to be taken to the hospital, she instructed petitioner to carry on the business for her and to pay the clients of the office from the bank account whatever sums of money were due them. Thereafter and on Saturday, March 28, 1942, petitioner closed the bank account maintained by Mrs. Osborne and transferred the balance therein, amounting to \$3,182.31, to a new account which he opened at the same bank in the name of "Stewart & Osborne, by Daniel F. McCarthy." Mrs. Osborne died on the following Monday, March 30, 1942, and during that week and after her death, petitioner drew checks on said account to pay a number of the clients the amounts due them as rental collections. At the end of that week and on April 6, 1942, the executor named in her will and his counsel conferred with petitioner, at which time petitioner informed them fully as to what he had done concerning the bank account; and thereupon they authorized and instructed petitioner to continue on with the business in the usual manner and to account to them from time to time as to its financial condition. Pursuant to that arrangement petitioner remained in charge and operated the business until October 1, 1942, at which time the bank account was exhausted and a disagreement arose over the accounting. Thereupon petitioner filed suit against the executor, asking for a court settlement of the accounts, alleging the existence of a partnership between himself and Mrs. Osborne; but before an answer was filed therein he voluntarily dismissed the suit. The executor then instituted the proceeding in the probate court under the authority of sections 613, 614 and 615 of the Probate Code, by the filing of a complaint on oath wherein he alleged that petitioner had in his possession and under his control, and was concealing, certain sums of money belonging to the decedent's estate, to-wit: (1) \$3,182.31 withdrawn by petitioner from the American Trust Company; (2) rentals in a sum unknown to the executor but known to the petitioner, collected by petitioner from property owned jointly by the decedent and petitioner; (3) moneys collected on promissory notes secured by trust deeds and mortgages owned jointly by the decedent and petitioner, the exact amount of which was unknown to the executor but known to the petitioner; (4) premiums collected on insurance policies, the amount

of which was unknown to the executor but known to petitioner. The complaint then went on to allege that although petitioner had furnished "various statements and sets of figures, that they do not, nor do any of them constitute an intelligible report or account of the amount, disposition or location of said moneys * * *." The prayer of the complaint was that petitioner be cited to appear and show cause why he should not (1) return and pay over to the executor "all money and property held and concealed" by petitioner; (2) account for all moneys belonging to the decedent which had been disbursed by petitioner, and (3) pay over to the executor "one half ($\frac{1}{2}$) of all moneys collected upon property or obligations owned jointly by" petitioner and decedent.

In obedience to the citation that was issued by the probate court petitioner appeared in person and by attorney and gave an account of the moneys referred to in the complaint; he also answered all questions put to him concerning the same. The hearing extended over three separate sessions of the court, with an intervening two weeks between the first and second sessions, and four weeks between the second and third sessions, to enable petitioner to supply a more definite account of the moneys he was charged with having received and disbursed. At the final session petitioner produced an expert accountant whom he had employed to audit the books, and according to the reports furnished by the accountant petitioner was indebted to the estate in the sum of \$366.77, which petitioner agreed to pay. The executor refused to accept that amount; whereupon the proceeding was ordered submitted, and thereafter and on December 9, 1943, the court made and entered an order wherein it found that petitioner had "under his possession and in his control the sum of \$2,153.24 * * * belonging to the Estate * * *." and that he "should be ordered to pay over" to the executor that amount; furthermore, "that said Executor shall have the aid of contempt process of this Court in the enforcement of this order and that executor [execution] shall issue thereon"; whereupon it was "ordered, adjudged and decreed" that petitioner was "indebted to the Estate of Allie C. M. Osborne, Deceased, in the sum of \$2,153.24"; that he pay over to the executor said sum, and the costs incurred herein, and that a writ of execution issue thereon.

[1] Under the circumstances we are of the opinion that petitioner is entitled to the issuance of the writ. Sections 613, 614 and 615 of the Probate Code are reenactments of the provisions of sections 1459, 1460 and 1461 of the Code of Civil Procedure in substantially the same language. Estate of Escolle, 134 Cal.App. 473, 25 P.2d 860. Section 613 provides a means of discovery, by way of citation and examination, in cases where a person is suspected of having embezzled, concealed, smuggled or fraudulently disposed of property belonging to the estate of a decedent; and section 615 provides a method of compelling an accounting under oath by a person who has been entrusted with any part of the estate of the decedent. The remedial powers conferred upon the probate court for the enforcement of the provisions of sections 613 and 615 are embodied in section 614, the pertinent portions of which declare that if the person suspected of having embezzled, concealed, smuggled or fraudulently disposed of the property of the estate refuses to appear and submit to an examination touching the matters of the complaint, the court, by warrant for that purpose, may commit him to the county jail, there to remain until he submits to the order of the court or is legally discharged. Or if, upon such examination it appears that he has embezzled, concealed, smuggled or fraudulently disposed of any property of the decedent, the court may make an order requiring him to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail, there to remain until the order is complied with, or he is legally discharged. It appears to be well settled, however, that the power thus granted to the probate court by the foregoing sections ends with the discovery of the property and the enforcement of the remedial powers of the statute, and does not extend beyond that; and that where a dispute arises between the person cited and the representative of the estate as to the title to property, or the amount claimed to be due as the result of the accounting, the probate court cannot in such proceeding determine the issue, nor order property delivered up to the executor or administrator, or to be deposited as the court may order; nor under such circumstances does it have the power to imprison the person for contempt for failure to obey any order so made. Ex parte Casey, 71 Cal.

149 P.2d—4½

269, 12 P. 118; Koerber v. Superior Court, 57 Cal.App. 31, 206 P. 496; In re Estate of Escollé, supra; In re Ochoa, 50 Cal. App.2d 457, 123 P.2d 106; 11A Cal.Jur. pp. 463-468. A different rule governs where the probate court has determined that funds belonging to an estate are being illegally withheld by an attorney. In re Estate of De Barry, 43 Cal.App.2d 715, 111 P.2d 728; In re Estate of Troy, 92 Cal.App. 352, 268 P. 426.

[2, 3] In the present case, as stated, the petitioner appeared in response to the citation and rendered an account of the moneys and property received and disbursed by him in carrying on the decedent's business; also of the moneys and property owned jointly by him and the decedent; and he submitted to an examination touching all of those matters. The record discloses no evidence showing, nor does the probate court find, that there has been any embezzlement, concealment, smuggling or fraudulent disposal of the moneys or property of the estate. The proceeding resolved itself into a dispute over a matter of accounting, which involved three items for which petitioner claimed credit, to-wit: (1) \$169.18 claimed to have been paid out by him as office expenses incurred prior to Mrs. Osborne's death; (2) \$1,148.70 claimed to have been paid out by him as operating expenses of the business between the date of her death and October, 1942, when he surrendered the business to the executor; and (3) \$468.70 which he claims he had previously paid to the executor as part of the estate's one-half of the net earnings received from the joint holdings. Therefore, in view of such dispute and the authorities above cited, the probate court is without legal authority to enforce the collection of those sums of money by execution or contempt proceedings. In other words, as said in substance in Re Estate of Olmstead, 216 Cal. 585, 15 P.2d 495, the object of section 615 is to place the executor or administrator in possession of such facts as would authorize a civil suit to restore the property held by another and claimed to belong to the estate.

It is ordered, therefore, that a writ of prohibition issue herein prohibiting the respondent court from taking further action by way of execution or contempt proceedings for the enforcement of the order entered on December 9, 1943.

PETERS, P. J., and WARD, J., concur.

In re GREEN'S ESTATE.**DICK v. ELLIS et al. ***

Civ. 6994.

Sac. 5619.

District Court of Appeal, Third District,
California.

May 24, 1944.

Rehearing Denied June 22, 1944.

Hearing Granted July 20, 1944.

1. Wills ⇨358

An appeal does not lie from order denying will proponents' motion for judgment notwithstanding jury's verdict for contestant, as Probate Code does not provide for such appeal, though contestant appeals from order granting new trial and Code of Civil Procedure provides that order denying judgment notwithstanding verdict may be reviewed on appeal, if adverse party appeals from order granting new trial. Code Civ.Proc. §§ 629, 657; Probate Code, § 1240.

2. Appeal and error ⇨1

The right of appeal is purely statutory.

3. Wills ⇨318(3)

A jury's findings in will contest are special in nature and must be adopted by court before they become effective. Probate Code, § 373.

4. Wills ⇨337

In will contest, where jury's special findings on issues of unsound mind and undue influence were not adopted by court, which made no decision on any other issues, including that of due execution of will, and rendered no judgment either admitting will to probate or denying probate, proponents' motion for new trial after jury's verdict for contestant was premature, and court was without jurisdiction to grant it, so as to require dismissal of appeal from order denying such motion. Code Civ.Proc. §§ 656, 657; Probate Code, §§ 50, 332, 373.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

In the matter of the estate of Robert Franklin Green, deceased. From an order granting Henry F. Ellis and others, proponents of deceased's will, a new trial after a jury's verdict for Frankie Green

* Subsequent opinion 154 P.2d 692.

Dick, contestant, on the issues of unsound mind and undue influence, contestant appeals, and from an order denying proponents' motion for judgment notwithstanding the verdict, proponents appeal.

Appeal from order denying motion for judgment notwithstanding the verdict dismissed, and order granting new trial reversed.

Warren H. Atherton, of Stockton, H. Raymond Hall, of Oakland, Gumpert & Mazzer, J. Calvert Snyder, and Darrah & Ellis, all of Stockton, for proponents, appellants, respondents.

J. Oscar Goldstein and Burton J. Goldstein, both of Chico, and Jack J. Miller, of Stockton, for contestant, appellant and respondent.

THOMPSON, Justice.

Two appeals are presented upon this record. They emanate from a contest of will before probate. The contestant, Frankie Green Dick, the daughter of Robert Franklin Green, deceased, appealed from an order granting a new trial, after a jury returned verdicts in her favor on the issues of unsound mind and undue influence. The motion for new trial was prematurely made. The court failed to adopt the special findings of the jury or to determine the chief issue regarding the due execution of the will pursuant to Section 50 of the Probate Code. No judgment was rendered as required by Section 373 of that Code.

The proponents of the will also appealed from an order denying their motion for judgment notwithstanding the verdicts, which motion was made pursuant to Section 629 of the Code of Civil Procedure.

The contestant asserts that an appeal in a probate proceeding does not lie from an order denying a motion for judgment notwithstanding the verdict, and that proponents' appeal should therefore be dismissed. The contestant also claims that the order granting a new trial is ineffectual and void because the motion therefor was prematurely made without the adoption of the special findings of the jury, the determination of the other essential issues, including the due execution of the will, or the rendering of a judgment.

Robert Franklin Green, the testator, executed the will in question October 18, 1935. He was then about seventy-three years of

age. He married his wife, Rosa Green, in 1904. They lived together as husband and wife only a brief period of time. They separated in 1904, since which date they have not lived together as husband and wife. At the time of their separation their property rights were settled. The estate consisted entirely of his separate property. The contestant, Frankie Green Dick, was born as the issue of the marriage. Mr. Green died August 31, 1939. The will, which was filed for probate, devised and bequeathed his entire estate in equal shares to his sister Mary Jane Snyder and his two nieces, Mrs. Freeman and Mrs. Erich. Ray E. Burson of Lodi was appointed executor without bond, and in the event of his death the Bank of America of that city was appointed executor of the will. The daughter filed a contest to the will before probate. That contest raised three issues, unsound mind, undue influence and fraud exercised in procuring the execution of the will. At the trial the last issue of fraud was withdrawn. The issues of unsound mind and undue influence were submitted to a jury for determination. Verdicts favorable to the contestant were rendered by the jury upon both issues. Evidence was adduced at the trial of the due execution of the will. The court failed to adopt findings either approving or disapproving the special findings of the jury. No finding was adopted regarding the essential question of the due execution of the will. No judgment was rendered. After the special verdicts of the jury were returned the proponents moved for judgment notwithstanding the verdicts pursuant to Section 629 of the Code of Civil Procedure, which was denied. The proponents then moved for a new trial under Section 657 of the Code of Civil Procedure, which was granted by the court on the express ground of insufficiency of the evidence to support the special findings of the jury. From that order and from the order denying proponents' motion for judgment notwithstanding the verdicts, separate appeals were perfected. Both appeals are presented on the same record.

[1] We will first consider proponents' purported appeal from the order denying their motion for judgment notwithstanding the verdicts.

The proponents of the will gave notice of appeal from the order of the trial court denying their motion for judgment not-

withstanding the verdict, under Section 629 of the Code of Civil Procedure. That section provides in part: "Where a new trial is granted to the party moving for judgment notwithstanding the verdict, the order denying the motion for judgment notwithstanding the verdict shall not be reviewed on appeal, unless the adverse party appeal from the order granting a new trial, in which case the order denying judgment notwithstanding the verdict may be reviewed on appeal."

Frankie Green Dick, the contestant of the will, who has also appealed from the order granting a new trial, contends that no appeal lies from an order in a probate matter denying a motion for judgment notwithstanding the verdict, because Section 1240 of the Probate Code does not provide for an appeal from such an order. The contestant therefore asserts that proponents' purported appeal should be dismissed. With that contention we agree.

[2] The right of appeal is purely statutory. In the absence of such statutory authorization no right of appeal exists. *Superior Wheeler Cake Corp. v. Superior Court*, 203 Cal. 384, 264 P. 488; 1 *Bancroft's Probate Pr.* 410, sec. 223; 2 *Cal. Jur.* 111, sec. 4. Section 1240 of the Probate Code, which was adopted May 11, 1931, was based on former subdivision 3 of Section 963 of the Code of Civil Procedure. *In re Estate of Armstrong*, 8 Cal.2d 204, 64 P.2d 1093; *In re Estate of O'Dea*, 15 Cal.2d 637, 104 P.2d 368; *In re Estate of Allen*, 175 Cal. 356, 165 P. 1011. In the *O'Dea* case, *supra*, the Supreme Court says, in holding that an appeal in a probate matter does not lie from an order denying relief under Section 473 of the Code of Civil Procedure, "We reiterate our adherence to the general rule, as stated above, and to the exception thereto as declared in [*Re*] *Estate of Allen*, *supra*." [15 Cal.2d 637, 104 P.2d 369.] The *Allen* case declares in that regard: "The order sought to be reviewed is not one from which an appeal lies. * * * the appellate jurisdiction in probate matters extends only to such orders and judgments as are specified in the third subdivision of section 963 of the Code of Civil Procedure. (Citing authorities.) This rule is subject to the limitation that an appeal will lie from an order granting or denying a motion for a new trial. * * * But, with this exception, subdivision 3 is the only part of section 963 to which resort may be had

in determining what orders or judgments in probate may be made the subject of an appeal."

The exception above referred to, recognizing the right to appeal from an order in a probate proceeding granting or denying a motion for new trial, which was contained in subdivision 2 of section 963 of the Code of Civil Procedure, but not in subdivision 3 thereof, is apparently based on the statute as it existed in 1917, when the Allen case was decided. Since that time subdivision 2 of section 963 was amended in 1923 to also authorize an appeal "from an order * * * denying a motion for judgment notwithstanding the verdict." That same amendment is still contained in section 963. Upon the authority of the Supreme Court recognizing the right of appeal in probate matters from an order granting or denying a motion for new trial, we are unable to perceive why, if that appeal lies, the same authorization should not also apply to orders granting or denying motions for judgments notwithstanding the verdicts, which ground is now included in the same subdivision of that section. This conclusion is reinforced by the language of section 629 of the Code of Civil Procedure, as amended in 1937. However, it has been definitely determined otherwise. In *re Estate of Webster*, 43 Cal.App.2d 6, 18, 110 P.2d 81, 87, 111 P.2d 355. In the case last cited, in which a hearing by the Supreme Court was denied, it is specifically said: "The attempted appeal from the order denying the motion for judgment notwithstanding the verdict, not being an appealable order under section 1240 of the Probate Code, is dismissed."

On the authorities above cited, the proponents' purported appeal from the order denying their motion for judgment notwithstanding the verdict should be dismissed.

[3, 4] We shall now consider the validity of the order of court granting proponents' motion for a new trial.

The contestant gave notice of appeal from the order granting a new trial. The jury merely determined the two issues of alleged unsound mind and undue influence, which were submitted to it, in favor of the contestant. The record contains no decision of the court on any other issues. The question of due execution of the will, as required by section 50 of the Probate

Code, apparently has not been determined. No decree pursuant to section 332 of the Probate Code, admitting the will to probate, or denying probate, has been rendered or entered. Section 373 of the Probate Code provides that: "The jury must return a special verdict upon the issues submitted to them by the court; and upon the verdict, or upon the proof taken if a jury is waived, the court must render judgment, either admitting the will to probate or rejecting it."

The contestant asserts that the motion for new trial was premature and that the court lacked jurisdiction to grant the new trial since essential issues had not been determined and no judgment had been rendered. In support of that contention the contestant relies on *In re Estate of McKenna*, 138 Cal. 439, 71 P. 501; *Cloud v. State Terminal Co., Ltd.*, 22 Cal.App.2d 568, 71 P.2d 600, and *Frye v. Pacific Freight Lines*, 27 Cal.App.2d 748, 81 P.2d 1027. In the McKenna matter, supra [138 Cal. 439, 71 P. 502], it is said:

"No finding, judgment, order, or other decision of the court appears in the record, or is referred to in the bill of exceptions; and it is said by the appellants' counsel in his brief, and, in effect, admitted by counsel for respondent, that there is none. The motion for new trial, the statement and affidavits on which it was made, and the order denying the motion, all relate exclusively to the verdict of the jury.

"It is clear, therefore, that there has been no decision of the case, and that the proceedings for new trial were prematurely taken, and, on that ground, that the motion was rightly denied. *Morris v. De Celis*, 41 Cal. 331; *De Gaze v. Lynch*, 42 Cal. 362; *Baker v. Borello*, 131 Cal. [615], 617, 618, 63 P. 914. The verdict of the jury did not dispose of all the issues raised by the petition of the contestants, and it was therefore the duty of the court to find upon the issues not thus disposed of. [*In re*] *Estate of Benton*, 131 Cal. [472], 475, 63 P. 775. Code Civ.Proc., § 1329."

In *Re Estate of Benton* [131 Cal. 472, 63 P. 776], last cited, the court said:

"The findings of the jury upon the issues submitted to them stand the same as the findings of fact made by the court in a civil action; that is, when we are brought to the consideration of their sufficiency to support the judgment rendered."

In the Frye case, *supra*, in which a hearing by the Supreme Court was denied, the court held that "proceedings for a new trial taken prematurely are a nullity and ineffectual for any purpose," and that a premature service of notice of motion for a new trial could not be waived. To the same effect are the cases of *Middleton v. Finney*, 214 Cal. 523, 6 P.2d 938, 78 A.L.R. 1104, and *Root v. Daugherty*, 201 Cal. 12, 255 P. 181.

It has been uniformly held that a motion for new trial under section 656 of the Code of Civil Procedure is premature until the court or a jury has determined all the issues involved. *Barnes v. Foley*, 189 Cal. 226, 207 P. 885; *Bell v. Marsh*, 80 Cal. 411, 22 P. 170; *Bradley Co. v. Bradley*, 37 Cal.App. 270, 173 P. 1009; *San Joaquin & Kings River Canal & Irr. Co. v. James J. Stevinson*, 30 Cal.App. 405, 158 P. 768; 20 Cal.Jur. 171, sec. 112; 1 Hayne on New Trial and Appeal, 103, sec. 18. The findings of a jury in a contest of will are special in their nature and must be adopted by the court before they become effective. Probate Code, sec. 373; 2 Hayne on New Trial and Appeal, 1299, sec. 234. In the authority last cited it is said:

"The tendency is to regard them [the verdicts in probate proceedings] as verdicts in equity cases; i. e., as advisory, and without effect, until adopted. * * *

"If verdicts in probate proceedings are thus to be regarded as advisory, as in equity, and require to be adopted before they become effective, the initiation of new trial proceedings before such adoption is premature, as in equity."

In the case of *James v. Superior Court*, 78 Cal. 107, 20 P. 241, a writ of mandamus was denied. The petition sought to compel the court to settle a statement on motion for new trial in a probate proceeding. Certain issues of fact were presented and decided by a jury in a probate proceeding. The jury was discharged and nothing further was done. The court took no further action. The Supreme Court said:

"The verdict of the jury in this proceeding * * * was merely advisory to the judge, and of no force or effect until adopted by him.

"In that state of the case we think the notice of intention to move for a new trial, and the presentation * * * of the settlement were premature."

We conclude that the motion for new trial in the present case was premature and that the court was therefore without jurisdiction to grant the motion.

The question of the sufficiency of the evidence to support the special findings of the jury on the issues of unsound mind and undue influence is elaborately argued by the respective parties. In view of our conclusion that the order granting a new trial was ineffectual and void, it is unnecessary and futile to discuss the sufficiency of the evidence to support the verdict.

The purported appeal from the order denying proponents' motion for judgment notwithstanding the verdicts is dismissed.

The order granting a new trial for lack of evidence to support the special findings of the jury on undue influence and unsound mind is reversed. Respondents, Henry F. Ellis et al., to recover costs on appeal.

ADAMS, P. J., and PEEK, J., concur.



ALMADA et al. v. SUPERIOR COURT IN AND FOR NAPA COUNTY.

Civ. 7031.

District Court of Appeal, Third District,
California.

May 26, 1944.

Rehearing Denied June 22, 1944.

Hearing Granted July 24, 1944.*

1. Eminent domain ⇨ 187

Purpose of 1918 amendment to Constitution giving certain political subdivisions right in eminent domain proceedings to take immediate possession and use of any right of way, is to permit the named political subdivisions, when acquiring rights of way only, to take possession upon commencing a condemnation suit. Const. art. 1, § 14.

2. Eminent domain ⇨ 187

Under the 1918 amendment to Constitution giving named political subdivisions right in eminent domain proceedings to take immediate possession and use of any right of way, term "right of way" has its usual and ordinary meaning, which is a

* Dismissed Aug. 29, 1944.

right of passage over another person's land; an easement to use the land of another for the purpose of passage over it; and the term denotes tenure by which land is held. Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Right of Way".

3. Eminent domain ☞187

A tract of land which, under statute, county had right to condemn for airport purposes, was not a "right of way" for the passage, landing, and taking off of aircraft, entitling county under Constitution to take immediate possession of the land. Civ. Code, § 802, subd. 5; Code Civ.Proc. § 1238, subds. 2, 20; Const. art. 1, § 14.

Appeal from Superior Court, Napa County; Mervin C. Lernhart, Judge.

Petition by J. B. Almada and others against the Superior Court of the State of California in and for the County of Napa, for a writ of certiorari for transcript of record and proceedings in action by County of Napa against named petitioner in respondent court to condemn land for airport purposes, wherein respondent made order granting named county right to immediate possession of the land.

Order annulled.

Rutherford, Rutherford & Rutherford, of Napa, for petitioners.

Daniel K. York, Dist. Atty., of Napa, for respondent.

Robert W. Kenny, Atty. Gen., and Perry H. Taft, Deputy Atty. Gen., and amicus curiae.

SCHOTTY, Justice pro tem.

In the fall of 1942 the Civil Aeronautics Administration of the United States Department of Commerce notified the City of Napa and the County of Napa that it desired to establish an airport south of the City of Napa, to be used as a public municipal airport except as it might be used by the United States Government for war and emergency purposes, and that the government proposed to expend not less than \$800,000 in the construction of said proposed airport. The said Civil Aeronautics Administration requested said city and county to secure the lands necessary for said airport and submitted with said request a description of the lands sought, in accordance

with surveys made by said government agency. The City of Napa withdrew from all interest in the said proposed airport and the County of Napa proceeded with the matter, and on July 2, 1943, the Board of Supervisors of said county passed a resolution to the effect that the public interest required the establishing of a county airport for the passage, landing and taking-off of aircraft on, upon, over and across the 622.42 acres of land described in said resolution; that the use of all of said lands was necessary as a right of way for the passage, landing, and taking-off of aircraft and for county airport purposes; and authorizing the District Attorney to institute such action or actions "as are necessary to condemn said lands for a right of way for the passage, landing, and taking off of aircraft and for county airport purposes."

On July 15, 1943, the County of Napa commenced in the Superior Court of said county an action to condemn 119.85 acres of land belonging to petitioner J. B. Almada "as a right of way for the passage, landing and taking-off of aircraft and for county airport purposes." The land of petitioner was one of a number of contiguous parcels of land owned by different owners, all of said parcels sought to be condemned aggregating the total of 622.42 acres. On the same day that the complaint was filed the said Superior Court made an order entitled "Order Granting Plaintiff Right to Take Immediate Possession of Proposed Right of Way for the Passage, Landing and Taking off of Aircraft and for County Airport Purposes, and Fixing Damages." After the filing of said order, the said Civil Aeronautics Administration entered into the possession of said land of petitioner and continues in possession thereof. Thereafter petitioner J. B. Almada filed in the said Superior Court a motion to set aside the said order granting immediate possession, which said motion was, after hearing, denied by said court. Petitioners then filed in this court a petition for a writ of certiorari, and an alternative writ was issued by this court commanding said Superior Court to certify to this court a transcript of the record and proceeding in said action in order that the same might be reviewed by this court and appropriate action taken thereon in relation thereto. A certified copy of the various pleadings, proceedings and orders filed in said Superior Court in said action have been filed herein and constitutes the record before this court.

Petitioners in their written memorandum of authorities and upon the oral argument made the following contentions:

"1st. That the land sought to be condemned was not a 'right of way', but was a large block of land sought for airport purposes.

"2nd. That the land sought to be condemned, to-wit: 622 acres, being for airport purposes, plaintiff was not entitled to immediate possession, or before judgment, or to have the block of land determined to be a 'right of way'.

"3rd. That the Court did not have jurisdiction to make the order for immediate possession, and acted in excess of its jurisdiction because it did not have, or receive evidence respecting the value of the crops and pasturage on the land, and the interests of lessees therein."

It is apparent at the outset that the principal question here involved is whether or not the land sought to be condemned can be considered a "right of way" as that term is used in section 14 of Article I of the Constitution of California, which provides:

"Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, and no right of way or lands to be used for reservoir purposes shall be appropriated to the use of any corporation, except a municipal corporation or a county or the State or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law; provided, that in any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the aforesaid State or municipality or county or public corporation or district aforesaid may take immediate possession and use of any right of way or lands to be used for

reservoir purposes, required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposited as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings."

[1] In 1918 said section 14 of Article I was amended by adding the portion commencing with the word "provided" and hereinbefore set forth. This amendment gave any of the political subdivisions therein mentioned the right in an eminent domain proceeding to "take immediate possession and use of any right of way * * * required for a public use" in accordance with the provisions of the amendment. The purpose of this amendment was well expressed in the following quotation from the official argument appearing in the election pamphlets:

"The principal purpose of this amendment is to permit the state, a county, a municipal corporation, or a drainage, irrigation, levee or reclamation district, when acquiring rights of way only, in eminent domain proceedings, to take possession upon commencing a condemnation suit and depositing in court such amount of *cash money* as is fixed by the court to secure the owners in the final payment of the compensation and damages fixed by the jury. If it should appear later that this amount is in adequate the court is empowered to increase it.

"Experience has shown that cities, in acquiring long stretches of rights of way for public purposes, are often held up by unreasonable and arbitrary owners who attempt to take advantage of a rule which requires that the city can not go into possession prior to a jury actually fixing the compensation to be paid."

Petitioners concede that the County of Napa has a right to condemn the land in question for airport purposes under subdivision 20 of section 1238 of the Code of Civil Procedure, but petitioners contend most earnestly that said county was not entitled to immediate possession, or to possession before judgment, and that the Superior Court of Napa County exceeded its jurisdiction in making its order for immediate possession.

[2] The District Attorney of Napa County on behalf of respondent, and the Attorney General, appearing as amicus curiae on behalf of respondent, argue that the term "right of way" should be liberally construed and that "land condemned for the passage, landing and taking-off of aircraft and for county airport purposes constitutes a right of way within the meaning of Art. I, Section 14." They stress the undoubted importance of aerial travel and transportation and argue that airports and airport facilities are but necessary links in the chain of aerial highways and are but necessary adjuncts to aerial transportation. This argument is ingenious but not convincing. We believe that it must be held that when in 1918 the said section 14 of Article I was amended so as to provide for the taking of immediate possession of a "right of way," the people intended the term "right of way" to have its usual and ordinary meaning.

Webster's New International Dictionary defines a right of way as "a right of passage over another person's land." And this definition has been so universally incorporated into innumerable decisions that it may be said to be generally accepted. Sometimes it is a right of way for a road, sometimes for a ditch, sometimes for a canal, but whatever the particular right of way may be for, it is a right of passage over another person's land, or, in other words, an easement to use the land of another for such particular purpose. See 54 C.J. 824. As was said in the case of *San Pedro, etc., R. Co. v. Pillsbury*, 23 Cal.App. 675, at page 680, 139 P. 669, 671: "The term 'right of way' denotes the tenure by which land is held; it is descriptive of the easement right and not of the land to which it is affixed."

In the early case of *Kripp v. Curtis*, 71 Cal. 62, at page 63, 11 P. 879, the court said:

"The privilege which one person, or particular description of persons, may have

of passing over the land of another in some particular line is termed a right of way.

"It is an incorporeal hereditament, (3 Kent, Comm. 419; Washb. Easem. 215; *Boyce v. Brown*, 7 Barb. [N.Y.] 80,) an easement which does not necessarily divest the owner of the fee of the land, and, for all other purposes except the servitude or use as a way, he owns it, and may have his action for an injury to his residuary interests as fully as he would be entitled to were it all of his own. *Gidney v. Earl*, 12 Wend. [N.Y.] 98."

Section 802 of the Civil Code provides: "The following land burdens, or servitudes upon land, may be granted and held, though not attached to land: * * * Five. The right of way." And in *Stockton Gas, etc., Co. v. San Joaquin County*, 148 Cal. 313, at page 322, 83 P. 54, at page 58, 5 L.R.A., N.S., 174, 7 Ann.Cas. 511, it is said: "Under section 802 of the same Code, 'the right of way' is designated as among the land burdens which may be granted or held, although not attached to land. This right of way, an easement, is real property, and is distinctly and necessarily local in character, and situated in and upon land."

In 9 Cal.Jur. it is said at page 964:

"The privilege which one person or particular description of persons may have of passing over the land of another in some particular line is termed a right of way. Technically, a right of way is merely an easement and does not necessarily divest the owner of the fee of the land although the term is often used indiscriminately to describe either the easement itself or the strip of land that is occupied for the easement."

[3] It is apparent from the complaint in the eminent domain proceeding, and from the maps of said proposed airport and of the land sought to be condemned therefor, that what is being sought by the County of Napa is a tract of land for county airport purposes. Under subdivision 2 of section 1238 of the Code of Civil Procedure the county had the undoubted right to condemn said land for such purpose. But we do not believe that merely by designating said land as "a right of way for the passage, landing and taking-off of aircraft" the County of Napa could transform said tract of land into a "right of way" within the meaning and intent of section 14 of Article I. Since the "immediate possession" amendment as to right of way was added to the constitution in 1918, said "im-

mediate possession" clause has been further amended to include "lands to be used for reservoir purposes," and it may well be that a still further amendment adding state, county and municipal airports would be highly desirable. However, such an amendment must come, if at all, in the manner provided for in the constitution, and not through strained judicial interpretation.

In view of the foregoing we conclude that the Superior Court of the County of Napa exceeded its jurisdiction in making its order of July 15, 1943, granting the County of Napa immediate possession of land of petitioner J. B. Almada and that said order should be annulled.

The order is annulled.

ADAMS, P. J., and THOMPSON, J.,
concur.



64 Cal.App.2d 473

In re PETERSON.

PETERSON v. PITZER.

PITZER et al. v. PETERSON.

Civ. Nos. 3130, 3134.

District Court of Appeal, Fourth District,
California.

May 23, 1944.

Rehearing Denied June 19, 1944.

Hearing Denied July 20, 1944.

1. Adoption ☞13

Guardian and ward ☞13(1)

Where petition for adoption was filed more than three months before petition for guardianship was filed and only apparent purpose of guardianship petition was to enable petitioner to obtain physical custody of child, the court had right to determine issues presented under the adoption proceeding before ruling on merits of guardianship proceeding.

2. Courts ☞26

Where a court has general jurisdiction of a subject, it has power to make a full disposition of the matter and conclude the litigation respecting it.

3. Appeal and error ☞189(5)

Appellant could not complain for first time on appeal that hearing of guardianship

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proceeding was continued until after trial and determination of adoption proceedings involving same child.

4. Guardian and ward ☞10

A decree of abandonment does not create a forfeiture of all right of parent to subsequently apply for appointment of guardian for minor child, but parent may regain custody of his child upon proper showing if intervening rights have not arisen.

5. Adoption ☞12

Where child had been judicially determined to be an abandoned child, notice of adoption proceeding to parent was unnecessary.

6. Adoption ☞15

Where trial court had knowledge of fact that minor had been declared an abandoned child and that father's petition for appointment of guardian was pending, but after hearing all evidence court granted decree of adoption, the decree of adoption was entitled to all presumptions which attach to any other judgment of court, and burden rested on objecting father to establish an abuse of discretion by trial court.

7. Adoption ☞13, 15

In proceedings for adoption of minor which had been declared an abandoned child, a wide discretion is reposed in trial judge, and his decision should not be disturbed by reviewing court, in absence of clear showing of abuse of discretion.

8. Adoption ☞13

Where minor had been declared an abandoned child, granting petition of a great aunt and her husband for adoption of the child over objections of father who had filed petition for appointment of guardian was not an abuse of discretion, under record.

9. Guardian and ward ☞10

Where minor had been declared an abandoned child and petition of great aunt and her husband for adoption had been granted, order denying father's petition for appointment of guardian was proper.

10. Guardian and ward ☞13(8)

Where minor had been declared an abandoned child and petition for adoption had been granted, in dismissing father's proceeding for appointment of guardian, failure of court to find that father was not a fit and proper person to have custody of

the child was not prejudicial, since intervening rights of adoptive parents justified the dismissal.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Proceedings in the matter of the guardianship of Kathleen Norma Peterson, wherein Leo R. Peterson filed a petition for letters of guardianship, and Earl V. Pitzer filed objections, and proceeding in the matter of the adoption of Kathleen Norma Peterson, a minor, wherein Earl V. Pitzer and Mildred A. Pitzer filed petition for adoption which was opposed by Leo R. Peterson. From order denying letters of guardianship and from decree of adoption, Leo R. Peterson appeals. The two appeals were consolidated.

Decree of adoption and order denying letters of administration affirmed.

Mack, Werdel & Bianco, of Bakersfield, for appellant.

West & Vizzard, of Bakersfield, for respondents.

GRIFFIN, Justice.

By stipulation, the two appeals have been consolidated. Appellant Leo R. Peterson is the petitioner for letters of guardianship and the objector in the adoption proceeding. He is the father of Kathleen Norma Peterson, five years of age. On September 1, 1942, by order of the Superior Court of Kern County, the minor was declared to have been abandoned by her parents and freed from their custody and control. This decree was affirmed on appeal. In re Peterson, 56 Cal.App.2d 791, 133 P.2d 831. On February 24, 1943, petitioners Earl V. Pitzer and Mildred A. Pitzer filed a petition for adoption of the minor. On June 2nd, 1943, the father of the child filed a petition for letters of guardianship alleging his relationship, the entry of the decree of abandonment, and prayed to be appointed guardian of the child. On June 10, 1943, the Pitzers filed objections thereto alleging that Peterson had forfeited all right to guardianship because he had wilfully abandoned and failed to provide for his child; that he had been judicially deprived of her custody by a decree of abandonment and that they had filed a petition for leave to adopt the child, which petition would be heard before July 1, 1943. They also alleged that the petition for guardianship was

filed for the purpose of hindering and delaying the adoption.

On June 18, 1943, the guardianship proceeding came on for hearing before Judge Lambert in department two of the Kern County court. Testimony was produced by Peterson indicating a change of his marital and home status. He set forth certain facts indicating that the home and marital conditions described in the former opinion (In re Peterson, supra), had changed and that his home was now a suitable place for the care of the minor and that he was a fit and proper person to have custody of his child. Before any evidence was produced by Pitzers and before any decision was made in the guardianship matter, when it was called to the attention of the court that the adoption proceeding was soon to be heard, according to the minutes, by oral stipulation, the court continued the further hearing of the matter to July 16, 1943. The reporter's transcript indicates the continuance was on the court's own motion or suggestion, and without objection by either party. It apparently was the belief of the trial judge that the adoption proceeding might adjudicate and make unnecessary a determination of the guardianship proceeding.

Because of the decree of abandonment, no notice of the petition for adoption was served on appellant. He claims that it was not until the objections to the guardianship proceedings were filed that he discovered the pendency of the petition for adoption. On June 29, 1943, he filed his objection thereto in which he alleged his efforts to prevent the decree of abandonment, his remarriage, his fitness to have the minor child in his custody, and similar allegations.

On July 1, 1943, the adoption proceeding was heard in department 3 of that court before Judge Bradshaw. Peterson introduced about the same evidence as was produced in the guardianship proceeding. The entire file of that proceeding was introduced into evidence. On July 8, 1943, Judge Bradshaw entered a minute order granting the petition for adoption and directed that findings and decree be prepared accordingly. On July 14, 1943, Peterson filed a notice of motion that on July 23, 1943, he would move for an order setting aside "the submission" and to reopen the adoption proceeding for the purpose of presenting therein the final determination of the guardianship proceeding. On July 16, 1943, when the guardianship proceed-

ing came on for further hearing before department two, the judge of that department, of its own motion, transferred the proceeding to department 3 and set July 23, 1943, as the time for further hearing. When the matter came on for hearing in department 3 on July 23, appellant moved the court for an order setting aside the "order of submission". The guardianship matter was never ordered submitted in department 3. The motion was made upon an affidavit which recited the proceedings taken. It was there urged that the guardianship proceeding was the only case where the fitness of appellant was a proper issue and that such issue should be determined before any final decree was entered in the adoption proceeding. The motion was denied. At the same time the court denied the petition for letters of guardianship stating that "to allow the adoption * * * automatically would do away with the guardianship proceeding". No further evidence was presented to or heard by the judge denying the petition for guardianship. The court thereafter, on July 23, 1943, signed findings of fact and conclusions of law and a decree granting the petition for adoption.

In the findings in the adoption matter it is recited that the child had been abandoned and declared free from the custody and control of her parents; that Mrs. Pitzer is a great aunt of the minor and that the child had been under her care and had been supported by her since November, 1938; that the father had not contributed to the child's support since then. The trial court then concluded that the Pitzers were fit and proper persons to become the adoptive parents and that the best interests of the child would be promoted by the adoption of the child by them. A proposed sentence in the findings that Peterson "is not a proper person to have the custody and control of said minor" was, by the trial court, stricken out. A decree was then entered granting the order of adoption. The trial court, on August 2, 1943, signed an "order" in the guardianship proceeding reciting the various steps that had been taken in the proceeding; that the court had granted the petition for adoption and the "court being fully advised of the premises" ordered that the petition for letters of guardianship be denied and dismissed.

On appeal from this order and the decree granting the adoption appellant first contends that under the evidence produced,

and in the absence of a finding of his unfitness, he was, as a matter of right, entitled to an order appointing him guardian of the minor child; that therefore the order of adoption was erroneously granted.

[1-3] We will first consider the question of the appeal from the decree granting the adoption. The petition for adoption was filed more than three months before the petition for guardianship was filed. It was disclosed by the evidence that the minor had no property and the only apparent purpose of the petition for letters of guardianship was to enable petitioner to obtain physical custody of the child. The guardianship proceeding was continued by the court, either by stipulation of the parties, or without objections, until after the hearing and determination of the adoption proceeding. It cannot be said that the trial court had no right to hear and determine the issues presented under the adoption proceeding before ruling on the merits of the guardianship proceeding. *Brown v. Campbell*, 100 Cal. 635, 636, 35 P. 433, 38 Am.St.Rep. 314. Where a court has general jurisdiction of a subject, it has power to make a full disposition of the matter and conclude the litigation respecting it. *Kennedy v. Hamer*, 19 Cal. 374. Appellant cannot now be heard to complain for the first time on appeal that the hearing of the guardianship proceeding was continued until after the trial and determination of the adoption proceeding. *Myers v. McDonald*, 68 Cal. 162, 8 P. 809; 2 Cal.Jur. p. 246, sec. 74.

[4] It has been held that a decree of abandonment does not create a forfeiture of all right of a parent to subsequently apply for an appointment as guardian of a minor child. *Guardianship of McCoy*, 46 Cal.App.2d 494, 497, 116 P.2d 103. He may regain the custody of his child upon a proper showing if intervening rights have not arisen such as adoption of the child by another. *Matter of Guardianship of Michels*, 170 Cal. 339, 149 P. 587.

[5-7] In the instant case the father appeared and presented his objections to the adoption although notice to the parent was unnecessary where the child had been judicially determined to be an abandoned child. The trial court had knowledge of the fact that the minor had been declared an abandoned child and that a petition for the appointment of a guardian was pending. After hearing all the evidence it

granted the decree of adoption. In such a case the order of adoption is entitled to all the presumptions which attach to any other judgment of such courts and the burden rests upon appellant to establish an abuse of discretion by the trial court. In such a case a wide discretion is reposed in the trial judge and his decision should not be disturbed by a reviewing court in the absence of a clear showing of an abuse of such discretion. *Adoption of Kelly*, 47 Cal.App.2d 577, 118 P.2d 479; *In re Hickson's Adoption*, 40 Cal.App.2d 89, 93, 104 P.2d 411.

In *In re Fahlman*, 84 Cal.App. 248, 250, 257 P. 893, 894, it is said:

"The trial court, in addition to oral testimony as to the fitness and capacity of the persons applying for adoption of the minor, had before it the individuals making the application and also the individuals filing the opposition thereto, and as sections 224, 225, 226, and 227 of the Civil Code, relating to adoption of minors, give no preference whatever to relatives, or other persons, making application for adoption, it would require a very clear case of the abuse of the judicial discretion vested in the trial court to authorize an appellate court to set aside an order of adoption, where the proceeding is shown to be taken and had according to the procedure specified by the Codes, and the fact of relationship only is urged as a cause for reversal.

"In guardianship proceedings, where both the estates and custody of minors may be involved, the Codes set forth certain preferences as to who may be appointed, but when it comes to the matter of adoption, the future welfare of the minor is the only matter for consideration. Under such circumstances, the Legislature has left such determination to the judicial discretion of the trial court."

[8] It there was held that an appellate court is confined to the record and when the record shows nothing reflecting upon the persons to whom the letters have been awarded, a reviewing court cannot declare the determination of the trial court er-

roneous, even though all the persons opposing the granting of letters may likewise be fit and proper persons to whom adoption letters might be granted. Appellant has cited *Guardianship of McCoy*, supra, and *Matter of Guardianship of Michels*, supra, but it is evident that authorities involving guardianship matters do not serve as authority to create a priority or preference in favor of appellant in the adoption matter herein. It therefore appears from the evidence and record in the adoption proceeding that the trial court was warranted in granting the decree of adoption. This court may not successfully hold that any abuse of discretion has been shown in granting it. That decree, therefore, must be affirmed on appeal.

[9] The judge who granted the decree of adoption was fully authorized to proceed with the further hearing of the petition for guardianship. At the time of the signing of the order denying and dismissing that proceeding intervening rights of the adopting parents had arisen under the decree of adoption. The order denying the petition and dismissing the proceeding, for the reasons shown in the order, was proper and must be affirmed.

[10] In dismissing the proceeding, the failure of the court to find in the order that the "appellant was not a fit and proper person to have the custody of the child" was not prejudicial. The only finding necessary on this subject, under the facts disclosed, was that intervening rights had arisen and therefore there was no need or necessity for the appointment of a guardian. The order sufficiently disposes of that issue. *Guardianship of Sharp*, 41 Cal. App.2d 79, 84, 106 P.2d 244.

The decree of adoption and order denying letters of guardianship are and each is affirmed.

BARNARD, P. J., and MARKS, J., concur.

Hearing denied; CARTER, J., dissenting.

CROWE et al. v. McBRIDE.*

Civ. 2869.

District Court of Appeal, Fourth District,
California.

May 26, 1944.

Hearing Granted July 24, 1944.

1. Negligence ⇨121(2)

The "res ipsa loquitur doctrine" is applicable where accident is of a kind which does not ordinarily occur in absence of negligence on part of one having management or control of thing which caused the injury.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

2. Negligence ⇨121(2)

The "res ipsa loquitur doctrine" is based upon theory that defendant, having charge of instrumentality which caused the injury, either knows the cause of the accident or had means of knowledge in that connection which was superior to that possessed by the injured party.

3. Physicians and surgeons ⇨18(6)

Where patient was injured when lamp globe exploded while physician was giving her a treatment with large infrared heating lamp, "res ipsa loquitur doctrine" was not applicable to establish negligence on part of physician.

4. Negligence ⇨121(2)

The "res ipsa loquitur doctrine" is only a rule of evidence raising an inference of negligence from proved facts and not an independent ground of liability.

5. Physicians and surgeons ⇨18(8)

Evidence failed to establish that physician was negligent in giving patient a treatment with large infrared heating lamp without using screen on lamp to protect patient when globe exploded, so as to render physician liable for injuries sustained by patient, in absence of showing that such lamp had ever previously exploded or justifying inference that physician should have anticipated such an occurrence.

juries sustained by the plaintiff Bertha Crowe. From a judgment for defendant, following granting of defendant's motion for nonsuit, the plaintiffs appeal.

Affirmed.

Harry P. Sweet, of San Diego, for appellants.

Gray, Cary, Ames & Driscoll, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for damages. Mrs. Crowe suffered from arthritis and neuritis and at frequent intervals over a period of four years Dr. McBride had been giving her treatments in which he used large infrared heating lamps. On December 6, 1940, while she was taking one of these treatments the globe of the lamp suddenly exploded and parts of the hot glass fell upon her body, causing the injuries of which complaint is made.

The complaint alleged that the defendant "did not use due and proper care and skill" in giving this treatment and that he "so carelessly and unskillfully employed, manipulated, operated and controlled the appliances and apparatus, particularly the electric lamps, used in and about said treatment as to seriously, painfully and permanently injure" this plaintiff.

The evidence is very meager. Mrs. Crowe testified that on this occasion she laid on a table with her back exposed; that she was supposed to have a 20 minutes light treatment; that it was a rather large lamp "something on the order of one of those", indicating a light globe in the courtroom; that the defendant fixed the light in a position about two and one-half feet above her body; that he then left, leaving her alone in the room; that after she had been in this position about 15 minutes the light globe exploded without warning; and that the hot glass fell upon her body.

The defendant, called by the plaintiffs under section 2055 C.C.P., testified that this lamp was an infrared deep therapy lamp; that the globe was a General Electric 1000-watt bulb; that he had made no inspection of the globe and could make none, other than turning it on to see if it was working; that he did not know what caused the globe to explode; that he had never heard of one exploding before; that there was no defect in the globe which was noticeable; that he had had globes of this type burning continuously for as much as seven hours with-

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Malpractice action by Bertha Crowe and Elmer Crowe against R. J. McBride for in-

* Subsequent opinion 153 P.2d 727.

out trouble; that there are hundreds of lamps of this type in use; that there are probably 150 or 200 in San Diego; that he frequently used this same lamp ten or twelve times a day; that the bulb in question was a standard one in general use; and that no manufacturer, so far as he knew, had ever theretofore recommended the screening of such lamps as a precautionary measure.

At the close of the plaintiffs' case the court granted the defendant's motion for a nonsuit and from the ensuing judgment the plaintiffs have appealed.

As the appellants state, "the sole question involved concerns the applicability of the doctrine of *res ipsa loquitur*". The question to be decided is whether or not the fact that this lamp globe exploded so speaks for itself as to justify an inference that the explosion occurred because of some negligent act on the part of the respondent.

The first point raised is that a plaintiff is not bound by testimony given under section 2055 C.C.P., and that the evidence given by the respondent may not be considered in passing upon this appeal from a judgment based upon a nonsuit. For present purposes, at least, this may be conceded.

It is next contended that the facts here appearing call for the application of the doctrine of *res ipsa loquitur*. It is first argued that no proof of a special standard of care was here required; that this is one of that class of malpractice cases in which the acts done are so patently negligent that no expert testimony is required; and that in that class of cases the doctrine of *res ipsa loquitur* is applicable and may be relied upon. In support thereof the appellants cite *Ales v. Ryan*, 8 Cal.2d 82, 64 P.2d 409; *Ragin v. Zimmerman*, 206 Cal. 723, 276 P. 107; *Moore v. Steen*, 102 Cal.App. 723, 283 P. 833; *Brown v. Shortlidge*, 98 Cal. App. 352, 277 P. 134; and *Bence v. Denbo*, 98 Ind.App. 52, 183 N.E. 326. In these cases, respectively, a sponge was left in a patient during an operation, burns were suffered from too long or improper exposure to an X-ray machine, a surgeon while removing tonsils had knocked out one of the patient's teeth, and an X-ray machine had been so handled that it was permitted to fall upon the face of the plaintiff. In these cases, no proof of a special standard of care was required and the doctrine of *res ipsa loquitur* was held applicable.

The appellants then argue that this doctrine is applied in cases where injury has been caused by mechanical equipment which is under the exclusive control of the defendant, citing cases. In *Chauvin v. Krupin*, 4 Cal.App.2d 322, 40 P.2d 904, 906, the plaintiff was burned while being given a permanent wave in a beauty shop. The court there said: "The injury was one which in the natural course of things would not have occurred had defendants used due care, and plaintiff was therefore entitled to recover, unless the defendants offered a satisfactory explanation to overcome the presumptive evidence of their negligence." In *Helms v. Pacific Gas & Elec. Co.*, 21 Cal. App.2d 711, 70 P.2d 247, the plaintiff was injured while standing on a sidewalk by a falling portion of the glass globe of an electrolier. It was held, in effect, that the danger could have been known by the defendant and that the question of whether proper inspection had been made was one for the jury. In *Windas v. Galston & Sutton Theatres*, 35 Cal.App.2d 533, 96 P.2d 170, the injury was the result of a block of plaster falling from the ceiling. In holding the doctrine of *res ipsa loquitur* applicable the court there observed that plaster does not ordinarily fall from a ceiling if proper care is used to see that the ceiling is safe.

[1, 2] In these and many other cases it is pointed out that the *res ipsa loquitur* doctrine is applicable where it appears that the accident is of a kind which does not ordinarily occur in the absence of negligence on the part of the one having the management or control of the thing which caused the injury. The doctrine is further based upon the theory that the defendant, having charge of the instrumentality in question, either knows the cause of the accident or had a means of knowledge in that connection which was superior to that possessed by the injured party. *Connor v. Atchison, Topeka & Santa Fe R. Co.*, 189 Cal. 1, 207 P. 378, 26 A.L.R. 1462. But, as said in *Johnson v. Ostrom*, 128 Cal.App. 38, 16 P. 2d 794, 795:

"The converse of this rule is likewise true. If the evidence affirmatively shows the operator or manager of the instrumentality by means of which the injuries are inflicted has no superior knowledge or by the exercise of reasonable care is unable to secure information regarding the cause of the accident, or the evidence establishes the fact that the complainant possesses all the

knowledge or information thereof which is reasonably accessible to the operator of the machine, then the doctrine of *res ipsa loquitur* has no application."

In the instant case, there was no evidence tending to show why this light globe exploded or tending to show that the accident was one which, according to common experience, would not ordinarily occur except through some fault of the respondent. In other words, disregarding any explanation offered by the respondent, there was no evidence justifying any inference that any amount of care which might have been exercised by the respondent would have prevented the explosion or that he failed to use proper care. In examining him under section 2055, C.C.P., some attempt was made to ascertain whether or not he had inspected this light globe. If we disregard his testimony in this respect there is nothing in the evidence or in common experience which would justify an inference that an inspection could have been made which could have been of any avail in disclosing any defect which might have been expected to cause such an explosion. As is well known, such a light globe is a sealed unit which cannot be inspected in any manner which might be material here. As this court said in *O'Rourke v. Day & Night W. H. Co.*, 31 Cal.App.2d 364, 88 P.2d 191, 194: "The article in question, the safety pilot, came to the respondent as a sealed unit. Its very nature precluded an internal inspection and any such inspection would have necessarily destroyed the adjustment of its parts, which was essential to its operation."

[3,4] The respondent possessed no knowledge insofar as anything which caused this accident is concerned which was superior to that possessed by Mrs. Crowe. There is nothing in common experience which would suggest that the explosion which here occurred was one which would not have taken place except for the negligence of the respondent, and it may not even be said that the respondent had the management or control of the instrumentality in the sense that he had it within his power to control anything which caused the explosion. The complaint alleged that the respondent so carelessly and unskillfully used, operated and controlled this electric lamp that he caused the injuries to Mrs. Crowe. There is no evidence to support that allegation and under the circumstances which here appear no inference is possi-

ble that the explosion occurred only because of negligence on the part of the respondent, and the doctrine of *res ipsa loquitur* is not applicable. *Scellars v. Universal Service*, 68 Cal.App. 252, 228 P. 879. As was said in *Dorswitt v. Wilson*, 51 Cal. App.2d 623, 125 P.2d 626, 627: "There is no room in this case for the application of the *res ipsa loquitur* doctrine. That is only a rule of evidence raising an inference of negligence from proved facts and not an independent ground of liability."

Appellants' last point is that the inference of negligence arising from the doctrine of *res ipsa loquitur* could not be disregarded by the trial court. This is sufficiently answered by what we have already said. Where the doctrine is not applicable no such inference arises.

Although the appellants state that the sole question here presented is the applicability of the doctrine of *res ipsa loquitur* they include in their opening brief certain evidence relating to the use of a screen on such a lamp. Mrs. Crowe, having testified that she had taken these treatments on many occasions was asked whether there was "any difference between this light and the other lights." She replied: "Only that the others have screens on and this didn't have any screen at the time." The respondent, during his examination, explained that at times he used copper screens on such lights for the purpose of changing the effect of the rays, that before the accident in question he had used such screens only for that purpose and that since the accident he has used them for a protective measure.

[5] It may first be observed that this phase of the case has no relation to the doctrine of *res ipsa loquitur*. Any possible effect of this evidence does not go to the cause of the explosion, but is in the nature of an attempt to show a particular manner in which the respondent was negligent, that is, in failing to use a screen for the purpose of lessening the damage. Again disregarding any explanatory evidence given by the respondent, the evidence of plaintiffs in this regard is not sufficient to show negligence on the respondent's part. There was no evidence that such a lamp had ever previously exploded and none justifying the inference that the respondent should have anticipated such an occurrence, or that he should have used such a screen. It is in no way claimed that the lack of a screen caused the explosion and there is no evidence justifying the inference that the presence

of any screen, which would not have interfered with the use for which the lamp was intended, would have even reduced the amount of injury suffered by Mrs. Crowe. On this phase of the case it was incumbent upon the appellants to produce sufficient evidence to support the allegations of their complaint, and this they did not do.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.



64 Cal.App.2d 559

LORD v. INGELS, Director of Motor Vehicle Department of California, et al.
Civ. No. 14148.

District Court of Appeal, Second District,
Division 3, California.

May 26, 1944.

Hearing Denied July 24, 1944.

1. Constitutional law ☞60(1)

The courts will not determine constitutionality of a statute as an abstract question but only when called on to do so in order to protect rights of a party to a pending action.

2. Constitutional law ☞46(1)

An order following stipulation of parties to action by plaintiff engaged in caravanning automobiles to enjoin officers of State Motor Vehicle Department from enforcing statutory provisions imposing fees on automobiles driven on state highways in such business, directing plaintiff to pay to department \$15 for each car caravanned on state highways, to be retained in a special fund pending final determination of constitutionality of statute, and specifically reserving continuing jurisdiction in court, did not create a departure from rule that no court will determine constitutionality of statute as an abstract question. St.1937, p. 2253.

3. Dismissal and nonsuit ☞60(2)

A stipulation that court should reserve continuing jurisdiction until final disposition of moneys paid into State Motor Vehicle Department in lieu of statutory fees by person engaged in caravanning automo-

biles into state after final determination of the constitutionality of statute imposing such fees did not extend time within which the action could be brought to trial beyond the statutory five-year period, where a trial was required because questions of fact were involved. Code Civ.Proc. § 583; St.1937, p. 2253.

4. Dismissal and nonsuit ☞60(1)

The statute requiring action to be brought to trial within five years after filing was intended to expedite trials. Code Civ.Proc. § 583.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Harry A. Lord against Ray R. Ingels, as Director of the Motor Vehicle Department of the State of California, and others, to enjoin defendants from enforcing statutory provisions imposing fees of \$15 on each automobile driven on state highways over the route followed by plaintiff in his business of caravanning automobiles into the state from other states. From an order dismissing the action for failure to prosecute it within five years, plaintiff appeals.

Affirmed.

Warren E. Libby, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondents.

BISHOP, Justice pro tem.

Plaintiff's appeal from the order dismissing his action because it had not been brought to trial within five years after its birth is mainly based upon the proposition that there is a fund in custodia legis whose disposition was made dependent upon the determination of a constitutional question, and until the question is decided and the fund disbursed the court cannot rid itself of the action. We find no circumstance in this case exempting it from the mandatory provisions of section 583, Code of Civil Procedure, which direct the dismissal of an action not brought to trial within five years after it is "filed."

Plaintiff, engaged in the year 1937 in the caravanning of automobiles into this state from states which are eastern to us, sought by this action to enjoin the defendants, who were officers of the State Motor

Vehicle Department, from enforcing those provisions of a new statute (Stats.1937, p. 2253) which imposed fees totaling \$15 upon each car driven upon the state highways over the route followed by plaintiff in his operations. The temporary restraining order which was issued upon the filing of the complaint was supplanted, in due course, by a preliminary injunction, granted upon the giving of a bond in the sum of \$2,000, which ordered the defendants not to enforce the statute. The number of cars caravanned was so great that within a very short time the protection given the state by the \$2,000 bond was gone, and a new arrangement was entered into. There first was a stipulation in which it was recited that, measured by the statute which the plaintiff was defying, the fees and penalties owed by the plaintiff already totalled \$5,152.50, of which amount the sum of \$3,152 had been paid to the Motor Vehicle Department. It was further stipulated, and then ordered, that the preliminary injunction be dissolved and the \$2,000 bond released from all liability. However, the defendants were again forbidden to enforce against the plaintiff any of the provisions of the statute. He, in turn, was directed to pay to the Motor Vehicle Department \$15 for each car which he caravanned on the state highways, within the purview of the statute. The order then continued in these words: "all sums which are so paid and the sum of \$3,152.50 heretofore paid to said Motor Vehicle Department of the State of California as recited and receipted for in said Stipulation of December 17, 1937, shall be retained by said Department of Motor Vehicles in a special fund pending the final determination in this action on appeal or otherwise of the constitutionality of the aforesaid Statute, at which time in the event that the said Statute shall be determined to be unconstitutional the sums so paid shall be returned upon application to the plaintiff herein by the defendants, or their successors in office, and in the event that the said Statute shall be determined to be constitutional the said sums so paid shall be retained by the Department of Motor Vehicles and shall be applied according to the provisions of said Chapter 788, p. 2253, of the California Statutes of 1937.

"It Is Hereby Further Ordered that this Court specifically reserves continuing jurisdiction until final disposition of said moneys as aforesaid to make orders in regard to such final disposition and par-

ticularly to make such Order as is meet and proper in the event that such Statute is finally held to be partially valid and partially invalid."

We have already noted plaintiff's position. "Having created this special trust fund in custodia legis in lieu of bond for temporary injunction," he states "the trial court must determine the constitutionality of the statute and decree a disposition of the fund before it dismisses the action and terminates and surrenders all its jurisdiction over the fund created in this case." Later he adds: "The appellant is still insistent upon the Court determining the constitutionality of Chapter 788, Statutes of 1937." That the statute in question is constitutional, so far as the Federal Constitution is concerned, has been determined in *Clark v. Paul Gray, Inc.*, 1939, 306 U.S. 583, 59 S.Ct. 744, 83 L.Ed. 1001, but apparently the plaintiff wants the state court to pass upon his contentions.

[1,2] We do not interpret the order, which followed quite meticulously the wording of the stipulation upon which it was based, as intending to create a departure from the rule prevailing in this state that no court undertakes to determine the constitutionality of a statute as an abstract question, but only when called upon to do so in order to enforce or protect the rights of a party to a pending action. The establishing of this fund in the Motor Vehicle Department was an incident to, not the object of, this action. The object of the action was to protect the plaintiff from the burden and embarrassment that would follow from the enforcement of a statute which he claimed had no validity because it violated both the Federal and State Constitutions. A final judgment, granting or denying a permanent injunction was contemplated when the stipulation was entered into and the order made providing a substitute arrangement for the bond usually required. A determination of the constitutionality of the statute could be anticipated only as a step in arriving at the judgment. There would be no occasion for the court to pass upon the validity of those provisions of the statute which did not affect the plaintiff, and if his allegation, denied by the defendants in their answer, that the fees which the defendants were threatening to collect on cars not owned by the plaintiff but which he was caravanning, would have to be paid out of his pocket, and not by

the cars' owners, was not found to be true, plaintiff would appear not to be affected by the burden of the statute and so in no position to question its constitutionality.

[3] If, however, the stipulation and subsequent order be interpreted as an acknowledgement that plaintiff did have an interest in the constitutionality of the statute, so that, at least for the purposes of an order disbursing the fund, no proof of his interest would be necessary, even so there remained issues of fact which had to be determined before plaintiff's contentions that the statute was unconstitutional could be disposed of. In his complaint he lists some eighteen reasons why the statute clashes with the State and Federal Constitutions. Among other reasons advanced are these: "That the charges and fees required of the plaintiff under said statute are arbitrary, unreasonable and excessive in amount, and bear no reasonable relation to the plaintiff's use of the highways of the State of California. * * * That said tax and charge is wholly disproportionate to other taxes, fees or other licenses charged by the State of California, either for the registration of vehicles in said state or for vehicles using the highways in said state; * * * That said tax and charge is exorbitant and arbitrary and unfair to such a degree that the interstate business in which plaintiff is engaged in the State of California will return a revenue to the said state in proportion far in excess of other fees, licenses or taxes charged other persons for the use of the highways of said state." It is obvious that none of these objections can be ruled upon from a mere reading of the statute; defendants' denial of all the allegations of the paragraph in which these objections were listed raised issues of fact which made proof necessary before the trial court could be in a position to pass upon the constitutional questions involved.

This is not a case, therefore, such as was *Martin v. Gibson*, 1941, 48 Cal.App. 2d 449, 119 P.2d 1012, where there was no issue of fact, so that no "trial" could be

had. Here there were issues of fact; the court could not determine the legal issues involved until the factual issues were tried; there was no trial within five years of the filing of the complaint. No excuse for failing to bring the action to trial has been offered. No reason appears why it could not have been tried during any of the five years while it was pending. The suggestion that the stipulation which preceded the order may be interpreted as a stipulation of the parties that the time within which the action may be brought to trial was extended, does not survive a reading of the stipulation; the "continuing jurisdiction" was plainly to enable the court to make orders disposing of the fund after it had exhausted its ordinary jurisdiction by entering a judgment, not to postpone indefinitely the time within which a trial, looking to a judgment, might be begun. The lament of the plaintiff that the dismissal of this action relegates him to the necessity of bringing another action has its echo in every case dismissed for failure of prosecution.

[4] The action, on the face of the record, was one which section 583, Code of Civil Procedure, says must be dismissed. "The statute", this court said in *Bank of America v. Moore & Harrah*, 1942, 54 Cal. App.2d 37, 43, 128 P.2d 623, 626, referring to section 583, "has the very salutary purpose of expediting trials. Its language is clear and definite and the integrity of its meaning has generally been upheld by the courts in a plenitude of decisions. In the several legislative amendments to which it has been subjected the legislature has not seen fit to temper the rigor of the language or its forthright construction and support by the courts; the tendency, rather, has been to extend and make more certain its operation."

We see no reason to doubt the correctness of the order appealed from; it is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.

**GLEED et al. v. LINCOLN NAT. LIFE
INS. CO.***

Civ. 12635.

District Court of Appeal, First District,
Division 2, California.

May 29, 1944.

* Rehearing Granted June 28, 1944.

1. Insurance ☞668(2)

In action on life policy wherein insurer contended that soliciting agent was not agent of insurer but was acting as broker for insured's assignee, soliciting agent's status as broker or agent was question for jury.

2. Insurance ☞388(4)

Where for six years insured's assignee had paid premiums to soliciting agent without receiving receipt therefor signed by insurer's president or secretary as required by life policy and all such payments were made while insured was in default, and in only one instance had insurer demanded and received application for reinstatement, insurer was estopped from insisting on strict compliance with policy until it had given reasonable notice of its change in policy.

3. Insurance ☞388(4)

In absence of fraud, where insured makes timely effort to transmit life policy premium, substantial objection should be required to defeat it as a payment when there are acts and conduct of insurer which would induce insured to omit to follow strict letter of policy.

4. Insurance ☞388(4)

A past course of conduct of acceptance by insurer of payment of premiums after grace period may establish a waiver by insurer of right to declare forfeiture for failure to pay premiums at stipulated time, or insurer may be estopped from asserting forfeiture where insured has been reasonably led to believe that payments made within a reasonable time after grace period will be acceptable.

Judgment for plaintiffs, and defendant appeals.

Affirmed.

Keesling & Keil, of San Francisco, for appellant.

Nathan G. Gray, of Berkeley, for respondents.

NOURSE, Presiding Justice.

In a trial by a jury the plaintiffs had a verdict for the sum of \$3000 based upon a policy of insurance on the life of F. C. Gleed, deceased. The plaintiff Gleed was the widow and the plaintiff Boggs was an assignee of deceased.

The appeal from the judgment is based upon the ground that the policy lapsed prior to the death of the insured because of non-payment of the premium then due. The respondents defend the judgment on the ground that time of payment under the strict terms of the policy was waived, and that defendant is estopped from contesting the policy on that ground.

The contested policy was issued on May 12, 1936, through one Hansen, a duly authorized soliciting agent, and by him delivered to the insured. Thereafter, until the death of the insured, Mrs. Boggs paid all the premiums to Hansen—sometimes in cash and sometimes by her personal check. For each payment Mrs. Boggs received a receipt signed "Edward F. Hansen, Agent," and containing the policy number and the amount received. On June 12, 1942, in accordance with her usual custom, Mrs. Boggs gave to Hansen her check drawn in his name to cover the premium due on May 12, 1942. Hansen deposited the check in his own bank and drew his check in the name of appellant which was deposited for collection by appellant and returned unpaid because of insufficient funds in the Hansen account. On June 18 the appellant notified Hansen that his check had been dishonored, and that the company would hold it until it received a new remittance. On the same day appellant mailed a letter to the insured advising him that the policy had lapsed and requesting an application for reinstatement. The insured died early the following morning and this letter was found unopened in his home.

[1] Appellant now contends that Hansen was not its agent, but that he was acting in the capacity of broker for Mrs. Boggs, that the express terms of the policy

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Bernice Taylor Gleed and another against the Lincoln National Life Insurance Company on a life insurance policy.

permitted payments of premiums to be made "to an authorized agent of the Company only in exchange for the Company's receipt therefor signed by the President or the Secretary," that the check of Hansen was received for collection only, and did not constitute a payment of the premium. The respondents refer to the license of the Insurance Commissioner of this State under which, at the request of the appellant, Hansen was appointed and authorized to act as an agent for appellant with all the powers conferred by the laws of this state. The respondents also rely upon the defense of waiver and estoppel and, since this is determinative of the appeal, we will confine our discussion to that issue with the observation that the question of Hansen's status as broker or agent was a question of fact for the jury, that we find no evidence that he at any time acted as a broker for the insured, and that there is evidence both ways as to his status as broker or agent in his dealings with Mrs. Boggs.

[2] On the issue of waiver and estoppel the evidence is that for a period of six years all premiums had been paid by Mrs. Boggs to Hansen, either in cash or by her personal check, and that no one of these payments was exchanged for the company's receipt signed by the president or secretary as required in the policy. It is also in evidence that each and all of these payments were made in this manner while the insured was in default, and in many cases after the period of grace had expired. During this period of six years eighteen separate premiums became due. Fourteen of these were accepted by appellant after the period of grace had expired. In only one instance—September, 1940—the appellant demanded and received an application for reinstatement.

[3] In *Huber v. New York Life Ins. Co.*, 18 Cal.App.2d 269, 274, 63 P.2d 318, 320, which is a case similar to this in many respects, the district court of appeal said: "In the absence of fraud, where a party makes an effort to transmit his premium in time, it seems to us that substantial objection should be required to defeat it as a payment when there are acts or conduct on the part of the Insurance Company which would induce the insured to omit to follow the strict letter of the policy * * *."

[4] In *Page v. Washington Mut. Life Ass'n*, 20 Cal.2d 234, 239, 125 P.2d 20, 23, the supreme court said: "It is clear that a past course of conduct of acceptance by the

insurer of payments of premiums after the grace period may establish a waiver by the insurer of the right to declare a forfeiture for failure to pay premiums exactly at the stipulated time, or the insurer may be said to be estopped to assert the forfeiture where the insured may be said to have been reasonably led to believe that payments made within a reasonable time after the grace period would be acceptable. *Nelson v. National Guaranty Life Co.*, 131 Cal.App. 669, 21 F.2d 1022; *Vinther v. Sunset Mut. Life Ins. Co.*, 11 Cal.App.2d 118, 53 P.2d 182; *Turner v. Redwood Mut. Life Ass'n*, 13 Cal. App.2d 573, 57 P.2d 222." To the same effect is *Bryson v. National Travelers Cas. Co.*, 206 Cal. 475, 479, 274 P. 957.

Upon these authorities we conclude that the course of conduct in relation to the payments of premiums running over a period of six years was such that the respondents were entitled to assume that the terms of the policy need not be adhered to strictly, and that the appellant was estopped from insisting upon a strict compliance with those terms until it had given the respondents reasonable notice of its change in policy.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concur.



64 Cal.App.2d 503

RIDLEY v. YOUNG et al.

Civ. 7023.

District Court of Appeal, Third District,
California.

May 24, 1944.

Hearing Denied July 20, 1944.

I. Judgment ¶570(3, 4)

Where action against minor was nonsuited on theory that he was powerless to delegate authority to drive automobile owned by him, whereupon the plaintiff dismissed the action as to other defendants with statement that he intended to file another action against minor and person driving automobile, such nonsuit and dismissal did not constitute bar to subsequent action. Civ.Code, § 33.

2. Judgment ⇨570(1)

In the absence of a retraxit or a trial on the merits, neither a dismissal of an action nor a nonsuit is a bar to subsequent suit for the same cause.

3. Limitation of actions ⇨182(5)

Failure to plead bar of statute of limitations to action for personal injuries resulting from automobile collision waived such defense. Code Civ.Proc. § 340, subd. 3.

4. Automobiles ⇨188

The limited liability of the owner of an automobile for imputed negligence of the driver who was operating the automobile without distinction between adults and minors. Vehicle Code, § 402, St.1937, p. 2353; Civ.Code, § 33.

5. Infants ⇨59

A minor is liable for his own torts, provided he is capable of understanding that they are wrong.

6. Automobiles ⇨188

A gratuitous loan of automobile by minor who was not present at time of accident rendered minor liable for negligence of borrower under the statute. Vehicle Code, § 402, St.1937, p. 2353; Civ.Code, § 33.

7. Army and navy ⇨34

The trial court has a sound discretion in determining from the showing made whether defense would be materially affected by a denial of continuance asked for under Soldiers' and Sailors' Civil Relief Act. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A.Appendix, § 521.

8. Army and navy ⇨34

A mere certificate showing that defendant was engaged in the military service was insufficient showing for continuance, where defendant's deposition was on file, the defendant was not present at the accident, defendant conceded that he owned the automobile involved and that it was being driven by his permission, and defendant's attorney had represented defendant throughout the entire litigation and was familiar with the facts. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A.Appendix, § 521.

9. Army and navy ⇨34

The Soldiers' and Sailors' Civil Relief Act should receive a liberal construction to properly protect soldiers and sailors, but the act may not be invoked to delay or defeat an orderly and expeditious trial of valid suits. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A. Appendix, § 521.

10. Judgment ⇨948(1)

In action for damages arising out of automobile collision where defendants did not plead estoppel or res judicata by virtue of former nonsuit, refusal to admit transcript of proceedings and minute order was proper.

Appeal from Superior Court, Placer County; A. L. Pierovich, Judge.

Action by Elbert A. Ridley against William Young and others for damages for property damage and personal injuries sustained in automobile collision. From a judgment for plaintiff for \$5,105, the named defendant appeals.

Affirmed.

T. L. Chamberlain and Gerald Beatty Wallace, both of Auburn, for appellant.

F. H. Bowers, of Roseville, for respondent.

THOMPSON, Justice.

The defendant, William Young, also known as Joseph William Young, has appealed from a judgment which was rendered against him and his codefendants jointly and severally, for property damage and personal injuries sustained by the plaintiff as the result of an automobile collision.

William Young owned the automobile which was involved in a head-on collision with plaintiff's machine on the public highway near Roseville on the afternoon of August 3, 1941. The plaintiff's machine was demolished and he received serious injuries. The defendant Dale Hastay was then driving William Young's car with his permission. Both William Young and Dale Hastay were minors. Each of them held an operator's license issued with the written endorsements of their parents as required by Section 350 of the Vehicle Code, St.1937, p. 1596.

The plaintiff filed a complaint against the defendants on August 19, 1941, for

damages sustained as a result of their negligence. It was alleged that the defendants were the owners of the machine which was driven by Dale Hastay at the time of the accident as the agent and employee of the other defendants. Separate answers were filed by William Young and the other defendants denying the material allegations of the complaint. The cause was set for trial for February 16, 1942. After a jury was impaneled the plaintiff's attorney made his opening statement to the jury, in which he declared that he relied upon proving that Dale Hastay was driving William Young's automobile at the time of the accident as his agent and upon his business. Some evidence was then adduced in behalf of the plaintiff, but before he had rested his cause the defendant William Young moved for a nonsuit in his own behalf on the ground that he, as a minor, could not lawfully authorize an agent or employee to drive his automobile. It was contended that any attempt on the part of a minor to create a relationship of respondeat superior in the use of his machine was void, or at least voidable, under Section 33 of the Civil Code, and that the negligence of Dale Hastay could therefore not be imputed to the owner of the car so as to render him liable for damages. Upon that theory the motion for nonsuit was granted February 17, 1942, in favor of William Young. The cause was dismissed against him. No appeal was taken from that order. The plaintiff's attorney then voluntarily dismissed the action against the other defendants, saying, "I propose to file another action against Dale Hastay and William Young."

March 2, 1942, more than one year after the accident occurred, the plaintiff filed a new complaint in that court against the same defendants, based on the same automobile casualty. The complaint was couched in two counts. The first count alleged that Dale Hastay was negligently driving William Young's automobile with his consent, at the time of the accident, and that said negligence was imputed to the owner of the machine and to the parents of Dale Hastay who had endorsed in writing his verified petition for an operator's license as required by Section 350 of the Vehicle Code. The second count of the complaint alleged that at the time of the accident Dale Hastay was driving the machine with the consent of the owner William Young upon a joint enterprise in which all defendants were interested.

Separate answers were filed by William Young and by Dale Hastay and the other defendants. Guardians ad litem were duly appointed to represent the minors. Each answer denied the material allegations of the complaint and alleged that the accident was the result of the contributory negligence of the plaintiff. Each answer set up the nonsuit with respect to William Young and the plaintiff's voluntary dismissal of the former action as a bar to this suit. The answer of Dale Hastay also set up the statute of limitations as a bar to the second suit, but William Young admitted that he owned the machine and that it was driven with his express consent, but failed to plead the bar of the statute of limitations.

Upon due notice as provided by Section 597 of the Code of Civil Procedure the defendants Elton Hastay and Lucille Hastay moved the court to dismiss the second action on the ground that it was barred by the nonsuit and voluntary dismissal of the former cause and by the statute of limitations. That motion was fully heard and denied.

This case was then set for trial by the court for March 17, 1943. At the trial evidence was adduced in behalf of the respective parties. The cause was argued and submitted for decision. The court adopted findings to the effect that William Young owned the automobile which was driven by Dale Hastay with his permission at the time of the accident; that Dale Hastay held an operator's license at the time of the accident which was issued by the Motor Vehicle Department upon the written approval of his parents as required by Section 350 of the Vehicle Code; that the collision was caused by the negligence of Dale Hastay, as a result of which plaintiff's automobile of the value of \$105 was demolished and he received personal injuries entitling him to damages in the further sum of \$6,738.50; that the plaintiff was not guilty of contributory negligence; that the defendants were not engaged in a joint venture with Dale Hastay, and that neither the nonsuit nor the dismissal of the former action is a bar to this suit.

The court thereupon rendered judgment against the defendants, but limited the liability of William Young and of Elton Hastay and Lucille Hastay, his wife, pursuant to Sections 352 and 402 of the Vehicle Code, St.1935, p. 145, St.1937, p. 2353, to the sum of \$5,105. From that

judgment the defendant William Young only has appealed. We are not concerned with the judgment against the other defendants.

The appellant contends that the granting of the nonsuit in his favor, and the voluntary dismissal of the former suit by the plaintiff, are bars to this action; that William Young, a minor, and the owner of the automobile involved in the accident, was powerless under Section 33 of the Civil Code, to authorize Dale Hastay to drive his machine so as to render him or any of the defendants liable for his negligence; that the court erred in refusing to admit in evidence the pleadings of the former case, and erred in denying plaintiff's motion for a continuance of the trial on the ground that he was engaged in the armed forces of the United States.

The findings are supported by the evidence.

[1] Neither the order granting a nonsuit in the former action in favor of the appellant nor the plaintiff's voluntary dismissal of that suit is a bar to this action. The former suit was not tried or determined on its merits. A nonsuit was granted in favor of William Young on the theory that he was powerless under Section 33 of the Civil Code to delegate authority for Dale Hastay to drive his automobile. The subsequent dismissal of the suit by the plaintiff did not amount to a retraxit of his cause of action. *McColgan v. Jones, Hubbard & Donnell, Inc.*, 11 Cal.2d 243, 78 P.2d 1010. At the time of that dismissal in open court the plaintiff's attorney clearly indicated that he was not conceding he had no valid cause of action for he then said, "I propose to file another action against Dale Hastay and William Young." There was no detriment to the appellant on account of that nonsuit in his favor.

[2] The rule is well established that, in the absence of a retraxit or a trial on the merits, neither a dismissal of an action nor a nonsuit is a bar to a subsequent suit for the same cause. *Mohn v. Tingley*, 191 Cal. 470, 478, 217 P. 733; *Anglo-California Nat. Bank v. Superior Court*, 15 Cal.App.2d 676, 679, 59 P.2d 1053; *Walton v. Southern Pacific Co.*, 8 Cal.App.2d 290, 48 P.2d 108; 15 Cal.Jur. 131, sec. 185.

In the present case it is immaterial, so far as this appellant is concerned, whether the present complaint states a cause of action different from that which was al-

leged in the original complaint. Both complaints were founded on the same automobile casualty. It is true that the amended complaint in the first action charged that Dale Hastay was driving the automobile at the time of the accident "as agent for each of said defendants and within the course and scope of said employment" and that he was then engaged in a joint enterprise in behalf of all of the defendants, while the present complaint alleges only that Dale Hastay was then negligently operating the machine "with the permission and consent of each of the defendants."

[3] In the case of *McKnight v. Gilzean*, 29 Cal.App.2d 218, 84 P.2d 213, this court affirmed an order of the trial court sustaining a demurrer to an amended complaint in an automobile casualty case on the ground that it added two causes of action for imputed negligence under Section 402 of the Vehicle Code to the original complaint which was based entirely on the doctrine of respondeat superior. In the *McKnight* case, however, the statute of limitations was specifically pleaded as a bar to the new causes alleged for the first time in the amended complaint. In the present case the appellant William Young failed to plead the bar of Section 340, subdivision 3, of the Code of Civil Procedure by either his demurrer or answer. He therefore waived that defense.

The statute of limitations as provided in the foregoing section, if properly pleaded, may bar the liability of the owner of an automobile for imputed negligence of the driver thereof who is operating the machine with the owner's consent, under Section 402 of the Vehicle Code, or the liability of the parents of the driver who have signed and verified his application for an operator's license as required by Section 352 of the Vehicle Code, unless the action is commenced within one year from the date of the injury complained of. *Franceschi v. Scott*, 7 Cal.App.2d 494, 46 P.2d 764; *McFarland v. Cordiero*, 99 Cal.App. 352, 278 P. 889.

The bar of the statute of limitations was, however, waived by the appellant in this case by failure to raise that issue by either demurrer or answer to the complaint. *Laffoon v. Collins*, 212 Cal. 750, 758, 300 P. 808; *Brownrigg v. DeFrees*, 196 Cal. 534, 541, 238 P. 714; *Pedro v. Soares*, 18 Cal. App.2d 600, 610, 64 P.2d 776; 16 Cal.Jur. 603, sec. 199.

[4] The appellant asserts that the judgment against him is void for the reason that he was a minor of the age of eighteen years at the time of the accident and that the permissive use of his automobile by Dale Hastay may therefore not create a liability against him on account of imputed negligence of the driver of the machine because Section 33 of the Civil Code prohibits a minor from "delegating power". William Young, the owner of the machine, was not present at the time of the accident. We are of the opinion there is no merit in this contention. The limited liability of the owner of an automobile for imputed negligence of a driver who is operating the machine by permission is specifically created by statute without distinction between adults and minors. Sec. 402, Vehicle Code. Subdivision (a) of that Section provides:

"Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages."

Section 33 of the Civil Code, upon which the appellant relies, reads:

"A minor cannot give a delegation of power, nor, under the age of eighteen, make a contract relating to real property, or any interest therein, *or relating to any personal property not in his immediate possession or control.*" (Italics added.)

It will be observed the preceding statute infers that a minor, even under the age of eighteen years, may make a contract relating to personal property which is "in his immediate possession or control." The automobile in this case was in his possession. Section 41 of the Civil Code provides that a minor is civilly liable for a wrong done by him, although liability for exemplary damages depends upon his capability to understand that the act is wrong.

[5, 6] The general rule with respect to contracts made by a minor is that he may avoid liability thereon, with certain exceptions. But he is nevertheless liable for his own *torts* provided he is capable of understanding that they are wrong. *House v. Fry*, 30 Cal.App. 157, 157 P. 500; *Hughes v. Quackenbush*, 1 Cal.App.2d 349, 357, 37 P.2d 99; 14 Cal.Jur. 134, secs. 23 and 24;

27 Am.Jur. 812, sec. 90; 127 A.L.R. 1442, note. A minor may make certain contracts not prohibited by law (Sec. 34, Civil Code), subject to disaffirmance as provided by Section 35 of the Civil Code. Certain prohibited contracts of minors, including deeds executed by minors under eighteen years of age, are void. *Hakes Inv. Co. v. Lyons*, 166 Cal. 557, 137 P. 911; Sec. 33, Civil Code. Since, on the policy of protecting infants, the contracts of a minor, with certain exceptions (Sec. 36, Civil Code), may be void or voidable by disaffirmance, as provided by Section 33 of the Civil Code, it has been held he may not appoint agents, servants or employees thereby rendering him liable for their torts. 14 Cal.Jur. 121, secs. 10-12; 103 A.L.R. 487, note. Assuming, without so deciding, that the owner of an automobile who is a minor may not be liable under Section 402 of the Vehicle Code for the tort or negligence of an agent, servant or employee who is authorized by contract expressed or implied to use his machine in the performance of the business of the minor, or for a joint enterprise in which the owner and driver of the machine are interested, no such appointment, founded on contract, either express or implied, is involved in the present appeal. The foregoing principle announced in the authorities wherein it is held that minors are exempted from liability is based on the existence of the relationship of respondeat superior where an agency or employment is created. This case was not tried on that theory. William Young was not present at the time of the accident. He had no control over Dale Hastay's operation of the car. His answer specifically so states and the court so found. Nor was the machine then being used in any business in which the owner was interested. The original complaint did allege a relationship of agency or employment between the owner and the driver of the automobile, but that complaint was dismissed and the present complaint merely alleges that the car was being driven "with the permission and consent" of the defendant William Young. No contract or agreement was involved in this action. The transaction was a mere gratuitous loaning of the automobile. Regardless of the distinction in the authorities between the liability of minors growing out of torts and contracts, we assume that Section 402 of the Vehicle Code, which creates a new and different liability for imputed negligence, renders the appellant

liable for the tort of the driver of his car under the circumstances of this case, in spite of the fact that he was only eighteen years of age. No question is raised regarding his ability to understand the dangers incident to the operation of his automobile. He could not escape his statutory liability for the tort of one who was driving his machine with his express consent by attempting to disaffirm his permission to drive the car after the accident had occurred.

In the case of *Krum v. Malloy*, 22 Cal.2d 132, 137 P.2d 18, 19, a judgment in favor of a minor of the age of nineteen years, who was co-owner with his father of the automobile involved in the accident, but who was not present at that time, was reversed by the Supreme Court, on the ground that the court failed to find upon the issue as to whether the minor had consented to his father's driving of the machine. The Supreme Court said:

"The crux of the case as it stands before us is the question as to whether defendant Claire E. Malloy, the nineteen-year-old son of Paul, is liable by imputation, under section 402 of the Vehicle Code, * * * for Paul's (his father's) negligence. * * *

"A co-owner, therefore, of an automobile, who desired its exclusive possession and usage for a time, would need the permission, express or implied, of his co-owners to that end. * * *

"It was error for the court to neglect to find directly on the essential issue of whether Paul Malloy's operation of the automobile at the time of the accident was with, or was without, Claire E. Malloy's permission."

If, as the appellant in the present case contends, a minor who owns an automobile, or a joint interest in one, may not bind himself to become liable under Section 402 of the Vehicle Code, for imputed negligence of the driver of an automobile by consenting to the use of his car, it would have been immaterial that the trial court in the *Krum* case, *supra*, failed to determine whether or not the father, Paul Malloy, was driving the machine with or without permission of his minor son and co-owner. The reversal of the judgment in that case clearly infers that the Supreme Court assumed the absent minor who owned a joint interest in the automobile would be liable for imputed negligence if his consent to drive the machine had been obtained.

In the case of *Silver Swan Liquor Corp. v. Adams*, 43 Cal.App.2d Supp. 851, 110 P. 2d 1097, the Appellate Department of the Superior Court determined that a non-resident minor, who was sued for damages for negligence in operating his automobile in California, is not exempt under Section 33 of the Civil Code from the provisions of Section 404 of the Vehicle Code, St. 1935, p. 154, on account of his infancy from substituted service of process in Canada. Section 404 provides that when any nonresident of California operates his automobile on the highways of this State he will be deemed to have authorized an appointment of the Director of Motor Vehicles in the event of a suit based on an automobile casualty in which he is involved as "his true and lawful attorney upon whom may be served all lawful processes" against him in that action. In the *Adams* case it was contended the substituted service of process was void under Section 33 of the Civil Code, because the defendant was a minor without authority to "delegate power" to appoint an agent or attorney. A motion to quash the service of summons was granted by the trial court. The Appellate Department of the Superior Court reversed that order, holding that the minor was not exempt from the provisions of the Vehicle Code. In support of that decision the court quoted with approval the following language from *Gesell v. Wells*, 229 App.Div. 11, 240 N.Y.S. 628, 631, which was affirmed on appeal (254 N.Y. 604, 173 N.E. 885):

"Surely they [the automobiles] are not less dangerous in the hands of minors. It is inconceivable that there should have been any legislative intent to exclude minors. But it is urged that the statute in question is based upon an implied agreement which, in the case of an infant, may be repudiated at his election. It would be strange if a police regulation of the state could be thus evaded."

The preceding language is appropriate to the present case. Section 402 of the Vehicle Code is general in its application with respect to imputed liability. No distinction is made between adults and minors. If the legislature had intended to exclude minors from its application it would have been easy to have so stated. It is a police regulation of highways for the safety of the public. In the absence of a statute to the contrary, we must assume it was intended to apply to minors as well as adults.

By inference, Section 33 of the Civil Code authorizes minors, even under the age of eighteen years, to make contracts relating to personal property which is in their immediate possession or control. In the present case the appellant was over eighteen years of age, and he made no contract. He merely loaned his automobile for the benefit of his friend. He is therefore liable for imputed negligence of the driver of his car under the circumstances of this case.

[7] The court did not err in denying the application of William Young's attorney for a continuance of the trial under Section 100 of the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.A. Appendix, § 510, on the ground that the defendant was then engaged in the United States military service. The trial court has a sound discretion to determine from the showing made whether the defense would be "materially affected" by a denial of the continuance. *Briner v. Briner*, 60 Cal.App.2d 473, 140 P.2d 995; *Boone v. Lightner*, 319 U.S. 561, 63 S.Ct. 1223, 87 L.Ed. 1587; *Pope v. United States Fidelity & Guaranty Co.*, 67 Ga.App. 415, 20 S.E.2d 618; 50 U.S.C.A. Appendix, § 521. The section last cited reads:

"At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, * * * may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, *unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.*" (Italics added.)

[8] In the present case no affidavit for continuance was filed. No showing whatever was made to indicate that William Young could not obtain a leave of absence to attend the trial, or that his defense would be materially affected by his absence. Nothing but a certificate showing he was engaged in the military service was offered in evidence. His deposition was on file in this case. His answer alleged that he was not present at the time of the accident; that he had no control over Dale Hastay's operation of the machine and that he knew nothing of the circumstances incident to the automobile collision. His answer concedes that he was the owner of the machine in

question and that it was being driven by Dale Hastay "with the permission of this answering defendant." No agency or employment of the driver was alleged. His attorney had represented William Young throughout the entire litigation and was perfectly familiar with the facts. We are directed to no material facts favorable to the appellant to which he might have testified if he had been present at the trial. We are unable to perceive that his defense to the action was materially, or at all, affected by his absence from the trial. The court, therefore, did not abuse its discretion in refusing to continue the trial.

[9] While it is true that the act in question should receive a liberal construction with the object to properly protect soldiers and sailors who are engaged in the military and naval services of the United States, it may not be invoked for the purpose of delaying or defeating an orderly and expeditious trial of valid suits.

[10] The court did not err in sustaining plaintiff's objection to the introduction in evidence of the pleadings which were filed in the former action, for the reason that the transcript of proceedings and the minute order, which are incorporated in this record, clearly show the former case was not determined on its merits and that a nonsuit was granted in favor of William Young in the first cause before the plaintiff had rested his case. It was granted as the court said on the theory that William Young, a minor, could not create a relationship of "master and servant" or of "agency" between himself and Dale Hastay, the driver of his car, so as to render him liable for imputed negligence. Young's answer does not plead the judgment of dismissal of the first action as *res judicata*, nor does it plead estoppel by reason of the statute of limitations. Since the dismissal of the original action was not a determination of the merits of the cause, and that judgment did not constitute *res judicata*, the proffered pleadings in that case were not competent on the trial of this case and the objection thereto was properly sustained. *Campanella v. Campanella*, 204 Cal. 515, 520, 269 P. 433, 435. Under similar circumstances the Supreme Court so held. It is said in the *Campanella* case:

"It is clear that the [former] judgment is not *res adjudicata* and therefore not a bar to the present action nor an estoppel upon any issue therein and that the ruling

refusing to admit the judgment roll in evidence was proper. The judgment roll not only fails to show a ruling upon the merits but discloses that no such ruling was made."

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.



VINCENT v. McCOLGAN, Bank and Corporation Franchise Tax Com'r.

Civ. 12601.

District Court of Appeal, First District,
Division 2, California.

May 23, 1944.

Rehearing Denied June 22, 1944.

See 149 P.2d 882.

I. Common law ☞9

The doctrine of "mobilia sequuntur personam" is a fiction of the common law under which intangible personal property has its situs or location in the state or country wherein the owner resides, unless it has acquired a business situs elsewhere.

See Words and Phrases, Permanent Edition, for all other definitions of "Mobilia Sequuntur Personam".

2. Taxation ☞104

Where trust property from which a nonresident derived his income was owned by and in the lawful possession of trustees having their situs in California, the income of such nonresident was derived from sources within the state and was taxable therein; the doctrine of "mobilia sequuntur personam" not applying to give the property situs at beneficiary's domicile. St.1935, pp. 1093, 1095, 1105, §§ 5, 7(f), 12(c).

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Arthur William Bourn Vincent against Charles J. McColgan, as Bank and Corporation Franchise Tax Commissioner, for a refund of personal income tax.

Judgment for plaintiff, and defendant appeals.

Reversed.

Robert W. Kenny, Atty. Gen., and Hartwell H. Linney and James E. Sabine, Deputy Attys. Gen., for appellant.

McCutchen, Thomas, Matthew, Griffiths & Greene, of San Francisco, for respondent.

STURTEVANT, Justice.

This is a suit to obtain a refund of personal income tax paid in 1937 with respect to income for the calendar year 1936.

Plaintiff during all of the year 1936 was a non-resident. He was a minor during all of the year 1936 and until July 16, 1940. During the year 1936 plaintiff's father, Arthur Rose Vincent, was the duly appointed, qualified and acting guardian of plaintiff's estate. On the last mentioned date, the Superior Court of the State of California in and for the County of San Mateo made an order accepting the resignation of plaintiff's father as guardian and appointing the American Trust Company, a corporation, in his stead. The American Trust Company continued in this capacity until plaintiff attained his majority in 1940.

On May 15, 1937, plaintiff, by the guardian of his estate, filed plaintiff's income tax return for the calendar year 1936, showing income tax in the amount of \$2621.27, which amount subsequently was paid. A claim for refund was filed which was not allowed by the Commissioner, and this suit was brought to recover. The judgment of the trial court was rendered in favor of plaintiff.

Income for the calendar year 1936 was as follows:

(1) Interest on savings bank account with Wells Fargo Bank & Union Trust Co. \$45.88;

(2) Interest on State of California bonds \$935.00;

(3) Income from fiduciaries, payable to plaintiff as a beneficiary of certain trusts, as follows:

(a) From said Wells Fargo Bank & Union Trust Co., as trustee of a residuary trust created by the last will and testament of Agnes M. Bourn, deceased \$4,402.55;

(b) From The Bank of California, National Association, as trustee of a residuary trust created by the last will and testament

of said Agnes M. Bourn, deceased \$4,402.55;

(c) From said Wells Fargo Bank & Union Trust Co., as trustee of a trust created by W. B. Bourn, now deceased \$14,459.74

(d) From said The Bank of California, National Association, as trustee of a trust created by said W. B. Bourn, now deceased \$14,459.74;

(e) From said Wells Fargo Bank & Union Trust Co., as trustee of a trust created by instrument dated July 19, 1910 between William B. Bourn and Agnes M. Bourn, as trustees, and James L. Laidlaw and William B. Bourn, as trustees, said trust being hereinafter referred to as the "Vincent Trust" \$14,696.71.

All of said income, other than the interest on said State of California bonds which was exempt, was reported and included in plaintiff's said personal income tax return for 1936.

All of the income received from the various trusts was from securities and other intangible property except for a small percentage from real property situate in California.

All of the income received from the two residuary trusts created by the last will and testament of Agnes M. Bourn, deceased, was distributed to the trustees of said trusts out of the estate of said Agnes M. Bourn, deceased, on December 31, 1936. The executors of the estate of Agnes M. Bourn, deceased, were the same two banks that were also the trustees of the trusts created by her last will and testament.

The executors of the estate of Agnes M. Bourn, deceased, and the trustees of the various trusts were Wells Fargo Bank and Union Trust Co., a California corporation, and The Bank of California, National Association, a national bank having its principal office and place of business in the City and County of San Francisco, State of California.

It was stipulated that neither any trustee as trustee of a trust here involved, nor any guardian as a guardian, nor plaintiff himself, during the year 1936, carried on or did any business, or trade, or practice, or carried on any profession. However, it also was stipulated that under the terms of the trusts discretion was conferred upon the trustees as to the administration of the trust estates and the trustees had authority to invest and reinvest, sell, exchange and dispose of the trust property.

During the year 1936 the trustees of certain of the trusts sold various assets of the trusts and purchased other assets.

It further was stipulated that the seat of each trust was at all times during the year 1936 in San Francisco, California. The grantors of the trusts, at the time of the creation of the various trusts as well as at the time of their death, were residents of California.

The guardianship of plaintiff's estate was subject to the jurisdiction of the Superior Court of the State of California in and for the County of San Mateo and the guardian could sell no property of the estate of plaintiff or purchase any property or make any investments or reinvestments without the approval of that court.

Agnes M. Bourn, who created certain of the trusts by her last will and testament was a resident of California at the time of her death.

All of the trusts were administered in California.

Pertinent portions of the statute involved are the following:

Section 5 of the Act provides in part as follows:

"There shall be levied, collected and paid for each taxable year upon the entire net income of every resident of this State and upon the net income of every nonresident which is *derived from sources within this State*, taxes in the following amounts. * * *" St. 1935, p. 1093.

Section 7(f) of the Act provides that:

"In the case of taxpayers other than residents the gross income includes only the gross *income from sources within this State*. * * *" St. 1935, p. 1095.

And, finally, Section 12(c) of the Act provides:

"The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that * * *

"(3) *Income Properly Paid or Credited.* In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during

such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary. In such cases the income of the legatee, heir, or beneficiary not a resident shall be taxable only to the extent provided in subsection (f) of section 7 of this act." St.1935, p. 1105. (*Italics ours.*)

The question involved is: Was the income from sources within this state?

[1,2] In addition to the facts hereinabove recited, counsel have not called to our attention any part of the record showing that the respondent now has or ever had any possession whatever of any part or portion of the securities involved. The appellant claims that said securities were at all times herein mentioned held by California trustees in *active trust*. He might go further and contend that a *naked trust* is not presented in any manner by the record before us. 65 C.J. 227, Trusts, sec. 16; Gray v. Union Trust Co., 171 Cal. 637, 639, 154 P. 306. That said trusts were vested in trustees that had their situs at all times in the State of California cannot be disputed. The respondent contends that it has been held that the doctrine of *mobilia sequuntur personam*—movables follow the law of the person—obtains in the State of California. That it so obtains in proper cases will be conceded. However it remains to ascertain whether said doctrine applies to the facts of this case. The doctrine is a fiction of the common law. 40 C. J. 1232. As said by the court in Liverpool, etc., Ins. Co. v. Board of Assessors for the Parish of Orleans, 221 U.S. 346, 354, 31 S.Ct. 550, 553, 55 L.Ed. 762, L.R.A.1915C, 903, "The legal fiction expressed in the maxim *mobilia sequuntur personam* yields to the fact of actual control elsewhere." The court cites Blackstone v. Miller, 188 U.S. 189, 23 S.Ct. 277, 47 L.Ed. 439. In that case, 188 U.S. at page 204, 23 S.Ct. at page 278, 47 L.Ed. 439, the court said: "The domicile, naturally, must control a succession of that kind. Universal succession is the artificial continuance of the person of a deceased by an executor, heir, or the like, so far as succession to rights and obligations is concerned. It is a fiction, the historical origin of which is familiar to scholars, and it is this fiction that gives whatever meaning it has to the saying *mobilia sequuntur personam*. But being a fiction it is not allowed to obscure the facts,

when the facts become important." Furthermore, it should be noted that there are well defined exceptions applicable to the maxim *mobilia sequuntur personam*. In Miller v. McColgan, 17 Cal.2d 432, commencing on page 438, 110 P.2d 419, on page 423, 134 A.L.R. 1424, the court said: "Having fixed upon the source of the particular income as the corporate stock, the next task is to assign to this source a taxable situs. Under the doctrine of *mobilia sequuntur personam*, shares of stock in a corporation have their situs or location in the state or country wherein their owner resides, *unless they have acquired a business situs elsewhere.*" And then, on page 444 of 17 Cal.2d, 110 P.2d on page 425, the court continues as follows: "At this point it should be noted that the general principle in relation to situs for the purposes of taxation of intangible personal property embodied in the maxim *mobilia sequuntur personam* has a well-established exception to the effect that there may be a business situs of intangibles distinct from the domicile of the creditor. But respondent has not divided his activities so as to bring himself within this exception. He did not set his property aside in a Philippine trust or engage in business in the Philippines. In consequence, nothing appears here to indicate that the *mobilia* rule is not applicable to this case." The principal difference between the case just cited and this case is that although respondent did not personally put said securities in a trust, nevertheless Agnes M. Bourn, the trustor, did put them in a trust and they have remained in that trust ever since. The distinction is of much importance. Under the uncontradicted facts the trust property was owned and actively located in San Francisco at all times herein mentioned. The case of De Ganay v. Lederer, 250 U.S. 376, 39 S.Ct. 524, 63 L.Ed. 1042, presented facts quite similar to the record before us. Commencing on page 381, of 250 U.S., 39 S.Ct. on page 526, 63 L.Ed. 1042, the court said:

"We have no doubt that the securities, herein involved, are property. Are they property within the United States? It is insisted that the maxim '*mobilia sequuntur personam*' applies in this instance, and that the situs of the property was at the domicile of the owner in France. But this court has frequently declared that maxim, a fiction at most, must yield to the facts and circumstances of cases which require it,

and that notes, bonds and mortgages may acquire a situs at a place other than the domicile of the owner, and be there reached by the taxing authority. It is only necessary to refer to some of the decisions of this court. (Citing cases.) Shares of stock in national banks, this court has held, for the purpose of taxation may be separated from the domicile of the owner, and taxed at the place where held. *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L.Ed. 189.

"In the case under consideration the stocks and bonds were those of corporations organized under the laws of the United States, and the bonds and mortgages were secured upon property in Pennsylvania. The certificates of stock, the bonds and mortgages were in the Pennsylvania Company's offices in Philadelphia. Not only is this so, but the stocks, bonds and mortgages were held under a power of attorney which gave authority to the agent to sell, assign, or transfer any of them, and to invest and reinvest the proceeds of such sales as it might deem best in the management of the business and affairs of the principal. It is difficult to conceive how property could be more completely localized in the United States. There can be no question of the power of Congress to tax the income from such securities. Thus situated and held, and with the authority given to the local agent over them, we think the income derived is clearly from property within the United States within the meaning of Congress as expressed in the statute under consideration. It follows that the question certified by the Circuit Court of Appeals must be answered in the affirmative." That case has been cited and followed many times. It is sufficient to refer to *Safe-Deposit & T. Co. v. Commonwealth of Virginia*, 280 U.S. 83, 92, 50 S.Ct. 59, 74 L.Ed. 180, 67 A.L.R. 386; *Hill v. Carter*, 9 Cir., 47 F.2d 869, 871; *Curry v. McCanless*, 307 U.S. 357, 59 S.Ct. 900, 83 L.Ed. 1339, 123 A.L.R. 162.

Applying the doctrine to the facts of this case, it clearly appears that the respondent's contention may not be sustained. All of the securities were in the lawful possession of trustees who had their situs in California. The legal title rested in those trustees. They were vested with broad discretionary powers of managing, collecting, investing, selling, and of reinvesting the proceeds. All of such facts refute the

fiction that said securities or any of them followed the respondent out of the state.

The judgment appealed from is reversed.

NOURSE P. J., concurs.

SPENCE, J., not participating.



64 Cal.App.2d Supp. 946

PEOPLE v. COOPER.

Cr. A. 2004.

Appellate Department, Superior Court, Los Angeles County, California.

May 19, 1944.

1. Nuisance ☞60

Pen.Code, § 372, is only available for use in prosecution of criminal public nuisances which are not specifically covered by other sections carrying their own prescribed punishment, and was inapplicable to veterinarian operating an animal hospital on premises which he leased, since nuisances on leased premises are within provisions of section 373a. Pen.Code, §§ 316, 372, 372a, 373a, 374b, 375.

2. Statutes ☞225½

Where general statute standing alone would include same matter as special act, special act will be considered as an exception to, and paramount to, the general statute whether passed before or after such general enactment, and where the special statute is later it will be regarded as an exception to or qualification of the prior general statute. Code Civ.Proc. § 1859; Civ. Code, § 3534.

3. Nuisance ☞60

Pen.Code, § 373a, is limited in its application to the maintenance, permitting, or allowing, a nuisance by a person on his own property or on that of another which he occupies or rents. Pen.Code, § 373a.

4. Nuisance ☞3(10)

The mere possession of dogs or cats does not create a "nuisance per se". Pen. Code, §§ 316, 370, 372, 372a, 373a, 374b, 375.

See Words and Phrases, Permanent Edition, for all other definitions of "Nuisance Per Se".

5. Nuisance $\hookrightarrow$ 61

Veterinarian operating a dog and cat hospital on leased premises, who was not given a notice to discontinue or abate an alleged nuisance in operating the hospital as required by statute, could not be convicted of maintaining a nuisance. Pen. Code, § 373a.

6. Nuisance $\hookrightarrow$ 91(1)

Complaint against a veterinarian for maintaining a nuisance in operating an animal hospital failed to state a violation of statute, where no facts were alleged showing veterinarian to have failed or omitted to abate the alleged nuisance after statutory notice by the proper authorities to discontinue it. Pen. Code, § 373a.

Appeal from Justice's Court, Beverly Hills Township, Los Angeles County; Cecil D. Holland, Judge.

Dr. Stanley Cooper was convicted of maintaining a public nuisance in operating an animal hospital, and he appeals.

Reversed.

Stuart P. Fischer, of Los Angeles, for appellant.

Fred N. Howser, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

KINCAID, Judge.

This appeal is taken from a judgment of conviction of violating section 372, Penal Code, a misdemeanor. The complaint charges that the defendant wilfully and unlawfully maintained a public nuisance which was injurious to the health and offensive to the senses, and which interfered with the comfortable enjoyment of life and property by the neighborhood, in that there was all night barking of dogs at the defendant's animal hospital, and that refuse and rubbish were burned during the day.

The evidence discloses that the defendant is a licensed veterinarian who is operating a "Dog and Cat Hospital" on premises which he leases, and which are located on a main business street in the City of Beverly Hills, California. The small building which he occupies for such business is located on the front part of the lot and his incinerator for the burning of refuse is on the rear portion, some 100 feet back. His place of business is adjoined by other business establishments, but there are occupied

residences to the rear of, and otherwise near defendant. While there is evidence that some 300 people live within a one-block radius of the defendant's place of business, five of them testified as to hearing dogs bark, which interfered with their sleep, and that at irregular intervals the odor of burning animal excrement emanated from the defendant's incinerator. Six of such neighbors testified in behalf of the defendant, that they were not annoyed by any such occurrences or conditions.

It is the contention of defendant that, under the foregoing facts, section 372, Penal Code, is inapplicable to him, and that the judgment of conviction against him of violating such section cannot be sustained. With this contention we agree.

Section 370, Penal Code, defines a public nuisance. The pertinent part of section 372, Penal Code, is as follows: "Every person who maintains or commits any public nuisance, *the punishment for which is not otherwise prescribed*, * * * is guilty of a misdemeanor." (Emphasis added.) This latter section of the code was enacted in 1872, and has never been amended.

In 1903, the Legislature added section 373a to the Penal Code, and it has never since been amended. The pertinent parts thereof are as follows: "Every person who maintains, permits, or allows a public nuisance to exist upon his or her property or premises, *and every person occupying or leasing the property or premises of another who maintains, permits or allows a public nuisance to exist thereon, after reasonable notice in writing from a health-officer or district attorney to remove, discontinue or abate the same has been served upon such person*, is guilty of a misdemeanor, *and shall be punished accordingly*; * * *." (Emphasis added.)

[1, 2] Section 372, Penal Code, is general in its terms and application, and is only available for use in the prosecution of criminal public nuisances which are not specifically covered by other Penal Code sections carrying their own prescribed punishment. Among such other sections are 316, 372a, 373a, 374b, and 375, of the Penal Code. The facts of this case bring it within the specific provisions of section 373a, because they relate to the maintenance of a public nuisance by a person who occupies or leases the property or premises of another. "It is the general rule that where the general statute standing alone would include the same matter as the special

act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment. Where the special statute is later it will be regarded as an exception to or qualification of the prior general one." *People v. Breyer*, 1934, 139 Cal.App. 547, 550, 34 P.2d 1065, 1066. When a general and a particular statute are inconsistent, the latter is paramount to the former. Code of Civil Procedure, sec. 1859; Civil Code, sec. 3534.

[3] This conclusion does not leave section 372 without operative effect. Section 373a is limited to the maintenance etc. of a nuisance by a person on his own property or on that of another which he occupies, or rents. It does not extend, for instance, to cases like *People v. Montoya*, 1933, 137 Cal.App.Supp. 784, 28 P.2d 101, where the nuisance was in the public street, or to any other case where defendant commits a nuisance on property he does not own, lease or occupy. All such cases may be prosecuted under section 372.

[4] It is conceded that no written notice of any kind was ever served upon the defendant by a health officer, district attorney or otherwise to discontinue or abate the acts alleged in these proceedings to constitute a nuisance. The service of such a notice is required by section 373a to be given within a reasonable time prior to the commencement of any prosecution for the maintenance of such nuisance, in order to give the one so charged an opportunity to rectify or discontinue the condition of which complaint is made. The justness of such a preliminary requirement is evident when measured by the situation which confronts the defendant by these proceedings. The evidence shows him to be a licensed professional man who is conducting a legitimate business at an established location. The mere possession of dogs or cats does not create a nuisance per se. See *In re Cohn*, 1940, 37 Cal.App.2d 39, 98 P.2d 769. Although appropriate civil remedies might have been resorted to by way of abatement of any such alleged nuisance, the defendant, without being given the opportunity of remedying the claimed evils through notice that they were offensive to his neighbors, found himself under arrest charged with the commission of a crime.

[5, 6] It is only where, " * * * after notice by the authorities to discontinue the same, the person maintaining such nuisance,

fails or omits to discontinue it or remove the cause thereof, [he] will be prosecuted and punished for such dereliction. His omission to abate the nuisance is in reality wherein he offends the law." *People v. Pozzi*, 1928, 91 Cal.App. 150, 157, 266 P. 860, 862. It is thus evident that the complaint herein fails to state a public offense by the defendant of a violation of section 373a, as no facts are alleged showing him to have failed or omitted to abate any nuisance after notice by the proper authorities to discontinue the same.

The judgment is reversed.

SHAW, P. J., and FOX, J., concur.



64 Cal.App.2d Supp. 938.

20TH CENTURY LITES, Inc., v.

GOODMAN.

Civ. 5641.

Appellate Department, Superior Court,
Los Angeles County, California.

May 18, 1944.

1. Contracts ⇐309(1)

Where assumed possibility of a desired object or effect to be attained by either party to a contract forms basis on which both parties enter into it, and this object or effect is or surely will be frustrated, promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from duty of performing his promise unless a contrary intention appears. Civ.Code, § 1511, subd. 1.

2. Contracts ⇐309(2)

Where, from nature of contract, it is evident that parties contracted on basis of continued existence of person or thing, condition or state of things, to which it relates, the subsequent perishing of the person or thing, or cessation of existence of condition, excuses under doctrine of "commercial frustration", performance though promise was unqualified. Civ.Code, § 1511, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Commercial Frustration".

3. Contracts 152

Ordinarily, words of a contract are to be understood in their ordinary or popular sense. Civ.Code, § 1644.

4. Bailment 22

War 4

Where defendant, in entering into written lease of neon sign installations for his restaurant, advised plaintiff that he wanted such signs for nighttime illumination and testified that he never illuminated signs in daytime, governmental order prohibiting illumination of all outside lighting equipment between sunset and sunrise terminated the contract under doctrine of "commercial frustration", though it remained physically possible to illuminate display with electricity in daytime and though signs were visible even though unlighted during daylight hours. Civ.Code, § 1511, subd. 1.

The noun "display" is defined as an opening or unfolding, exhibition, manifestation, ostentatious show, exhibition for effect, parade. When qualified by the adjective "electrical" it becomes an "electrical exhibition" or "electrical manifestation", and in order to be an "electrical display" it must use electricity, in which event it becomes illuminated and is an "electrical advertising display" and when not illuminated it remains a "sign", but is not the "electrical advertising display" contemplated by the contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Display", "Electrical Advertising Display", "Electrical Display", "Electrical Exhibition", "Electrical Manifestation", and "Sign".

5. Evidence 450(5)

The absence from contract leasing neon sign installations of any provision fixing hours of day or night during which sign was to be illuminated did not create an uncertainty, and parol evidence was inadmissible.

6. Evidence 417(9), 466

In action to recover payments allegedly due under contract leasing neon sign installations, involving defense of termination of contract because of "commercial frustration" because of governmental order prohibiting illumination of all outside lighting equipment between sunset and sunrise, parol evidence was admissible to show state of facts to which such doctrine was

applicable, but not for purpose of inserting in contract a provision requiring defendant to use sign at night or forbidding him to use it at any other time. Civ. Code, § 1511, subd. 1.

7. Bailment 31(3)

War 4

In action to recover payments allegedly due under contract leasing neon sign installations, evidence sustained finding that governmental order prohibiting illumination of all outside lighting equipment between sunset and sunrise as war measure constituted a cessation of existence of the condition which was the desired object of the contract so as to terminate contract under doctrine of "commercial frustration". Civ.Code, § 1511, subd. 1.

8. Contracts 309(1)

The doctrine of "commercial frustration" may be invoked whenever official governmental action prevents hirer from using property for primary and principal purpose for which it was hired, even though other incidental uses might remain available for thing hired. Civ.Code, § 1511, subd. 1.

9. Bailment 22

War 4

Where governmental order prohibiting illumination of all outside lighting equipment between sunset and sunrise as war measure frustrates desired object of parties to contract leasing neon sign installations, the doctrine of "commercial frustration" is applied to terminate the contract through the means of implying a condition to exist in the contract whereby, under such circumstances, the parties shall be excused from any further performance of contract. Civ.Code, § 1511, subd. 1.

10. Contracts 309(1)

Where, from nature of contract and surrounding circumstances, parties from beginning must have known it could not be fulfilled unless when time thereof arrived some particular condition continued to exist under doctrine of "commercial frustration", in absence of warranty that such condition of things shall exist, the contract is to be construed as subject to an implied condition that parties shall be excused in case, before breach, performance becomes impossible or purpose frustrated from such condition ceasing to exist without fault of either. Civ.Code, § 1511, subd. 1.

11. Ballment Ⓒ22**War** Ⓒ4

Where governmental order prohibiting illumination of outside lighting equipment between sunset and sunrise as war measure frustrated contract leasing neon sign installations for defendant's place of business, plaintiff's claim that doctrine of "commercial frustration" could not be invoked because plaintiff had been put to expense of manufacturing and installing the signs and that termination of contract on such grounds would violate principles of equity could not be sustained. Civ.Code, § 1511, subd. 1.

12. Ballment Ⓒ22**War** Ⓒ4

Where governmental order prohibiting illumination of outside lighting equipment between sunset and sunrise frustrated contract leasing neon sign installations on defendant's place of business, fact that over a year later another governmental order abolished the dim-out requirements did not cause first order to have effect of merely suspending rather than terminating the contract. Civ.Code, § 1511, subd. 1.

Appeal from Municipal Court of City of Los Angeles; Frank G. Tyrrell, Judge.

Action by 20th Century Lites, Inc., against Herman Goodman to recover monthly payments claimed to be due under a written contract whereby plaintiff leased neon sign installations to defendant. From an adverse judgment, plaintiff appeals.

Affirmed.

Harrison Weil, Stanley Phipps and Everett B. Laybourne, all of Los Angeles, for plaintiff and appellant.

Sims & Wallbert and James H. Sims, all of Los Angeles, for defendant and respondent.

KINCAID, Judge.

This appeal arises out of an action commenced by plaintiff to recover certain monthly payments claimed due under a written contract whereby plaintiff leased neon sign installations to defendant in consideration of agreed payments to be made by defendant for the contractual period. The defendant, among other defenses, alleges that by reason of the governmental order of August 5, 1942, prohibiting the illumination of all outside neon or light-

ing equipment between the hours of sunset and sunrise, he has been prevented, without fault on his part, from using such installations during the nighttime, and that such use was the desired object and effect contemplated by the parties at the time of the execution of the contract.

The lease contract of September 3, 1941 is one wherein plaintiff retains the title to the neon signs and tubing which it installed and maintained on the exterior of defendant's "drive-in" restaurant. The court found from the evidence that the parties had each performed all terms and conditions of the contract to August 4, 1942; that on August 5, 1942 the Government of the United States, as an emergency war measure, ordered a cessation of all outside lighting, including neon illuminated signs, at all hours between sunset and sunrise, covering the district in which defendant's place of business is located; that said proclamation of cessation has, during all the time in question, remained in full force and effect, and that, because of this fact, the defendant has been prevented from illuminating such signs during such hours; that subsequent to August 5, 1942 defendant offered to surrender to plaintiff such contract, to terminate same, and to permit plaintiff to remove such signs, but plaintiff refused to accept the offer and thereafter, beginning September 1, 1942, defendant failed to pay the monthly rental payments in the contract set forth.

The trial court properly concluded and found that, by reason of such governmental proclamation, the desired object or effect that the parties to the contract intended to attain at the time it was entered into, was frustrated without the fault of either party on and after August 5, 1942, and that defendant was harmed thereby. It further found that on and after said date both parties to said contract were excused from any further performance of any one of the terms or conditions thereof, and that said contract thereupon terminated.

[1,2] The legal principles which are here applicable are set forth in the case of *Johnson v. Atkins*, 1942, 53 Cal.App.2d 430, 433, 127 P.2d 1027, 1029, wherein the court quotes with approval from Restatement of the Law of Contracts, section 288, as follows: "Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely

will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears.'” To the same general effect such decision further quotes (page 434 of 53 Cal.App.2d, page 1030 of 127 P.2d), from 13 C.J. 642: “Where from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of the person or thing, condition or state of things to which it relates, the subsequent perishing of the person or thing, or cessation of existence of the condition, will excuse the performance, a condition to such effect being implied, in spite of the fact that the promise may have been unqualified.” These principles are apparently recognized by Civil Code, sec. 1511, subd. 1. Among the California cases in support thereof are *Johnson v. Atkins*, supra; *Hackfeld & Co. v. Castle*, 1921, 186 Cal. 53, 198 P. 1041; and *La Cumbre Golf & Country Club v. Santa Barbara Hotel Co.*, 1928, 205 Cal. 422, 271 P. 476.

[3,4] Plaintiff contends that the foregoing principles of law, which have been called the doctrine of commercial frustration, are inapplicable under the terms and conditions of the contract made by the parties herein; that the contractual provisions for block lettering of the signs, thus making them visible in the daytime when they are not illuminated, and the availability of the illumination of the sign during daylight as well as dark hours, demonstrate that there has been no destruction of the subject matter of the contract and that the desired object was not completely frustrated. It argues that the enforced termination of illumination of the signs during the night hours caused only a condition rendering the transaction less attractive and less profitable to defendant.

In considering the soundness of plaintiff's position, it is first necessary to examine the contract in order to ascertain the nature of the “desired object or effect to be attained” by the transaction which the agreement represents. The contract describes the thing leased to defendant as an “electrical advertising display.” The defendant is required to use it at his place of business and not elsewhere. Ordinarily, words of a contract are to be understood in their ordinary or popular sense. (Civil Code, sec. 1644.) Webster's New International Dictionary defines the noun “display” as “An

opening or unfolding; exhibition; manifestation. Ostentatious show; exhibition for effect; parade.” When qualified by the adjective “electrical” it becomes an electrical exhibition or electrical manifestation. In order to be an electrical display, it must use electricity, in which event it then becomes illuminated and is an “electrical advertising display.” Unelectrified, it is merely a display. While unilluminated, it would remain as a sign, still it would not be the “electrical advertising display” which the contract called for and which manifestly was the “desired object or effect to be attained.”

[5,6] The contract is silent as to what hours of the day or night the signs were to be illuminated, although it requires the use of the “electrical advertising display” for a period of 36 months. The absence from the contract of any provision fixing hours of the day or night during which the sign is to be illuminated does not create an uncertainty. The parol evidence was inadmissible for the purpose of interpreting any such claimed uncertainty, but it was properly admitted to show a state of facts to which the doctrine of commercial frustration was applicable. The cases do not hold that such facts must appear on the face of the contract, and the purpose of proving them is not to vary the terms of the contract itself, but to show that a state of facts has arisen which results in its termination. The evidence is admissible, not for the purpose of inserting in the contract a provision requiring the defendant to use the sign at night or forbidding him to use it at any other time, but only to show that its illumination at night was the desired object to be obtained by the parties, and that the possibility of such illumination formed the basis on which both parties entered into the contract.

The defendant testified that he had never at any time illuminated the signs in the daytime, and that at the time of his negotiations with plaintiff's representative for such signs defendant advised plaintiff that he was interested in a neon sign for nighttime illumination for his place of business, which he needed because he was “blocked off more or less on a side street.” Plaintiff's agent then demonstrated a tube which he said was a much larger and brighter neon tube than the ordinary one, and that by installing it in the tower of the building, it would give illumination at night from a great distance and would bring

traffic into his place. Such a tube was ultimately installed as a part of the display.

It is apparent, therefore, that the "desired object or effect to be obtained" by defendant in his hiring of the "electrical advertising display" was the dual purpose of illuminating the exterior of his place of business at night, and the advertising thereof by means of the electrically illuminated signs during the nighttime, whereby passing trade would be notified of the presence of his place of business and would be attracted thereto. The merely incidental facts, that it remained physically possible to illuminate the display with electricity in the daytime and the signs were visible even though unlighted during the daylight hours, are of such inconsequential moment as to have no effect on the application of the rule.

[7] When considered with the fact that all of such neon installations were on the exterior of the building, the required termination of the use of electricity in such signs, between the hours of sunset and sunrise, constituted a "cessation of existence of the condition" which was the "desired object or effect" and was the essential, primary and principal basis for which the signs were rented. The court's finding that such were the facts is substantially supported by the evidence.

[8] We cannot agree with plaintiff's contention that the doctrine of commercial frustration may not be applied unless the defendant can show that the legal prohibition of the use to which the electrical equipment may be put was complete and that such use was entirely prevented for any purpose permitted under the contract of letting. The weight of authority in the United States is to the contrary, and is to the effect that such doctrine may be invoked whenever official governmental action prevents the hirer from using the property for the primary and principal purpose for which it was hired. In such event the contract of hiring is terminated even though other incidental uses might remain available for the thing hired.

[9-10] Such governmental proclamation having, without the fault of either party to the contract, frustrated the "desired object or effect to be obtained," the doctrine of commercial frustration is applied through the means of implying a condition to exist in the contract whereby un-

der such circumstances as are here found, the parties shall be excused from any further performance of its terms. This rule is cited in *Johnson v. Atkins*, supra, 53 Cal. App.2d page 431, 127 P.2d page 1028 wherein an excerpt from the case of *Straus v. Kazemekas*, 100 Conn. 581, 124 A. 234, 238, is quoted as follows: "'Where from the nature of the contract and the surrounding circumstances the parties from the beginning must have known that it could not be fulfilled unless when the time for fulfillment arrived, some particular thing or condition of things continued to exist so that they must be deemed, when entering into the contract, to have contemplated such continuing existence as the foundation of what was to be done; in the absence of any express or implied warranty that such thing or condition of things shall exist the contract is to be construed as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible or the purpose of the contract frustrated from such thing or condition ceasing to exist without default of either of the parties. 12 A.L.R. 1275.'"

The lease contract herein contains no provisions with regard to the contingencies here considered. The right to illuminate the signs at night being the primary foundation essential to the desirability and usefulness of the contract, the termination of that right under the conditions here found results in a situation wherein the contract must be deemed subject to the implied condition that the parties had in mind, at the inception of the contract, that such primary foundation should be continuing in existence. Such being the case the trial court properly held that from and after August 5, 1942 the contract was terminated and both parties thereto were excused from further performance.

[11] Plaintiff argues that, even conceding the facts above referred to as being true, the doctrine of commercial frustration cannot be invoked in this case, because of the fact that it has been put to an expense in manufacturing and installing the signs; that the termination of the contract on such grounds would violate the principles of equity. It relies strongly on the case of *San Joaquin L. & P. Corp. v. Costaloupes*, 1929, 96 Cal.App. 322, 274 P. 84, in support of this contention. The latter case may be distinguished from the one here under consideration, as the court

there held the contract to be one to deliver electrical energy to a certain described piece of land irrespective of its use. Although a fire had destroyed the factory wherein it had been contemplated that the electricity would be used, the court said (page 327 of 96 Cal.App., page 86 of 274 P.): "All that appears here is that by reason of the premises the defendants could not use any more power or light in these particular buildings, but, if at any time, they chose to rebuild or make other use or application of the light and power, they could have enforced their right of delivery of electrical energy." This is a vastly different situation than is presented by the contract and the facts of our case. Here, the plaintiff agreed to furnish an "electrical advertising display" which contemplated its being continuously operatable by electrified illumination at night. Furthermore, the defendant was not in the position of the user of electricity in the cited case, in that he could not relieve his situation by any voluntary act of his own, such as rebuilding his factory or making other use of the hired product. The facts herein are such as to prohibit the application of this exception to the general rule.

[12] The defendant, by way of petition for rehearing, for the first time advanced the proposition that, because of the governmental order of November 1, 1943 abolishing the dim-out requirements, the effect of such dim-out regulation was to merely suspend, rather than terminate, the contract during the approximately fourteen months' existence of such regulation. Rehearing was granted, and this proposition was argued and considered.

Such is not the rule in cases where the doctrine of commercial frustration applies. On the application of such doctrine, the promisor "is *discharged* from the duty of performing his promise * * *." John-

son v. Atkins, supra, 53 Cal.App.2d page 434, 127 P.2d page 1029. (Emphasis added.) On page 433 of 53 Cal.App.2d, on page 1029 of 127 P.2d, we find, "* * *" such a frustration brings the contract to an end forthwith, without more and automatically."

This rule has been recognized by the United States Supreme Court in the case of Allanwilde Transport Corp. v. Vacuum Oil Co., 1918, 248 U.S. 377, 39 S.Ct. 147, 149, 63 L.Ed. 312, 3 A.L.R. 15, where it was urged that the government's embargo on ships leaving American ports during a part of World War I, because of the enemy submarine menace, constituted but a temporary impediment, and therefore did not terminate the contract. In holding to the contrary, the court said: "The duration was of indefinite extent. Necessarily, the embargo would be continued as long as the cause of its imposition—that is, the submarine menace—and that, as far as then could be inferred, would be the duration of the war, of which there could be no estimate or reliable speculation. The condition was, therefore, so far permanent as naturally and justifiably to determine business judgment and action depending upon it."

The cases where the doctrine of commercial frustration, with its immediate termination of the obligations of the promisor applies, are to be distinguished from that type of case wherein such doctrine is inapplicable and the governmental embargo or regulation is not a permanent prohibition but is temporary only. The case of United States Trading Corp. v. Newmark G. Co., 1922, 56 Cal.App. 176, 186, 205 P. 29, is of the latter class, and does not conflict with the rule heretofore enunciated.

The judgment is affirmed, respondent to recover his costs of appeal.

SHAW, P. J., and FOX, J., concur.

24 Cal.2d 290

ZINN et al. v. EX-CELL-O CORPORATION et al.
S. F. 16814.

Supreme Court of California.

May 22, 1944.

As Modified on Denial of Rehearing
June 19, 1944.

1. Corporations ⚭617(2, 5)

Dissolution of corporation prevented effectual rescission of sale of the capital stock therein and left an action which originally was in the alternative for rescission or damages based on alleged fraudulent procurement of sale as an action for damages for fraud only.

2. Fraud ⚭58(1)

In stockholders' action for fraudulent procurement of sale of agency corporation's capital stock, evidence did not sustain finding that stockholders would have sold their stock at price paid for it if they had known that their efforts had been rewarded by a contract for sale of machines from principal.

3. Contracts ⚭94(1)

A single material misstatement, knowingly made with intent to influence another into entering into a contract, will, if believed and relied on, afford complete ground for rescission.

4. Corporations ⚭174, 307

There is no such privity between officers or stockholders of a corporation as to impute the knowledge of one to another in his individual capacity.

5. Fraud ⚭58(1)

Finding that termination of agency contract rendered valueless agency corporation's capital stock, the sale of which allegedly was procured by fraud, was not sustained by evidence showing that at time of misrepresentations corporation had prospects for placing principal's machines, which if contracts therefor were placed within reasonable time would give corporation's stock a value of some \$100,000 or more.

6. Principal and agent ⚭82

Where agency contract for sale of machines called for 12½ per cent. commis-

sion of all rental payments received by principal, but principal reserved right to adopt other methods of placing machines and exercised that right in sale of one machine, some commission was payable to agent on the purchase price, and the 12½ per cent. rate would at least prima facie establish rate of commission to be paid in case of sales.

7. Brokers ⚭52

A broker having obtained an option is entitled to a commission when customer exercises option within the life thereof by entering into the transaction which broker was employed to negotiate.

8. Principal and agent ⚭81(5)

An agent selling goods on commission is entitled to a commission on goods sold by him during continuance of the agency, though goods were not delivered or paid for or even though orders were not received by principal until after termination of agency relationship.

9. Principal and agent ⚭81(5)

Where agency contract contemplates that agent shall receive compensation for sales of which agent was the procuring cause, agent is entitled to commission on sales procured by him though sales were actually consummated by principal after termination of the agency.

10. Principal and agent ⚭81(5)

Where services to be performed by agent are severable, agent may, in absence of a contrary provision in agency contract, recover for services performed before termination of the relationship.

11. Principal and agent ⚭81(5)

Distributing agent, having brought about execution of contract for the purchase of a machine from principal subject to trial with option to purchase additional machines on specified terms, was entitled to commissions on whatever sales were made pursuant to such contract, though in meantime, agency contract was forfeited for agent's breach thereof.

12. Fraud ⚭59(3)

The measure of damages for fraudulent procurement of sale of capital stock was the difference in actual value between what stockholders received and what the shares were in fact worth, the "actual value" of the stock being determined by the

worth of the corporate assets, not the "market value" of the stock. Civ.Code, § 3343.

See Words and Phrases, Permanent Edition, for all other definitions of "Actual Value" and "Market Value".

13. Fraud ⚡57

In determining measure of damages for fraudulent procurement of sale of capital stock, future profits may be shown for the light they throw on actual value of the stock at time of its fraudulent purchase. Civ.Code, § 3343.

14. Damages ⚡6

One whose wrongful conduct has rendered difficult the ascertainment of damages cannot escape liability because damages cannot be measured with exactness.

15. Fraud ⚡9, 57

Stockholders who relied on false representations that agency corporation had placed no machines for its principal, inducing belief that when agency contract was canceled the stock in agency corporation would be valueless, could recover damages on showing that subsequent sales of principal's machines were made as result of efforts of corporation under canceled contract, and such sales should be considered in computing value of stock sold. Civ. Code, § 3343.

In Bank.

Action by J. A. Zinn and others against Ex-Cell-O Corporation and others to rescind a sale by plaintiffs to named defendant of shares of the capital stock of Sealed-Pure Systems, Inc., or to recover damages for alleged fraudulent procurement of such sale. From a judgment for defendants, plaintiffs appeal.

Affirmed as to one defendant and reversed as to other defendants.

Prior opinion, Cal.App., 141 P.2d 948.

Livingston & Livingston, David Livingston, and Louis F. Di Resta, all of San Francisco, for appellants.

Webb, Webb & Olds, U. S. Webb, and Walter K. Olds, all of San Francisco, for respondents.

PER CURIAM.

Plaintiffs instituted an action for rescission or damages based on the alleged fraudulent procurement of the termination

of an agency contract and the sale by them to defendant Ex-Cell-O Corporation (hereinafter referred to as Ex-Cell-O) of shares of capital stock of Sealed-Pure Systems, Inc., (hereinafter referred to as Sealed-Pure). Judgment in the trial court was in favor of the defendants. The plaintiffs appealed.

The question presented is whether the findings of the trial court are supported by the evidence and furnish support for the judgment.

On October 30, 1937, plaintiff Zinn and his associates procured from Ex-Cell-O, a manufacturer of machines designed to make cardboard milk containers, an exclusive agency contract, which provided that within ninety days plaintiffs should place three machines, and within six months they should place one machine in Seattle, one in either Oakland or San Francisco, and one in Los Angeles, all under lease-royalty contracts with the manufacturer. Plaintiff and his associates then incorporated Sealed-Pure, with a capital stock of 10,000 shares of no par value, and, with the consent of Ex-Cell-O, assigned to it the agency contract in return for stock. The defendant Malkson received stock in return for cash. One machine was immediately placed with Gold Star Creameries (hereinafter referred to as Gold Star), a corporation in which Zinn and his associates were stockholders. This is conceded to have been a substantial compliance with the requirement that a machine be placed in Seattle, but no other machines were placed within the ninety-day or six-month periods. Gold Star had financial difficulties, and Sealed-Pure, apparently with the acquiescence of Ex-Cell-O, lent considerable money to Gold Star in the belief that it would be fatal to the prospect of placing other machines in the Pacific Coast territory if the first one installed there should be a failure. As a result of these loans Sealed-Pure also encountered financial difficulties, and discord arose among its promoters.

In February, 1938, the sales manager of Ex-Cell-O went to Seattle and arranged that Sealed-Pure should open an office in San Francisco with defendant Malkson as general manager, and that Zinn should devote his attention exclusively to the business of Gold Star. From the time the arrangement was made, Malkson had charge of Sealed-Pure's activities. Gold Star con-

tinued to operate at a loss and was unable to pay the moneys due Sealed-Pure. As a result, Malkson was short of funds and Ex-Cell-O made advances to him on the security of the Gold Star notes.

During all of this time Ex-Cell-O took no steps to cancel the agency agreement. In January, 1938, it expressly agreed to an extension of the ninety-day period provided aggressive sales efforts were made. Zinn, and later Malkson, devoted much time in attempting to place machines with Lucerne Cream and Butter Company, a subsidiary of Safeway Stores, Inc. (hereinafter referred to as Safeway), which operated chain stores in the Pacific Coast territory. By July, 1938, these negotiations reached the point where Safeway requested that an officer of Ex-Cell-O come to San Francisco for the purpose of negotiating a contract. At the request of Malkson, defendant Bixby secretary-treasurer of Ex-Cell-O, went from Detroit to San Francisco, and on July 25th, he and Malkson obtained a contract with Safeway for the placing in Oakland of one machine on ninety days' trial, with an option to purchase it for \$32,500, and additional machines at \$37,500 each. As part of the same transaction they received a purchase order for the trial machine at \$32,500.

While in San Francisco, Bixby told Malkson that Ex-Cell-O planned to cancel the Sealed-Pure agency contract. Malkson expressed his regret, but asked Bixby to engage him as Pacific Coast agent if that were done. Bixby proceeded to Seattle and three days after the Safeway contract was signed, on July 28th, met Zinn and his associates. Bixby told them that Sealed-Pure had failed to place any machines in California as required by the agency contract, and that Ex-Cell-O was going to abolish the agency, in which event the Sealed-Pure stock would be valueless. Zinn and his associates first demurred to the proposed cancellation and made unsuccessful attempts to raise additional funds. They then negotiated with Bixby for the sale of their Sealed-Pure stock to Ex-Cell-O, and Bixby told them he would try to get one dollar a share for them. Zinn then said to Bixby in the presence of others, "How do I know you haven't already got an order in your pocket or have made some deal we don't know anything about?" Bixby replied, "If I had an order in my pocket or had made any deal I would tell you

about it." Bixby denied that this conversation took place but he did not reveal that an agreement had theretofore been made with Safeway for the installation of one machine and for an option to purchase others.

On August 1st Ex-Cell-O wrote Sealed-Pure cancelling the agency agreement, and negotiations were entered into for the sale of the Sealed-Pure stock to Ex-Cell-O. These negotiations were completed, and the transfer of the stock was made on August 30th. Subsequently Sealed-Pure was dissolved by Ex-Cell-O, and Ex-Cell-O appointed Malkson its Pacific Coast agent. Within a short time Safeway bought six machines. It may not be questioned that these machines had been placed through the efforts of Malkson on behalf of Sealed-Pure.

[1] When Zinn learned of the Safeway installation at the end of August, 1938, he took no action. The testimony disclosed that, relying on Bixby's representations, the plaintiffs believed that the installation was made pursuant to an arrangement effected by Ex-Cell-O after the Sealed-Pure agency agreement was cancelled, and it was not until January, 1939, when Zinn learned that a large quantity of cardboard for milk bottles had been ordered by Safeway on August 1, 1938, that he suspected for the first time that a machine had already been placed by Sealed-Pure when Bixby's representations were made. He immediately instituted an investigation. This action was then brought to rescind the sale to Ex-Cell-O of Sealed-Pure stock, or for damages. Rescission being impossible by reason of the dissolution of Sealed-Pure, the plaintiffs abandoned that claim and sought damages only.

The trial court found that Bixby made the representations alleged, that the same were false, and that plaintiffs believed and relied upon them; but further found that even had plaintiffs known that the representations were false they would not have rejected defendants' offer to purchase their stock at the price paid. The court also found that Sealed-Pure was in default under its contract with Ex-Cell-O; that Ex-Cell-O had a right to declare the contract forfeited; that plaintiffs were entitled to notice of the intended termination and cancellation and to a reasonable time within which to comply with the terms and conditions before a forfeiture thereof could be

declared, but that plaintiffs waived their right to notice and to time within which to comply with the contract; that both plaintiffs and defendants acquiesced in the cancellation of the contract by Ex-Cell-O.

[2] The evidence is insufficient to support the finding that plaintiffs would have sold their stock at the price paid for it if they had known that their efforts had been rewarded by the contract with Safeway.

[3] Both the evidence and the findings are clear to the effect that the false representation was believed and relied upon by the plaintiffs. This court has held that "a single material misstatement, knowingly made, with intent to influence another into entering into a contract, will, if believed and relied on by that other, afford as complete ground for rescission as if it had been accompanied by a multitude of other false representations." *Davis v. Butler*, 154 Cal. 623, 98 P. 1047, 1048; see, also, 12 Cal.Jur. 741, and cases there cited.

[4] The defendants seek to impute Malkson's knowledge as an officer of Sealed-Pure to the plaintiffs. That knowledge may not be so imputed. There is no privity between the officers and stockholders of a corporation which would impute the knowledge of one to another in his individual capacity. *Pitman v. Walker*, 187 Cal. 667, 670, 203 P. 739.

[5] The court's further finding that the effect of the cancellation of the agency contract was to render the stock of Sealed-Pure valueless is also without substantial support in the evidence. The evidence shows value, and the trial court recognized value and the falsity of Bixby's representation as to lack of value by its finding that at the time the representation was made by Bixby, Sealed-Pure had prospects for the placing of certain of the machines, which, if contracts therefor were placed within a reasonable time, would give the stock of Sealed-Pure "a value of \$100,000 or more as alleged by plaintiffs."

[6] The agency contract called for a 12½ per cent commission to Sealed-Pure of all rental payments received by Ex-Cell-O, but Ex-Cell-O reserved the right to adopt other methods of placing the machines than by lease-royalty, and in the case of the contract with Safeway it exercised that right. Under those circumstances some commission would be payable to Sealed-Pure on the purchase price, and the

12½ per cent commission fixed in the contract as commission on lease-royalty agreements would at least prima facie establish the rate of commission to be paid in case of sales.

[7] It is apparent that when Sealed-Pure brought about the execution of the contract with Safeway it had done all that was required by the agency contract as modified, to entitle it to receive commissions if thereafter Safeway elected to purchase one or more machines pursuant thereto. The applicable rule is stated in 12 C.J.S., Brokers, § 86, p. 200: "Although the broker has obtained only an option, he is entitled to a commission when the customer exercises the option, within the life thereof, by entering into the transaction which the broker was employed to negotiate." To the same effect are: *Dinkelspiel v. Nason*, 17 Cal.App. 591, 120 P. 789; *Mitchell v. Derby Oil Co.*, 117 Kan. 520, 232 P. 224; *Finnerty v. Stratton's Estate*, 53 Colo. 17, 123 P. 667; *Snead v. Wood*, 24 Ga.App. 210, 100 S.E. 714; *Mahoney v. Pitman*, Tex.Civ.App., 43 S.W.2d 143; *Campbell v. Rawlings*, 52 App.D.C. 37, 280 F. 1011; 8 Am.Jur. 1094.

[8-10] Having fully performed the service which would entitle Sealed-Pure to commissions upon sales subsequently made under the trial-option agreement, the only question remaining is the effect of the termination of the agency contract upon the agent's right to commissions.

The applicable rule with supporting authorities is stated in 3 C.J.S., Agency, § 187, p. 88: "The rule that the agent is entitled to recover for services rendered before his discharge is particularly applicable where the contract of agency is severable. Accordingly, an agent selling goods on commission is entitled to a commission on goods sold by him during the continuance of the agency, although the goods were not delivered or paid for, or even where the orders were not received by the principal, until after the termination of the relationship. If the contract contemplates that the agent shall receive compensation for sales of which the agent was the procuring cause, the agent is entitled to a commission on sales procured by him although the sales were actually consummated by the principal after the termination of the agency." And § 189, at page 91 of the same volume: "Where the services to be performed by the agent are severable, he may,

in the absence of a contrary provision in the agency contract, recover for services performed before the termination of the relationship."

The rule is applied in cases involving similar situations. *Brea v. McGlashan*, 3 Cal.App.2d 454, 39 P.2d 877; *Sackett v. Centaur Motor Co.*, 189 Ill.App. 372; *S. H. Greene & Sons v. Freund*, 2 Cir., 150 F. 721, 80 C.C.A. 387; *White Co. v. W. P. Farley & Co.*, 219 Ky. 66, 292 S.W. 472, 52 A.L.R. 541; *Crosby v. Pacific S. S. Lines*, 9 Cir., 133 F.2d 470.

In *Sackett v. Centaur Motor Co.*, supra, plaintiff had an agency for the sale of automobiles on a commission "of the gross sales emanating" through his office. He was discharged and claimed commissions on automobiles sold on orders given after his discharge pursuant to what amounted to options arranged by him before discharge. The court said at page 375 of 189 Ill.App.: "If the alleged contracts were nothing more than arrangements, when an 'arrangement' with a prospective purchaser ripens into a sale, it gives a right to the agent to a commission for the reason that the agent's efforts are the efficient cause of the sale."

[11] The rule exists for the protection of the agent and is applicable to the undisputed facts of this case. Sealed-Pure "obtained" Safeway as a buyer pursuant to the contract brought about by it, and was entitled to the commissions on such sales despite the termination of its agency. For this reason the termination of the agency contract did not render the stock of Sealed-Pure valueless as found by the trial court.

[12-14] The evidence and the findings settle the plaintiffs' right to a recovery of the difference in the value of the stock by reason of the prospective sales brought about by the efforts of Bixby and Malkson on behalf of Sealed-Pure, and the amount which the plaintiffs actually received for their stock. Section 3343 of the Civil Code provides that one defrauded in the sale of property is entitled to recover the differ-

ence between the actual value of that with which he parted and the actual value of that which he received. The value of the stock is to be determined by the worth of the corporate assets, not the "market value" of the stock. Note in 57 A.L.R. 1153, and cases therein collected. Future profits may be shown for the light that they throw on the value of the stock at the time of its fraudulent purchase. *Hacker Pipe & S. Co. v. Chapman Valve Mfg. Co.*, 17 Cal.App.2d 265, 271, 61 P.2d 944; *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N.Y. 205, 4 N.E. 264, 54 Am.St.Rep. 676. In *Sinclair Refining Co. v. Jenkins, etc., Co.*, 289 U.S. 689, 53 S.Ct. 736, 739, 77 L.Ed. 1449, 88 A.L.R. 496, the Supreme Court stated: "To correct uncertain prophecies in such circumstances is not to charge the offender with elements of value nonexistent at the time of his offense. It is to bring out and expose to the light the elements of value that were there from the beginning." One whose wrongful conduct has rendered difficult the ascertainment of the damages cannot escape liability because the damages could not be measured with exactness. *Pacific, etc., Co. v. Alaska Packers' Ass'n*, 138 Cal. 632, 638, 72 P. 161; 15 Am.Jur. 412, and cases cited.

[15] The plaintiffs in any event are entitled to recover on the showing that subsequent sales to Safeway were made as a result of the efforts of Sealed-Pure under the cancelled contract and those sales should be taken into consideration in computing the value of the stock sold. Whether by reason of the termination of the agency contract Sealed Pure was entitled to recover against Ex-Cell-O for wrongful repudiation of the agency contract is a matter bearing upon any possible additional damages.

The record shows that Malkson was not a party to the false representations. The judgment as to that defendant is therefore affirmed. As to the defendants Ex-Cell-O Corporation and Bixby the judgment is reversed.

64 Cal.App.2d 674

PEOPLE v. MEYER.

Cr. 3783.

District Court of Appeal, Second District,
Division 2, California.

June 1, 1944.

Hearing Denied June 29, 1944.

Criminal law §1182

Where evidence was overwhelming that defendant was guilty of infamous crime against nature and of lewd and lascivious conduct upon 13 year old boys and the trial was fairly conducted and the rulings complained of, if erroneous, were of a trivial nature which did not result in a miscarriage of justice, the conviction would be affirmed. Pen.Code, §§ 286, 288.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Frederic Meyer was convicted of the infamous crime against nature, and of lewd and lascivious conduct upon the private parts of 13 year old boys, and he appeals.

Judgment affirmed.

Morris Lavine, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

W. J. WOOD, Justice.

Defendant was found guilty by a jury on eight counts of an information containing six counts charging the commission of the infamous crime against nature, Sec. 286 of the Penal Code, and four counts charging lewd and lascivious conduct upon the private parts of thirteen year old boys, Sec. 288 of the Penal Code. The boy mentioned as the victim in counts V and VI, not having been served with process of the court, did not appear at the trial and counts V and VI were dismissed. The five boys mentioned as victims in the other counts gave testimony detailing the actions of defendant on their persons at a summer camp for boys, which was being conducted by defendant. Their testimony clearly established defendant's guilt of the various charges.

There is no occasion to again besmirch the records of this court by here setting out in detail the actions of defendant as related by the boys involved. The evidence

of guilt was overwhelming. The trial was fairly conducted. The rulings complained of, if erroneous, were of a trivial nature, which did not result in a miscarriage of justice.

The judgments are affirmed.

McCOMB, J., concurs.

MOORE, P. J., took no part in the consideration or decision of this case.



In the Matter of the **ESTATE of Viola G. SANDERS, Deceased.**

Edith Sanders STEWARD, Benjamin Sanders, and Helen Sanders Boehner, Respondents, v. Minnie Maude STODDARD, Appellant.

Civ. 3274.

District Court of Appeal, Fourth District,
California.

June 5, 1944.

Appeal from a decree of the Superior Court of Orange County determining heirship; Franklin G. West, Judge.

A. D. Orme, George S. Carter, and C. C. Hamill, all of Pasadena, for appellant.

Forgy, Reinhaus & Forgy, of Santa Ana, and Leslie P. Kimmell, of Long Beach, for respondents.

PER CURIAM.

On stipulation of all parties to this appeal, duly filed herein, it is hereby ordered that the Decree Determining Heirship, dated November 8, 1943, from which this appeal was taken, is hereby modified by striking therefrom the second paragraph, reading as follows:

"It is ordered, adjudged and decreed that Minnie Maude Stoddard, sister of the above named decedent, be and she is entitled to distribution from the said estate of Certificate No. 48 evidencing seven shares of stock of Sheldon University Press standing in the name of V. G. Miller which was

the maiden name of the above named decedent; the said Minnie Maude Stoddard is further entitled to distribution from said estate of old coins in the sum of \$64.00 and in addition thereto of the sum of \$768.04; that the brother and sisters of Leslie L. Sanders, predeceased husband of the above named decedent, said brother and sisters being named as follows, to-wit: Ben E. Sanders, Edith Sanders Steward and Helen Sanders Boehner, are entitled to distribution of all of the rest, residue and remainder of said estate."

And inserting in lieu thereof the following:

"It is ordered, adjudged and decreed that Minnie Maude Stoddard, sister of the above named decedent, is entitled to have distributed to her one-half of the estate of Viola Glen Sanders, deceased, and that Benjamin Sanders (sometimes called Ben E. Sanders), Edith Sanders Steward and Helen Sanders Boehner, are entitled to distribution of all of the rest, residue and remainder of said estate."

As so modified the decree appealed from is affirmed. Each party to pay his own costs on appeal, and, by stipulation, the remittitur shall issue forthwith.



64 Cal.App.2d 567

UNITED STATES FIDELITY & GUARANTY CO. v. POSTEL et al.

Civ. No. 12609.

District Court of Appeal, First District,
Division 1, California.

May 27, 1944.

As Modified June 1, 1944.

1. Fraudulent conveyances ⇨298(1), 299(1)

In action by surety on guardian's bonds against guardian and her attorney, to whom she assigned her interest in assets of her deceased husband's estate as consideration for professional services, to set aside the assignment after surety paid judgment for guardian's default, evidence was insufficient to show that assignment was intended to defraud plaintiff.

2. Fraudulent conveyances ⇨295(1)

The fact that assignment was fraudulent as to assignor's creditors must be proved by clear and convincing evidence.

3. Fraudulent conveyances ⇨91

The fact that debt or part thereof is barred by statute of limitations does not invalidate assignment of claim based thereon as defrauding assignor's creditors, unless fraud be proven as fact.

4. Fraudulent conveyances ⇨86, 88

The extinguishment of security or pre-existing debt constitutes valuable consideration for sale or assignment of property.

5. Fraudulent conveyances ⇨115(1)

A debtor may prefer one creditor to another, in absence of fraud. Civ.Code, §§ 3431, 3432.

6. Fraudulent conveyances ⇨115(1)

The fact that debtor's preference of one creditor to another, as authorized by statute, hinders or delays other creditors in collection of their claims against debtor, or fact that preferred creditor has knowledge of such consequence, does not render preference void. Civ.Code, § 3432.

7. Fraudulent conveyances ⇨77

A guardian's assignment to her attorney of claim against her deceased husband's estate for \$17,966.55 in consideration of legal services reasonably worth over \$20,000 after surety on her bonds obtained judgment against her for amounts paid by surety to satisfy wards' judgments against guardian, was supported by valid consideration, and hence binding, though it rendered guardian insolvent and constituted preference of one of her creditors over such surety and other creditors.

8. Fraudulent conveyances ⇨91

The Uniform Fraudulent Conveyance Act, defining "fair consideration," does not exclude promise to pay debt barred in part by statute of limitations, if fair consideration is given in good faith by respective parties. Civ.Code, §§ 3439 et seq., 3439.03.

9. Executors and administrators ⇨115, 220

The purpose of statute providing that no executor or administrator may purchase any property of or claim against decedent's estate is to forbid such representative from directly or indirectly purchasing such property or claim for his own advantage and to estate's detriment. Probate Code, § 583.

10. Executors and administrators ⇨115

The statute prohibiting administrator from purchasing any property of or claim against decedent's estate is only declaratory of pre-existing legal principle that a trustee must not deal with himself, and hence does not prevent decedent's heirs from making contract with administrator as one of heirs for division of estate. Probate Code, § 583.

11. Executors and administrators ⇨220

An administrator has no right to be interested, directly or indirectly, in purchase of claim against decedent's estate before court's approval thereof, but may accept assignment of claim in payment of claimant's personal indebtedness to administrator if claim has acquired legal status before assignment, as in case of widow's claim against her deceased husband's estate for alimony awarded her by interlocutory decree of divorce from husband. Probate Code, § 583.

12. Executors and administrators ⇨220

An administrator's acceptance of assignment of approved claim of decedent's widow against decedent's estate in consideration of legal services, worth more than amount of claim, as claimant's attorney in connection with other matters than such claim, did not violate statute prohibiting administrator from purchasing any property of or claim against estate, in absence of showing of resulting injury to any heir of decedent or any one interested in estate. Probate Code, § 583.

13. Executors and administrators ⇨220

Transactions in violation of statute prohibiting administrator from purchasing or being interested in purchase of any property of, or claim against, decedent's estate are not void, but only voidable at instance of parties interested in estate. Probate Code, § 583.

14. Executors and administrators ⇨220

A surety company, recovering judgment against guardian for amounts paid by such company as surety on guardian's bonds to satisfy ward's judgments against guardian, had no interest in guardian's deceased husband's estate, and hence could not attack validity of guardian's assignment of her claim against such estate to her attorney, who was administrator of estate, in consideration of legal services, as violating statute prohibiting administrator from purchasing property of or claim against estate. Probate Code, § 583.

15. Appeal and error ⇨1184

Where respondent died on a date subsequent to submission of the appeal, the appellate court ordered that the judgment be filed nunc pro tunc as the date of the submission of the appeal.

Appeal from Superior Court, City and County of San Francisco; Robert W. McWilliams, Judge.

Action by the United States Fidelity & Guaranty Company against Waldo F. Postel, individually and as administrator of the estate of Arthur W. Keck, deceased, and Lizzie Keck, to set aside defendant Keck's assignment of her interest in the assets of the estate to defendant Postel. Judgment for defendants, and plaintiff appeals.

Affirmed.

J. A. Chase, of Visalia, for appellant.

Waldo F. Postel, of San Francisco, for respondents.

WARD, Justice.

On May 22, 1925 the plaintiff, a surety company, at the request of Lizzie B. Keck issued to her three surety bonds, each in the amount of \$2,600, and being respectively in favor of the three minor children of herself and her husband Arthur W. Keck. The bonds were given to assure the faithful discharge by Mrs. Keck of her duties as the duly appointed guardian of the minors.

Mrs. Keck subsequently, and while the bonds were in full force, defaulted in accounting for the funds of the minors which had come into her possession as guardian, and by reason thereof each of said minors brought suit and secured judgment against the surety company in the sum of \$2,771.03. The surety company paid the judgments and thereafter filed an action against Mrs. Keck upon her original application for the bonds and the indemnity agreement contained therein, and obtained judgment against her for the aggregate of the amounts paid by it upon the bonds.

In 1931 an interlocutory decree of divorce was granted Mrs. Keck, which provided for payment of alimony by her husband in the sum of \$100 a month. No payments were made on account of said alimony nor was a final decree of divorce ever entered. Mr. Keck died intestate in November of 1941 and the defendant herein, Waldo F. Postel, who had acted as attorney for Mrs. Keck in various matters over a number of years, was, at her re-

quest, appointed administrator of Keck's estate, which was appraised at \$20,455.18. Based upon the sum due and payable in her judgment for alimony, Mrs. Keck filed a creditor's claim against her husband's estate in an amount of \$17,966.55, which claim was duly allowed.

On January 26, 1942 Mrs. Keck made, executed and delivered to her attorney, Postel, an assignment of all her right, title and interest in and to the estate of her husband, and to all the assets of said estate. The consideration for the execution of the assignment was professional services, and costs in connection therewith, rendered by Postel over a number of years commencing in 1928; also amounts loaned her by him from time to time. Mrs. Keck testified that she was altogether satisfied that Postel, her attorney in all of the litigation, should receive what there was; that she did not think the claim of the surety company just and did not feel she owed it anything. On July 10, 1942, by virtue of its judgment against Mrs. Keck the surety company levied on all the assets of the estate of her deceased husband.

[1,2] On the trial the reasonable value of the legal services rendered was testified to be in excess of \$20,000. There is no evidence that they were of a lesser value. To that extent it must be assumed that there was an adequate consideration for the assignment. It is contended by appellant that the assignment was motivated by an intent to defraud it and other creditors. There is no evidence of an intent to defraud other creditors, or that any were in fact defrauded. The only evidence introduced was documentary, plus the testimony of Mrs. Keck and Postel. Postel testified that Mrs. Keck suggested the assignment and that at her request he prepared the necessary instruments. Mrs. Keck testified that she "phoned" Postel and told him to prepare the papers and bring them to her; that she understood she was conveying all of her interest in the estate to Postel, who had represented her in previous litigation covering a number of years and had given her financial aid. She testified further: "He did more for me than anybody in this world or anybody's family would do for them, as far as carrying me as he did; took care of everything; he is surely entitled to it, and I hope he does get plenty out of it, whatever it might be."

There is nothing in the documentary evidence or in any inference that may be drawn therefrom indicating that the transaction was fraudulent, a fact which must be proved by clear and convincing evidence. The court on this issue found against appellant. The record in this respect does not disclose evidence justifying a contrary finding. *Raine v. Spreckels*, 54 Cal.App.2d 169, 128 P.2d 709.

[3-7] The assignment by Mrs. Keck appears to have rendered her insolvent. Appellant contends that the consideration was not in fact a fair one. If this is so the assignment as a matter of law is void. The services by Postel were rendered not only prior to the assignment but prior to the death of Mr. Keck. As previously stated the evidence of their value was not successfully attacked. It is urged that part of the claim for services is barred by the statute of limitations. The fact that a debt or part thereof is so barred does not invalidate an assignment of a claim based thereon unless fraud be proven as a fact. In *Ferguson v. Larson*, 139 Cal.App. 133, 135, 136, 33 P.2d 1061, 1062, this court said: "The fact that the debt may be barred by the statute of limitations can affect the remedy only, but in no degree can it release the debtor of the moral duty of paying it. Although the note was barred by said statute it constituted a good and valuable consideration. *Hoover v. Wasson*, 11 Cal.App. 589, 105 P. 945; *Manchester v. Tibbetts*, 121 N.Y. 219, 24 N.E. 304, 18 Am.St.Rep. 816; 12 R.C.L. 576. It is well settled in this state that the extinguishment of security or a pre-existing debt constitutes a valuable consideration for the sale or assignment of property. *Hart v. Church*, 126 Cal. 471, 480, 58 P. 910, 59 P. 296, 77 Am.St.Rep. 195. It is also a well-settled law of this state that in the absence of fraud a debtor may prefer one creditor in preference to another. Section 3431 of the Civil Code provides: 'In the absence of fraud every contract of a debtor is valid against all his creditors, existing or subsequent, who have not acquired a lien on the property affected by such contract.' Section 3432 of the same Code provides: 'A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another.' The statutory right of a debtor to prefer one creditor to another

is based upon the principle that in the absence of fraud the owner of property may do with it as he pleases (*Heath v. Wilson*, 139 Cal. 362, 73 P. 182), nor does the fact that such preference hinders or delays other creditors in the collection of their claims render it void, nor the fact that the preferred creditor had knowledge that such consequence would follow the preference. 12 Cal.Jur. 1010, 1011; In the Matter of Muller & Kennedy, 118 Cal. 432, 50 P. 660; *Priest v. Brown*, 100 Cal. 626, 35 P. 323." See *Easton v. Ash*, 18 Cal.2d 530, 116 P.2d 433; *McGee v. Allen*, 7 Cal. 2d 468, 60 P.2d 1026; *Hibernia Sav. & Loan Soc. v. Belcher*, 4 Cal.2d 268, 48 P. 2d 681; *Chichester v. Mason*, 43 Cal.App.2d 577, 111 P.2d 362. In view of the holdings in the cases cited, the consideration was valid.

[8] Appellant argues that this rule has been changed by the passage of the Uniform Fraudulent Conveyance Act of 1939, wherein a definition of "fair consideration" is given. (See Civil Code, Div. 4, Pt. 2, Tit. 2, secs. 3439 et seq., Stats.1939, Ch. 329, p. 1667.) Nothing in the wording of the act indicates that it was intended to exclude a promise to pay a debt barred in part by the statute of limitations if there was in fact a fair consideration given in good faith by the respective parties. Sec. 3439.03.

[9] Appellant contends that since Postel, the administrator of the estate, took an assignment from Mrs. Keck of her approved claim against the estate, the record raises the issue whether or not such acceptance of the assignment violated Probate Code, section 583, which provides: "No executor or administrator may purchase any property of the estate, or any claim against the estate, directly or indirectly, nor be interested in any such purchase."

The purpose of the section is to forbid an administrator or executor from directly or indirectly purchasing the property of an estate or a claim against it for his own advantage and to the detriment of the estate. If an administrator is interested even indirectly in a claim which works to the detriment of an estate, he is false to the trust imposed in his acceptance of the obligation to administer the estate and perform the duties required by law, including the protection of the rights of heirs, devisees, legatees, creditors and all who have a legal interest in the estate.

[10] An administrator may not deal with himself. 11 Cal.Jur. 864, sec. 516. This rule does not prevent heirs from making a contract with him as one of the heirs for the division of the estate. Section 583 based upon section 1576 of the Code of Civil Procedure "is only declaratory of the principle of law existing before its enactment, that a trustee must not deal with himself. *Burris v. Adams et al.*, 96 Cal. 664, 31 P. 565." *Baker v. Miller*, 190 Cal. 263, 269, 212 P. 11, 13. In the last cited case it was definitely held that an administrator could make a contract with other heirs for the division of an estate.

[11] An administrator has no right directly or indirectly to be interested in the purchase of a claim before its approval by the court, but he may accept a claim in payment of a personal indebtedness if the claim has acquired a legal status prior to its assignment as appears from the record in this case. 11 Cal.Jur., p. 1038, sec. 665; *Dudley v. Dudley*, 300 Mass. 270, 15 N.E. 2d 212, 117 A.L.R. 1371; 11 Cal.Jur. 864; *Burnett v. Lyford*, 93 Cal. 114, 28 P. 855; In re Estate of McDougald, 146 Cal. 191, 79 P. 878.

Cases cited by appellant are not controlling as applied to the facts of this case. In *Jones v. Hanna*, 81 Cal. 507, 22 P. 883, the executrix sought "to make a profit to herself" on a purchase of property for the estate. In *Re Estate of Watkins*, 121 Cal. 327, 53 P. 702, the administrator appeared in the dual capacity of trustee of the estate funds and as the representative of a creditor who had given him a power of attorney to collect a claim against the estate. At page 328 of 121 Cal., at page 703 of 53 P., the court said: "* * * the authority to sign a receipt, conferred by the power of attorney, was but an incident of the authority to collect the money. It necessarily follows that when he became administrator of the estate the operation of the power from Mrs. Lawrence was suspended, if, indeed, his agency for her was not entirely renounced." In *Re Estate of Boggs*, 19 Cal.2d 324, 121 P.2d 678, an executrix appropriated rental which she claimed as her personal property. The Supreme Court disapproved an arbitrary apportionment and said (19 Cal.2d at page 334, 121 P.2d at page 684): "* * * a further hearing of this matter should be had in the probate court for the purpose of determining the reasonable rental value of her furniture for the period mentioned."

[12] In the present case the administrator was not dealing with himself as administrator, but with a claimant against the estate. He did not represent Mrs. Keck as attorney in connection with the claim. He did not appear in a dual capacity. If injury resulted to an heir, etc., or to any one interested in the estate, such fact does not appear in the record. In addition the trial court found that there was a fair consideration for the assignment.

The judgment upon which execution issued was a judgment against Lizzie B. Keck. It was her interest in the husband's estate that was sought in satisfaction of appellant's judgment. If Mrs. Keck, though insolvent, preferred to pay the indebtedness to Postel rather than appellant's judgment, appellant's remedy lay in bankruptcy proceedings. Civil Code, sec. 3432; *Appling v. Brueckner*, 97 Cal.App. 750, 276 P. 382.

[13,14] Assuming section 583 applies to claims already approved by the administrator and the court, and therefore in the status of a "quasi" judgment when assigned to the administrator, the answer to the contentions of appellant, based upon section 583, is that appellant is in no position to rely on that section, which was intended to protect those interested in an estate from being legally injured by the acts of an administrator. Transactions in violation of section 583 are not void—only voidable. *Boyd v. Blankman*, 29 Cal. 19, 87 Am.Dec. 146; *O'Connor v. Flynn*, 57 Cal. 293; *Burris v. Kennedy*, 108 Cal. 331, 41 P. 458. They are "voidable only at the instance of those interested in the estate." *Santos v. Santos*, 32 Cal.App.2d 62, 65, 89 P.2d 164, 166. In *Boyd v. Blankman*, supra, 29 Cal. at page 36, 87 Am.Dec. 146, the court said: "An examination of the Probate Act will disclose the intent of section one hundred and ninety-three [subsequently enacted as Code of Civil Procedure, sec. 1576, which was used as the basis for the first clause of Probate Code section 583]; and it is apparent that the object was not to declare who might or who might not become a purchaser of the property of the estate; but it was to prevent the property from being sold at a price less than its true value, which might be the case if the administrator, either directly or indirectly, prevented competition among the bidders, by entering into the market, either personally or by his agents, or if, with a view of purchasing, he was tempted to undervalue the property in his proceedings respecting the sale. The protection

to the estate designed by that section can be as fully secured by permitting the parties interested in the estate to set the sale aside and have the administrator declared a trustee, as it would be to construe the section so as to allow strangers to impeach the sale, with the consequent risk to the bona fide purchaser, without notice, from the administrator's agent, of losing the premises he purchased, relying on the apparent regularity of the probate proceedings and the confirmation of the sale." (Italics added.) In the present case, for the purposes of this appeal it may be assumed that the acquisition by Postel of Mrs. Keck's claim against the estate of Mr. Keck violated section 583. The appellant is not legally interested—has no legal claim—in the estate of Mr. Keck. Appellant is a judgment creditor of Mrs. Keck, a claimant against the estate of Mr. Keck. The appellant not having an interest in the estate of Mr. Keck cannot raise section 583.

In view of the conclusions reached herein it is not necessary to consider further points raised by respondents.

[15] It having come to the attention of the Court that respondent, Lizzie B. Keck, died April 2, 1944, which date was subsequent to the submission of this appeal, it is ordered that this judgment be filed *nunc pro tunc* as of the date of the submission of said appeal, to-wit; March 27, 1944. *Estate of Randall*, 194 Cal. 725, 230 P. 445; *Remondino v. Remondino*, 41 Cal.App.2d 208-218, 106 P.2d 437; *Holman v. Stockton Savings and Loan Bank*, 49 Cal.App. 2d 500, 122 P.2d 120.

The times for filing any petition for rehearing or hearing in this proceeding shall not be affected by this order, such times to run from the date of the original filing of this opinion, to-wit; May 27, 1944.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.



64 Cal.App.2d 672

EDDY v. EDDY.

Civ. 14483.

District Court of Appeal, Second District,
Division 2, California.

June 1, 1944.

I. Divorce 203

Where prayer in wife's complaint for divorce made no demand on husband

for support and default was duly entered, it was error for trial court to make award for such purpose. Code Civ.Proc. § 580.

2. Divorce ⇨203

In divorce action plaintiff may demand in prayer that alleged property settlement be approved and that decree include order for payments in accordance with contract of parties.

3. Divorce ⇨161

In divorce action, where court would not be authorized to award alimony to wife on husband's default because wife did not pray for alimony, court should set default aside, if justice required payment of alimony and authorize wife to serve amended complaint after which court would be in position to include order for alimony in its decree. Code Civ.Proc. § 580.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Vera H. Eddy against Everett L. Eddy for divorce. From a default judgment awarding alimony, defendant appeals.

Modified, and as modified, affirmed.

Henry M. Lee, of Los Angeles, for appellant.

Paul R. Matthews and Wm. H. Hodges, both of Los Angeles, for respondent.

MOORE, Presiding Justice.

The question for decision is whether that part of an interlocutory decree awarding plaintiff \$100 per month is erroneous, in view of the absence from the prayer of the complaint of any demand for support money.

The appeal comes here on the judgment roll. The only documents contained are the following: (1) demurrer to complaint; (2) stipulation that the original complaint be withdrawn and the amended complaint filed; (3) the amended complaint; (4) order for default; (5) minute order for judgment; (6) interlocutory decree; (7) notice of appeal; (8) request for transcript.

The amended complaint is in the usual form for a divorce action based upon extreme cruelty. Paragraph seven alleges "that a property settlement has heretofore been made affecting the community property of the parties for the support and maintenance of the plaintiff, including her attorney's fees."

While the prayer asks that the property

document neither appears nor does the judgment in terms approve it. After awarding plaintiff the custody of the minor child the decree proceeds: "Defendant ordered * * * to pay plaintiff \$100 per month."

[1] Such order is clearly contrary to section 580, Code Civil Procedure, which forbids the granting of relief in excess of that demanded, if there be no answer. The validity of such an order was before this court in the case of Darsie v. Darsie, 49 Cal.App.2d 491, 122 P.2d 64. In that action the steps taken, the absence of a demand for support money, the default, the order for monthly payments in the decree, parallel the events of the instant case. We there held that where the prayer of the complaint makes no demand on the defendant for support and the default is duly entered, it is error for the trial court to make an award for such purpose. That decision followed Bennett v. Bennett, 50 Cal.App. 48, 194 P. 503, which held that in the absence of a prayer for alimony and of allegations upon which to base such prayer and no answer is filed, the relief granted plaintiff cannot exceed that which he shall have demanded in his complaint. See Staacke v. Bell, 125 Cal. 309, 57 P. 1012; Cohen v. Cohen, 150 Cal. 99, 88 P. 267, 11 Ann.Cas. 520; Benton v. Benton, 122 Cal. 395, 55 P. 152; Metropolitan Life Insurance Company v. Welch, 202 Cal. 312, 260 P. 545; Parker v. Parker, 203 Cal. 787, 266 P. 283. These cases hold that in the absence of a prayer for support, the granting of excessive relief is erroneous; that a defaulting defendant is entitled to assume that the only matter which will be determined by the court is the matter of divorce; that the prayer for general relief cannot enlarge the power of the court to award what is not specifically demanded.

[2, 3] While we recognize the privilege of plaintiff to demand in her prayer that the property settlement be approved and that the decree include an order for payments to be made in accordance with the contract of the parties, yet we have no power to ignore a plain, valid, procedural statute. It is an essential of the proper administration of justice that no unfair advantage ever be taken of any person. When it appeared to the court that justice required the payment of support money it should have set aside the default and authorized the filing and service of an amended complaint containing appropriate allegations and prayer for support money.

to include any appropriate orders in its decree. *Darsie v. Darsie*, supra.

It is ordered that the judgment be modified by striking therefrom the following words: "and to pay to plaintiff \$100.00 per month." Appellant to recover costs on appeal.

W. J. WOOD and McCOMB, JJ., concur.



64 Cal.App.2d 675

PEOPLE v. TONEY.

Cr. 3786.

District Court of Appeal, Second District,
Division 2, California.

June 1, 1944.

Criminal law §1159(4)

In prosecution for lewd and lascivious conduct and for attempt to commit rape, testimony of complaining witnesses, who were girls nine and ten years of age, was not so highly improbable as to call for reversal of conviction.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

R. E. Toney was convicted of lewd and lascivious conduct and of attempt to commit rape, and he appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

Maurice A. Gleason, of Los Angeles, for appellant.

W. J. WOOD, Justice.

Defendant was convicted on three counts of an information charging lewd and lascivious conduct upon the private parts of two girls, 9 and 10 years old; and on two counts charging attempt to commit rape on one of the girls. He has appealed from the judgments and from the order denying his motion for a new trial.

The only contention now made by defendant is that "the evidence is so highly

improbable that it amounts to no evidence at all". In support of this contention defendant points to the fact that, according to the testimony of one of the girls, defendant's ten year old adopted daughter was in the room at the time of the commission of the acts in question and was also similarly mistreated by defendant; and that defendant's wife was in the adjoining bedroom, the door being open. Defendant's wife and his adopted daughter both gave testimony in conflict with the testimony of the complaining witness.

The testimony of the two complaining witnesses was sufficient to establish the guilt of defendant and it was the duty of the trial judge, who heard the evidence without a jury, to resolve conflicts in the testimony. It cannot be ruled as a matter of law that the findings of the trial judge are not supported by substantial evidence or that the statements of the complaining witnesses are so highly improbable as to call for a reversal of the judgment.

The judgments and the order denying a new trial are affirmed.

MOORE, P. J., and McCOMB, J., concur.



64 Cal.App.2d 665

AJAX HOLDING CO. v. HEINSBERGEN

et al.

Civ. No. 14409.

District Court of Appeal, Second District,
Division 2, California.

June 1, 1944.

1. Contracts §23, 24

An acceptance to be effective must be unequivocal and must comply with terms of offer, and addition of any condition is tantamount to a rejection of offer and the making of a counter offer which, if not accepted by original offeror, amounts to nothing.

2. Vendor and purchaser §17

Where only writing pertaining to sale by defendants to plaintiff of an apartment hotel consisted of escrow instructions prepared by plaintiff in which de-

defendants, before signing, inserted a supplement requiring defendants' approval of letters relative to transaction to be written by plaintiff, which supplement was never accepted by plaintiff, escrow did not evidence a meeting of minds of parties.

3. Judgment ⇨181

In action for breach of an alleged contract to convey an apartment hotel, proof of existence of which contract would have depended on inadmissible parol testimony, summary judgment for defendants was proper. Civ.Code, § 1624, subd. 4; Code Civ.Proc. §§ 437c, 1856.

4. Judgment ⇨186

In action for breach of an alleged contract to convey an apartment hotel, on defendants' motion for summary judgment for nonexistence of a contract in writing, trial judge was not bound to insert what was omitted but merely to ascertain and declare legal effect of contents of writings filed by plaintiff purporting to evidence contract. Civ.Code, § 1624, subd. 4; Code Civ.Proc. §§ 437c, 1856.

5. Vendor and purchaser ⇨17

Where vendor's written counter proposal to purchaser's written offer was never accepted by purchaser, there was no contract of sale. Civ.Code, §§ 1624, 1638, 1639.

6. Contracts ⇨25

Where a preliminary contract leaves certain terms to be agreed upon as final contract, it may not be inferred upon what parties will agree.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Ajax Holding Company against A. B. Heinsbergen and another for damages for defendants' refusal to convey certain property in accordance with a written agreement. From a summary judgment for defendants, plaintiff appeals.

Affirmed.

Charles A. Bank, of Los Angeles, for appellant.

Isadore Moidel (of Moidel, Moidel, Moidel & Goldsmith), of Los Angeles, for respondents.

MOORE, Presiding Justice.

The question for decision is whether the summary judgment of dismissal is correct

where the only writing signed by defendants for the sale of a number of city lots and the apartment hotel on a number of them was escrow instructions prepared by plaintiff in which, before signing, defendants inserted a supplement or counter proposal requiring their own approval of letters relative to the transaction to be written by plaintiff, which supplement was never accepted by plaintiff.

Summary judgment herein denied plaintiff damages allegedly suffered by reason of defendants' refusal to convey real and personal property in accordance with a written agreement. The complaint filed August 3, 1943, alleges (1) plaintiff's compliance with, and its readiness to perform, all of its obligations under an agreement in writing to buy from defendants an apartment house, its furniture, and six lots for \$215,000, \$40,000 payable in cash, the balance to be evidenced by a promissory note secured by a deed of trust on the property; (2) the refusal of defendants to accept the cash, or to perform any term, covenant or conditions imposed by the writing. As an item of special damage it pleads the employment of attorney Bank and the reasonable value of his services in attempting to prevail upon defendants to perform the contract.

The answer filed August 13, 1943, denies the execution of any agreement to sell the property. It alleges that the minds of the parties had never met upon any terms for the sale and purchase; that to the time of filing the complaint offers and counter-offers had been made, but that the parties never unconditionally agreed upon any offer or counter-offer. It admits that they refused to accept \$40,000 on account of the alleged sale; that attorney Bank attempted to negotiate a purchase of the property but not on the terms alleged in the complaint, and denies that defendants entered into any agreement for the sale of their property through Mr. Bank, or that his services were necessary.

The only writing ever signed by defendants was certain escrow instructions prepared and placed by plaintiff with the Title Insurance and Trust Company. Defendants' notice of motion for judgment of dismissal filed August 26, 1943, under Section 437c, Code of Civil Procedure, is based upon the grounds (1) that there was never a written contract for the sale as alleged; (2) that plaintiff made an offer by means of proposed escrow instructions;

(3) that defendants made a counter-offer which was never accepted in the escrow; and (4) that defendants never approved the documents required of plaintiff by defendants.

The supporting affidavit of witness Cammert, the escrow clerk, avers that the secretary of plaintiff on May 14, 1943, delivered to affiant the escrow instructions already signed by plaintiff as prospective buyer of six lots and the furnished apartment house situate thereon, that before either defendant signed the document, defendants inserted two paragraphs as supplemental instructions, to wit:

"Obtain for me a letter in re inspection of property & any renewal or replacement of the personal property, which letter we reserve the right to approve prior to close of escrow.

"Obtain for me, subject to my approval prior to close of escrow, a letter re plans and specifications for a proposed improvement." That thereafter affiant notified plaintiff of the insertion of the proposed supplement and requested that plaintiff send an agent of plaintiff to approve in writing the new matter; that on June 21, 1943, affiant forwarded to plaintiff a copy of the proposed supplement and requested their approval and return if satisfactory to plaintiff, but that such document had not been returned prior to August 25, 1943, the date of Cammert's affidavit; that neither has plaintiff ever signed the supplemental instruction nor does the escrow placed by plaintiff contain a writing signed by either of the sellers approving either (1) a letter with reference to the inspection of property and replacement of personal property or (2) a letter with reference to plans and specifications for a proposed improvement; that according to sellers' written instructions they reserved the right to approve both of such letters, which they never did.

Mrs. Heinsbergen's affidavit denied that either alone or with her husband she had ever executed a contract for the sale of their property to plaintiff or that she had ever approved a letter of plaintiff with reference to inspection of the property and renewals or replacements of personal property or a letter with reference to plans and specifications for a proposed improvement as required by the proposed supplemental instruction in the same escrow; and she averred that plaintiff had failed to present for sellers' approval any let-

ter to the escrow depository on the two subjects included in the proposed supplemental instruction.

Mr. Heinsbergen's affidavit contained substantially the averments and denials in the affidavit of his wife. He averred also that he had heard Mr. Tauber, president of Ajax Holding Company, on August 23, 1943, say that the escrow instructions did not contain all the terms and conditions they should have had to conform to the oral agreement of Ajax and affiant for the proposed purchase; that Mr. Tauber said that affiant had asked that affiants' plans and specifications be used in the event any improvement should be made on the two vacant lots; and that affiant wished his own services to be used to supervise such improvements if made; that he knew of no writing signed by either seller approving of any letter of Ajax touching upon plans and specifications for improvements; that he had never read any of the instructions in the escrow; that he had read the complaint before he signed it; that he knows of no written agreement with defendants for the purchase of the apartment hotel and personalty; except the escrow instructions which are referred to in that part of the complaint which alleges a contract of purchase and sale; that there had been a mutual mistake in stating the consideration in the escrow instructions and that after the instructions had been signed by all parties he and Samuel E. Gordon, vice president of Ajax, had told affiant at the Ajax office that the price would be changed and \$10,000 would be added so that affiant would receive the price he and Ajax had agreed orally that Ajax would pay for the property.

In reply to the supporting affidavits of defendants, plaintiff presented the affidavits of attorney Bank, Tauber, and Gordon. By such documents it undertook to prove divers negotiations with defendants; the communication of offers and counter-offers to defendants made by Mr. Bank as agent for plaintiff on and after June 25, 1943; the deposit of such communications and the sum of \$35,000 required by the initially proposed escrow instructions filed by plaintiff. But no proof was offered that the proposed supplemental instruction of defendants was ever approved by plaintiff. Mr. Bank filed in the escrow a lengthy letter to defendants dated June 25, 1943, but it contains no clean-cut acceptance of the proposed supplemental instruction.

Mr. Tauber gave extensive explanations of the statements averred to have been made by himself on August 23, 1943. Mr. Gordon detailed at length his negotiations with defendants, in one of which he stated to Mr. Heinsbergen that in the event that plaintiff should desire to improve the vacant lots, plaintiff would be willing to consider favorably the use of such plans and specifications and the use of such supervisory services of Heinsbergen whenever such improvements should be made and if, at such time, mutually satisfactory arrangements for compensation should be agreed upon.

[1] To be effective an acceptance must be unequivocal and positive and must comply with the terms of the offer. *Laird v. McPhee*, 90 Cal.App. 136, 139, 265 P. 501. It must be approved in the terms in which it is made. The addition of any condition or limitation is tantamount to a rejection of the original offer and the making of a counter-offer. *Alexander v. Bosworth*, 26 Cal.App. 589, 597, 147 P. 607. A counter-offer containing a condition different from that in the original offer is a new proposal and, if not accepted by the original offeror, amounts to nothing. *Cooper v. Stansbury*, 28 Cal.App. 444, 152 P. 948. The supplement was definite and unambiguous. Its requirement was for two writings, both of which should be approved by defendants prior to close of escrow. No such documents were to be found in the escrow.

[2,3] It follows that by reason of the failure of plaintiff unequivocally to accept the proposed supplemental instruction, the escrow did not evidence a meeting of the minds of the parties. Moreover, plaintiff's letter of June 25, 1943, proposes that the release price of lots 47 and 48 shall be increased from \$15,000 to \$25,000. This was a material variance from the terms contained in the original offer. In order to prove the existence of a contract it would have been necessary for plaintiff to prove by parol (1) that the parties had agreed that plaintiff should landscape vacant lots 47 and 48 within six months; (2) that improvements on the vacant lots should harmonize in design with the apartment hotel; (3) that plaintiff would be bound by such condition for seven years; (4) that plaintiff would use defendants' plans for the structure on the vacant lots and use Mr. Heinsbergen's services in making such improvements; (5) that

plaintiff would make renewals of movable property of like quality and workmanship; (6) that plaintiff would do certain exterior painting and oiling of the roofs within six months. Inasmuch as a contract for the sale of realty is invalid unless in writing signed by the seller (Sec. 1624, Civil Code, Subd. 4) such parol proof would have been inadmissible. (Sec. 1856, Code Civ.Proc.) Since there was no written contract of the parties there was no issue requiring a deliberate trial. It is not in the class of the *Walsh* and *Krieger* cases (*Walsh v. Walsh*, 18 Cal.2d 439, 116 P.2d 62; *Krieger v. Denny*, 123 Cal.App.Supp. 777, 10 P.2d 820) cited by appellant. In each of them issues of fact were raised by the pleadings. Here there is none. The alleged contract for the sale of realty turned out to be a myth.

[4-6] The contention is made that appellant wrote the required letters in full compliance with the oral agreement which specified only the subject matter but no details. It was not the duty of the trial judge to insert what had been omitted, but merely to ascertain and declare the legal effect of the contents of the writings filed by Ajax in the vain hope of completing the escrow. If a counter-offer is clear and explicit and does not involve an absurdity, its own language is to govern its interpretation. Sec. 1638, Civil Code. When a contract is written, the intention of the parties must be ascertained from the writing alone, if possible. Sec. 1639, Civil Code. Since a contract for the sale of real property is invalid unless it be in writing signed by the party to be charged (Sec. 1624, Civil Code), it cannot be said that we have a contract where a counter proposal to a written offer was never accepted by the original offeror. The supplemental instruction was in plain English. Appellant readily understood that two new terms were to be added to the instructions proposed by plaintiff and that they must be approved by defendants by filing their written approval in the escrow. Instead of accepting the counter offer by a writing attached to the escrow instructions, plaintiff proceeded belatedly to prepare such a letter as it conceived to have been required. In order for the minds to meet upon the subject, the first act required of plaintiffs was to accept the precise offer made. It would then have been in a position to write the letter and request its approval by defendants. It did not even perform the condition proposed, which was that plain-

tiff get defendants' approval of a letter making definite commitments prior to the close of escrow. The approval of such letter was an essential prerequisite to a binding contract. Where a preliminary contract leaves certain terms to be agreed upon as the final contract it may not be inferred upon what the parties will agree. *Kerr Glass Mfg. Corp. v. Elizabeth Arden Sales Corp.*, 61 Cal.App.2d 55, 141 P.2d 938.

No issue appearing to have been presented by the complaint, the conclusion of the trial court to dismiss the action was correct.

Judgment affirmed.

W. J. WOOD and McCOMB, JJ., concur.



64 Cal.App.2d 677

Ex parte SOLDAVINI.

Cr. 2291.

District Court of Appeal, First District,
Division 2, California.
June 2, 1944.

1. Habeas corpus ☞79

Where a return is made to a petition for a writ of habeas corpus, the petition becomes functus officio and the return then is to be taken as true unless petitioner makes a traverse.

2. Habeas corpus ☞83, 85(1)

Though habeas corpus petitioner may make his petition a traverse to the return and thus satisfy the rules of pleading, the burden is upon him to prove by competent evidence the issues of fact which are thus presented.

3. Habeas corpus ☞83

Where petitioner for habeas corpus made no traverse to return filed by parole board, stating that board had determined upon competent proof that petitioner had violated the rules of the prison and that his time credits had been forfeited, and offered no contradictory evidence, the court must accept as admitted the findings of the board. Pen.Code, §§ 2923, 2924, 3060.

4. Habeas corpus ☞23, 85(1)

In habeas corpus proceeding court must presume that evidence before parole board was sufficient to support order that petitioner had violated rules of the prison and that he should be punished by forfeiture of his time credits, and, since the board may revoke any parole without notice, the order may not be attacked in habeas corpus because of some claimed irregularity in language of the complaint before the board. Pen.Code, §§ 2923, 2924, 3060.

5. Prisons ☞15

A parolee's violation of the rules and regulations of parole board would form a sufficient ground for forfeiture of his time credits. Pen.Code, §§ 2923, 2924, 3060.

6. Habeas corpus ☞22(1)

Where, under the record made, petitioner for habeas corpus was under confinement upon a valid judgment serving a valid sentence which had not expired, because of a forfeiture of time credits, petitioner was not entitled to his release. Pen.Code, §§ 2923, 2924, 3060.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Proceeding in the matter of the application of James Soldavini for a writ of habeas corpus. From an order granting the writ and discharging petitioner from custody, the State appeals.

Reversed.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for appellant.

Nathan C. Coghlan, of San Francisco, for respondent.

NOURSE, Presiding Justice.

The State appeals from an order granting petitioner a writ of habeas corpus discharging him from custody. In 1933 respondent was delivered to the warden at San Quentin prison following a conviction for attempted robbery. In August, 1934, his term was fixed at twelve years, and in June, 1939, he was released on parole. In October, 1940, he was convicted of burglary in the second degree and sentenced to Folsom prison, where he was received on November 22, 1940. On June 19, 1941,

this conviction was reversed on the grounds of the failure of the trial court to instruct the jury on the presumption of innocence. *People v. Soldavini*, 45 Cal.App.2d 460, 114 P.2d 415.

On January 21, 1941, the Board of Prison Terms and Paroles revoked the parole of respondent, and on May 30, 1941, the Board of Prison Directors, after due notice and hearing, cancelled "such time credits as he has heretofore earned, or may hereafter earn."

On January 16, 1942, respondent was again convicted of burglary in the second degree upon a retrial of the former case. He was granted probation subject to the condition that he serve ten months in the county jail. At the completion of this sentence he was taken into custody by the state parole officer and commenced these proceedings for his release.

The petition is grounded on the assertion that the Board of Prison Directors acted unlawfully in cancelling petitioner's time credits because they acted solely upon the charge of the prisoner's conviction upon the burglary charge and that no other evidence was offered or received. Following the issuance of the writ herein the State Parole Officer made return containing excerpts from the minutes of the two boards relating to the revocation of parole and to the cancellation of the time credits. From these exhibits it appears that the procedure outlined in section 2923 of the Penal Code was strictly followed and the orders of these boards became final as of their date.

In attacking these orders the petitioner asked that his petition be treated as a traverse to the return, but he offered no evidence in support of his assertion and none to contradict the record found in the return, except the wholly inadmissible and irrelevant testimony of himself that he did not plead guilty when he appeared before the Board of Prison Directors.

[1,2] It is the settled rule of our decisions that when a return is made to a petition for a writ of habeas corpus the petition becomes functus officio and that the return then is to be taken as true unless the petitioner makes a traverse. Though he may make his petition a traverse to the return and thus satisfy the rules of pleading, the burden is upon him to prove by competent evidence the issues of fact which are thus presented. In *re Collins*, 151 Cal.

340, 90 P. 827, 91 P. 397, 129 Am.St.Rep. 122.

[3,4] For this reason we must accept as admitted, or uncontroverted, the findings of the prison board that on the hearing oral and documentary evidence was received and considered and that the Board "determined that due proof had been made that the prisoner had with evil intent violated the rules and regulations of the prison," and that he should therefore be punished by a forfeiture of his time credits. The petitioner argues that this order was beyond the jurisdiction of the Board because it was founded solely on the conviction which was subsequently reversed. But the complaint went further than that. It charged the parolee with having been arrested while on parole for two separate criminal offenses. The findings of the Board recite that evidence both oral and documentary was taken at the hearing and that thereupon the prisoner pleaded guilty to the charge. What this evidence was we do not know and cannot learn in this proceeding. We must presume that it was sufficient to support the order, and, since the board may revoke any parole without notice (Penal Code, section 3060) the order may not be attacked because of some claimed irregularity in the language of the complaint.

[5,6] The determinative question on this appeal relates to the "time credits" of petitioner. In 1933 his term of sentence upon his first conviction was set at twelve years. He does not allege or prove that any time credits were granted to him which would reduce his period of service. The burden of such proof was on petitioner. Section 2923 of the Penal Code specifies the grounds upon which time credits may be forfeited. One ground is the violation or disregard of any prison rule or regulation. In October, 1940, the prisoner had been returned to prison as a "parole violator" and the order suspending his parole on January 21, 1941, was presumably for such violation of the rules and regulations of the parole board, and this would form a sufficient ground for the forfeiture of credits. In *re Stanton*, 169 Cal. 607, 610, 147 P. 264. In conformance with section 2924 of the Penal Code due notice was given the prisoner and a hearing conducted before his credits were cancelled. The record recites that he pleaded guilty. He attacks this portion of the record and contends that he pleaded "not

guilty." However, he does not attack the recitals in the order of the Board that "Oral and documentary evidence to show the particulars involved in said matter was introduced and considered by the Board. Thereupon the Board, having duly considered all the evidence, determined that due proof had been made that the prisoner had with evil intent *violated the rules and regulations of the prison*, was guilty of the offense specified in the complaint, and should be punished therefor by a forfeiture of such time credits as hereinafter specified.
* * *

It does not appear that he made any objection to the form of the complaint or to the uncertainty of the charge. The evidence before the Board upon which its order of forfeiture was based is not in the record and cannot be considered by us in this proceeding. Upon the case made the petitioner is under confinement upon a valid judgment serving a valid sentence which has not expired.

The order is reversed.

STURTEVANT, and SPENCE, JJ.,
concur.



64 Cal.App.2d 427

CITY OF OAKLAND v. KEY SYSTEM
(two cases).
Civ. 12519.

District Court of Appeal, First District,
Division 1, California.

May 22, 1944.

Rehearing Denied June 21, 1944.

Hearing Denied July 20, 1944.

1. Public service commissions $\Rightarrow$ 19 1/2

Legal disputes pertaining to a continuance or cancellation of a franchise of a public utility at the end of its designated period are solely within the jurisdiction of the court and not that of Railroad Commission. Public Utilities Act, Gen.Laws 1937, act 6386.

2. Public service commissions $\Rightarrow$ 19 1/2

Cancellation of a franchise of a public utility during term of its existence for a cause specified therein is primarily a legal question and must be decided by the court,

but if the convenience of the public is involved and continued operation is necessary, such interest must be paramount to rights of parties to franchise, in which case jurisdiction of Railroad Commission is dominant. Gen.Laws 1937, act 6386; Const. art. 12, §§ 22, 23.

3. Public service commissions $\Rightarrow$ 6, 21

The Railroad Commission has independent and controlling jurisdiction over public transportation facilities, subject to review by the Supreme Court, and Superior Court has no power to interfere with an order or decision of the Railroad Commission. St. 1915, p. 115; Const. art. 12, §§ 22, 23.

4. Public service commissions $\Rightarrow$ 19 1/2

In proceeding in quo warranto brought by city, through port commission, to determine authority of defendant public utilities to exercise certain franchises and privileges upon an area of tidelands within territorial limits of city, superior court could enter binding judgment if the Railroad Commission should not assume jurisdiction upon a related question germane to the operation of the utility company. Gen. Laws 1937, act 6386; Const. art. 12, §§ 22, 23.

5. Quo warranto $\Rightarrow$ 3

Matter primarily involved in quo warranto proceeding by city through port commission, to determine authority of defendant public utility to exercise franchises upon an area of tidelands within territorial limits of city was not exclusively within jurisdiction of Railroad Commission. Gen.Laws 1937, act 6386; Const. art. 12, §§ 22, 23.

6. Public service commissions $\Rightarrow$ 19 1/2

Whether extent of nonuse or disuse of franchise granted to public utility on an area of tide lands within territorial limits of city was a breach of public duty by franchise holders was question of fact for Railroad Commission. Gen.Laws 1937, act 6386; Const. art. 12, §§ 22, 23.

7. Municipal corporations $\Rightarrow$ 719(4)

Under city charter providing that no franchise for terminal facilities on land exceeding 1,000 feet of frontage on water front shall be granted to any one company, where defendant corporation had already been granted a franchise for such a building upon a full 1,000 feet of water frontage under an ordinance, a provision

granting such corporation right to use in common with others 1,000 foot strips lying to the north and south thereof was a "franchise upon land" prohibited by the charter even though land was submerged. St. 1909, p. 1328, § 31, subd. 29.

8. Franchises ☞2

When the grant of a franchise is in excess of grantor's powers, there is no obligation on its part to restore any real or supposed benefits.

9. Municipal corporations ☞247

All persons contracting with a municipal corporation must, at their peril, inquire into the statutory power of the corporation or of its officers who make the contract.

10. Municipal corporations ☞247

An "ultra vires contract" is a contract which is not within power of a municipal corporation to make under any circumstances or for any purpose.

See Words and Phrases, Permanent Edition, for all other definitions of "Ultra Vires Contract".

11. Estoppel ☞62(6)

Municipal corporations ☞247, 248(1), 249

Where a contract is ultra vires it is wholly void and no recovery can be had against municipality thereon, there should be no ratification, except by legislation, municipality cannot be estopped to deny validity of contract, and there can be no recovery on an implied contract although it has been executed and municipality has received benefits.

12. Quo warranto ☞7

When "quo warranto" is invoked to remedy the abuse, misuse or nonuse of a franchise, the action is similar to an equity proceeding by injunction and it may partake of the essentials of an action to quiet title or for declaratory relief and it should be determined so as to make remedy effective if possible.

See Words and Phrases, Permanent Edition, for all other definitions of "Quo Warranto".

13. Quo warranto ☞7

"Quo warranto" is an extraordinary proceeding and it may at times be used as a drastic cure of the misuse of a special privilege granted by governmental agency.

14. Process ☞4

In absence of special legislative directions, courts may, in interest of justice,

direct a notice to be served upon parties who may probably or possibly be interested in outcome of litigation under constitutional or legislative provisions.

15. Quo warranto ☞45

Where Railroad Commission had possible or probable interest in quo warranto proceedings brought by city through port commission to determine authority, defendant public utility had to exercise certain franchises upon an area of tide lands within territorial limits of city, Railroad Commission should be notified of pendency of the proceedings.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Proceeding in quo warranto by the City of Oakland, acting by and through its Board of Port Commissioners, against Key System and others to determine by what right or authority the defendants are exercising certain franchises and privileges upon an area of tide lands within the territorial limits of the municipality. The action as to the defendants not named was dismissed. From the judgment, each of the parties named appeal.

Affirmed in part and reversed in part.

W. Reginald Jones, Port Atty., of Oakland, for City of Oakland.

Brobeck, Phleger & Harrison, of San Francisco, and Donahue, Richards & Hamlin, of Oakland, for Key System.

WARD, Justice.

This is a proceeding in quo warranto, brought by the City of Oakland through its port commission, for the purpose of determining by what right or authority the defendants are exercising certain franchises and privileges upon an area of tide lands within the territorial limits of said municipality and particularly designated and described in the complaint. Joined as defendants with Key System were Railway Equipment and Realty Company, Oakland Terminal Railroad Co. and two fictitious corporations, but as to these the action was dismissed.

Two causes of action were set forth in the complaint, the first dealing with certain rights and privileges granted by section 1 of an ordinance of the city, No. 3099, and the other being confined to such

of those rights as purport to have been granted by section 2 thereof.

Judgment was rendered that plaintiff take nothing by its first cause of action; and, as to the second, that the franchise described therein was at no time authorized by law or by the charter of the city, and is null and void. Each party has appealed from the portion of the judgment adverse to it. (In this opinion the municipal corporation will be referred to as the "City," and the Key System by that designation or as the "Company.")

The cause was submitted upon the pleadings and a written stipulation of facts, those pertinent to the questions raised on the respective appeals being the following:

Section 1 of Ordinance 3099 granted to the Company's predecessor, a railroad corporation, for a term of 50 years "the right, privilege and franchise * * * to construct and maintain * * * freight and passenger depots, engine houses, workshops, wharves, docks, slips, ferries, landing places and other terminal facilities and railroads" over a strip of land 1,000 feet in width in San Francisco Bay, extending approximately 2½ miles from the shore to the pierhead line and "during said term to use, operate and conduct said freight and passenger depots, engine houses, workshops, wharves, docks, slips, ferries, landing places and other terminal facilities and railroads, and to collect tolls, wharfage, dockage and other charges thereon." The franchise became effective July 5, 1910.

The granting clauses above quoted are in the precise words of subdivision 29, section 31 of the city charter as it then read, Stats.1909, p. 1328, and the ordinance recites that the property over which the franchise was granted lay within the area as to which that section applied. At the time the franchise was granted the area affected lay within the limits of the City, but the City had no proprietary interest in the lands covered thereby. Title to the land was transferred to the City in 1911.

Section 2 further granted "the right, privilege and franchise during said term of fifty (50) years to use in common with others, and to have maintained as a fairway for the free and uninterrupted passage to and from said wharves, docks, slips, ferries, landing places and other terminal facilities, and for the purposes of general navigation the waters of the bay of San Francisco lying outside of

said strip of land described in Section 1" and contiguous thereto, and comprised within 1,000 foot strips lying to the north and to the south of the lands described in section 1 from the bulkhead line to the pierhead line, with an agreement on the part of the grantee that the bulkhead line might be moved westerly from its then location.

By section 3 the parties fixed upon an agreed line of ordinary low tide as of 1852 serving to delimit the westerly line of the privately owned land of the grantee from the Southern Pacific Oakland Mole to the northern line of the City. Also section 4 provides that "in consideration of" the rights granted, the grantee should reconvey to the City such wharfing-out rights as it possessed under the so-called Carpenter grant, should dedicate across its privately owned land certain streets as described and should convey to the City all its interest in lands west of the agreed low tide line. Section 5 requires that exercise of the franchise be commenced within six months.

Section 6 requires the holder of the franchise to pay "as rent" for the privileges thereby granted \$1,000 per year for the first 25 years and \$2,000 per year for the last 25 years "of said term" and provides that if any installment of rent should be unpaid the City "shall have the right to forfeit and annul the rights, privileges and franchises hereby granted." Section 7 imposed the condition that all fills and other permanent structures "shall revert to and become the absolute property of the City of Oakland upon the expiration of said term of fifty (50) years" with an option granted to the City to purchase structures not subject to such reversion, and section 8 provided that the ordinance should be inoperative unless written acceptance be filed within 90 days "and upon such filing of said written acceptance this ordinance and said written acceptance shall constitute and be a contract between the City of Oakland and said * * * [grantee] and its successors and assigns."

It is agreed that the ordinance was duly accepted; that the conveyances and dedications thereby required were duly made, and that the Company is the successor of the original grantee of the franchise.

All rental payments required by section 6 of the ordinance, including those accruing after the commencement of the action, have been made and retained by the City,

which has not returned or offered to return any thereof.

When the franchise was granted, the Company's predecessor had in existence a trestle supporting its double track railroad which extended diagonally across the entire franchise strip from a point near the northerly line thereof at the agreed low tide line to the ferry terminal located in the southwesterly corner of the strip. The location of these facilities is shown in an exhibit attached to the stipulation. These facilities were used by the Company's predecessor in the operation of its railroad lines from the date of the franchise until 1916.

In 1911 the City applied for and obtained from the War Department a permit to extend a solid fill into the waters of San Francisco Bay. This was done as part of a larger project for the general development of the western waterfront of the City, and at the City's request the Company's predecessor constructed such fill on the franchise strip at a cost of \$1,136,000. This fill was made during the period 1913-1916 and was located along the northerly line of the franchise strip, being protected by a rock bulkhead along that line. From the easterly line of the franchise strip to a transverse rock wall substantially the entire width of the franchise strip was partially filled by permitting the dredged material to attain a natural slope. This method of construction was adopted to reduce the expense of construction, and also to prepare that part of the franchise area for further reclamation.

At the same time the timber trestle beyond the new fill line was relocated, extending along the north line of the strip and then curving to the south to meet the ferry terminal facilities which were reconstructed and enlarged. This work was completed in 1916 and the interurban train service was operated over these facilities for many years thereafter.

After the work last mentioned was performed, a portion of the original trestle easterly from the terminal remained in place and was used for storing cars until 1933. In 1917 a spur track had been built extending southerly across the franchise strip in the vicinity of the transverse wall, which remained in place for serving an industry located on property of the city south of the franchise strip until 1930, at which time a new means of access to that industry was provided through a permit

granted by the City for the construction of additional trackage along the western waterfront.

In 1933 the greater part of the ferry terminal facilities was destroyed by fire. Immediately thereafter the State of California instituted proceedings in eminent domain and under order of court took possession of portions of the franchise strip which it desired for construction of the San Francisco-Oakland Bay Bridge. The terminal facilities were then rebuilt in the area not taken by the state at a cost of \$252,000. Subsequently a part of the franchise strip was conveyed to the state for the construction of the San Francisco-Oakland Bay Bridge and the bridge railway facilities owned by the state in connection therewith, subject to certain reserved rights of the Company. The City also conveyed its interest in this property under a contract with the state. In this contract the existence of the franchise was recognized.

The portion of the franchise area as to which the City seeks to declare a forfeiture by abandonment and non-use is an irregularly shaped area a portion of which actually overlaps the area conveyed to the state in 1937 by both the Company and the City. A large portion of the remaining area involved in the first cause of action, was, subsequent to the commencement of this suit, taken by the federal government under eminent domain proceedings and an order of possession of the United States District Court, and is now occupied by the facilities erected by the army for the Oakland Port of Embarcation.

Pursuant to an agreement with the army as part of the federal government, this case is prosecuted by the City, which has instituted condemnation proceedings as to portions of the land covered by the franchise. Between the City and the Company there is no dispute relative to an award in condemnation. The City seeks to clear an alleged cloud on the title. The company may be benefited only to the extent of a continuation of its present rights for the remaining period of the franchise.

From the stipulated facts the trial court concluded "That the use of the property described in Section 1 of Ordinance 3099 of the City of Oakland and set forth in Exhibit A to the Amended and Supplemental Complaint herein, which is the subject of the first cause of action alleged in said complaint, is a matter primarily with-

in the jurisdiction of the Railroad Commission of the State of California," and (2) "That the purported franchise described in Section 2 of said ordinance which is the subject of the second cause of action alleged in said complaint was at no time authorized by law or by the charter of the City of Oakland, and that the same is and at all times since the purported grant thereof has been null and void."

Taking up first the City's appeal, it contends that the issue of the use or non-user of the property described in section 1 of Ordinance 3099 of the City of Oakland is not one exclusively within the authority of the Railroad Commission—arguing in this behalf that the test is whether or not the commission has acted in the matter; that the Public Utilities Act affirmatively supports the jurisdiction of the court; that reason is against concluding that the courts have no jurisdiction; and that the right to use the designated portion of the franchise area has been lost by non-use. It supports this contention by the following considerations: that non-user is a recognized cause of forfeiture; that forfeiture may be partial only; that the franchise itself provides for its loss by non-use; that the franchise to engage in the business of wharfinger was never exercised and that the forfeiture was self-executing and occurred before the Railroad Commission had any power in the matter.

The City concedes that as to any existing and continuing use the Company is making of the area described in the complaint the franchise exists, but points out that the only use shown by the record is that dredging material or spoils have been deposited in the area which furnish adjacent support for the rock fill. However, it agreed that the Company is entitled to have this condition continue until the expiration of its franchise in 1960.

[1-3] As previously stated, based upon the findings of fact, the court as a conclusion of law found that the use of the property described in the first cause of action "is a matter primarily within the jurisdiction of the Railroad Commission." Ordinarily this statement is correct. However, the jurisdiction is not exclusively with the commission. Questions of public convenience and necessity, and matters directly relating thereto, in connection with the operation of public utility franchises, are the concern of the commission; legal

disputes pertaining to a continuance or cancellation of a franchise at the end of its designated period are solely within the jurisdiction of the courts. The cancellation of a franchise during the term of its existence for a cause specified therein is primarily a legal question and must be decided by the courts, but if convenience of the public is involved and continued operation is necessary, such interest may be paramount to the rights of the parties to the franchise, in which case the jurisdiction of the Railroad Commission is dominant and controlling. A restriction or limitation in one case may not apply under the facts of another. It is sufficient to say that under constitutional provisions the courts of this state recognize the independent and controlling jurisdiction of the Railroad Commission over public transportation utilities, Const. Calif., art. XII, secs. 22, 23, subject to review by the Supreme Court. Public Utilities Act, Stats. 1915, p. 115. The superior court has no power to interfere with an order or decision of the Railroad Commission. *Truck Owners, etc., Inc., v. Superior Court*, 194 Cal. 146, 228 P. 19.

The Railroad Commission may have general jurisdiction over a transportation company and may properly have assumed jurisdiction in determining certain questions previously, but if the commission does not in fact act on the particular question involved the courts are forced to prescribe a remedy. In addition, the question involved may be strictly a legal one, in which event the courts take jurisdiction (*Sale v. Railroad Commission*, 15 Cal.2d 612, 104 P.2d 38; *Hanlon v. Eshleman*, 169 Cal. 200, 146 P. 656), but the powers of the commission are unlimited if the matter is cognate and germane to the regulation of public utilities. *City of San Mateo v. Railroad Commission*, 9 Cal.2d 1, 68 P.2d 713.

Thus, in certain cases and as to certain problems relating to public utilities the jurisdiction of the commission is exclusive. As to other matters the regular law courts have jurisdiction. In between these two well defined fields there is a somewhat ill defined field in which the law courts have jurisdiction unless the commission has elected to act as to the particular subject matter. If it has elected to so act the exercise of such jurisdiction ousts the law courts of any jurisdiction assumed by them. It is in this field that the first cause of action falls.

Key System, on the first cause of action, relies upon *People v. Northwestern Pac. R. Co.*, 20 Cal.App.2d 120, at page 122, 66 P.2d 697, at page 698, where the court said: "The briefs of the parties have narrowed the issues on this appeal. It is conceded therein that the superior court has jurisdiction to cancel a franchise under certain circumstances and that while the Railroad Commission has jurisdiction to determine whether the service actually rendered under a franchise is adequate and, if not, to require adequate service, said commission has no jurisdiction to cancel a franchise under any circumstances. It is further conceded that the courts may take judicial notice of the decision of the Railroad Commission." The court then referred to a decision by the Railroad Commission upon the precise question, saying (20 Cal.App.2d at pages 122, 123, 66 P.2d at page 698): "It affirmatively appeared from the allegations of said amended complaint that the defendants had been and were actually operating boats and rendering some service under said franchise despite other allegations of the amended complaint which were based upon the plaintiff's conclusion that the service rendered was a sham and pretense and in fact no service at all because of its claimed inadequacy. But since 1912, exclusive jurisdiction has been vested in the Railroad Commission to determine the adequacy of service actually being rendered under a franchise by any public utility within the purview of the Public Utility Act. (Const. [Calif.], art. 12, §§ 22, 23; Public Utilities Act, Deering's General Laws, * * * Act 6386.) We therefore conclude that when the amended complaint affirmatively showed that some service had been and was actually being rendered under the franchise, said amended complaint was insufficient to state a cause of action for the cancellation of said franchise upon the theory of 'non-user and abandonment' at least in the absence of further allegations showing a decision of the Railroad Commission determining that the service rendered was inadequate."

In the present case the complaint does not allege that any service was rendered at the time of the institution of the proceeding. In the *Northwestern Pacific* case the Railroad Commission had acted; in the present case, so far as the record indicates, the commission had not acted upon the particular point in controversy.

In *Truck Owners, etc., Inc., v. Superior Court*, supra, the commission had assumed jurisdiction by granting to plaintiffs a certificate of public convenience but had not "acted" on the question involved in the case, namely, the right of defendants therein to transport freight. At pages 149, 150 of 194 Cal., at page 20 of 228 P., the nature of the controversy is stated: "The cause pending in the respondent court is a suit in equity and that court has jurisdiction to hear and determine the same to enforce its judgment therein, unless it has been divested of such jurisdiction by some provision of the Constitution or by the Legislature acting in pursuance of some constitutional authority. It is not seriously contended by petitioners that the amendment to the Constitution relating to the railroad commission and to public utilities (art 12, §§ 22, 23) contains language sufficient in itself to divest the superior court of its equity jurisdiction to hear and determine a cause involving a complaint against a transportation company, but it is insisted that, because of the broad powers lodged in the Legislature under said section 23, and its exercise of such powers in the enactment of the Public Utilities Act, (Stats.1915, p. 115) and the said Auto Stage and Truck Transportation Act, the sole recourse of the plaintiff in the injunction suit was to file its complaint with the railroad commission and there have its rights determined." In that case it was insisted that the Railroad Commission had exclusive jurisdiction to determine the question. The court, distinguishing between jurisdiction generally assumed, and the determination of the question of fact involved, said (194 Cal. at pages 155, 156, 157, 228 P. at page 23.): "In answer to the query it should be borne in mind that we are not here dealing with a situation where the commission *has acted*. (Italics added.) It may also be noted that the commission undoubtedly has power to inquire into the methods and activities of the plaintiffs, as well as the defendants, in said action as to their transportation operations, either on its own motion or on the complaint of petitioners. Likewise it may be noted that the functions of the commission may be brought into play by an application by petitioners for a certificate of public convenience and necessity. If such certificate be granted, the injunction in the pending cause would cease, for by its own terms it is enforceable

against the petitioners only 'until they shall have obtained from the railroad commission of the state of California a certificate declaring that public convenience and necessity require such operation.' Furthermore, if the commission should assume jurisdiction in an investigation as to the activities of the petitioner and the injunction plaintiff, or both, and should determine under subdivision (3) of section 1 of the Auto Stage and Truck Transportation Act that the petitioners were not operating 'between fixed termini and over a regular route' and, therefore, were not transportation companies as defined by that act, its finding would not be subject to review and it would then have the power under section 31 of the Public Utilities Act, to make all necessary orders to enforce its decision in the matter. * * * We entertain no doubt that, when the commission has assumed and exercised its jurisdiction, the court would conform its orders and process agreeably to the action of the commission made within its jurisdiction. When the commission has acted, it may be said, as was very aptly stated in *Yolo Water & Power Co. v. Superior Court*, *supra*, [43 Cal.App. 332, 185 P. 195]: 'Powers conferred by the constitution upon the railroad commission to supervise and regulate public utilities and to bring suit to enforce its orders and compel public utilities to obey the law, are not inconsistent with the power conferred upon superior courts to entertain injunction suits instituted by others than the commission against public utilities. To so hold will not create any conflict between the courts and the commission, because in all such suits the courts will be bound and guided and controlled in all respects in entertaining and deciding or dismissing them as much by section 23 of the Constitution and the Public Utility Act as by any other provisions of the law.' * * * The question of exclusive control of public utilities is primarily one of legislative policy subject, of course, to constitutional grant or limitation. Where the courts have been denied or have refused to take jurisdiction, it has been said that it was the legislative policy to relegate all such questions to the commission having jurisdiction to entertain the same."

In *Miller v. Railroad Commission*, 9 Cal.2d 190, 195, 197, 70 P.2d 164, 168, 112 A.L.R. 221, the court held: "By section 23 of article 12 of the Constitution

all public utilities are made subject to control and regulation by the Railroad Commission. This grant of power to the commission is reiterated in section 31 of the Public Utilities Act. (St.1915, p. 132.) This jurisdiction, however, is not exclusive, and until the Railroad Commission *has acted* in reference to any public utility the superior court has jurisdiction in equity to enforce an obligation imposed by law upon such utility. But after the commission has assumed jurisdiction over a public utility for the purpose of administering the law applicable to the activities of the utility, the commission has exclusive jurisdiction over the regulation and control of said utility and may take any action necessary to the proper and complete exercise of this jurisdiction. In the exercise of this jurisdiction the commission may set aside any prior order or determination of the courts in matters coming under the exclusive jurisdiction of the commission. This decision of the Railroad Commission in matters affecting public utilities is final and conclusive except as the same is restricted by section 67 of the Public Utilities Act * * *, which provides for a writ of review to this court in certain matters." (Italics added.) "We further hold that said judgment was valid and binding upon the parties to said action until the Railroad Commission assumed jurisdiction of said utility for the purpose of regulating its operations, and upon its assumption of jurisdiction over the activities of said utility, any order or judgment of the superior court in conflict with the orders of the commission is to that extent ineffective and of no binding effect upon the parties thereto."

[4] In the present case, upon the facts presented the superior court could enter a valid and binding judgment if the Railroad Commission should not assume jurisdiction upon a related question germane to the operation of the utility company. Upon its assumption of jurisdiction over the activities of the utility it would be proper, in view of the heretofore cited cases based upon constitutional provisions, to cease further the determination of a question of fact. If the commission should "act", as by order or otherwise, in determining a question (and it may up to date be assumed that such determination will not be in disregard of established rules of law), such order is binding upon courts.

This brings us to the question of the rights of the parties to invoke the offices of the Railroad Commission on the first cause of action. Irrespective of their rights to demand a hearing, if any legally exist, the commission could under its rules of practice "on its own motion" have initiated an investigation to determine whether the company would be able to meet the requirements of transportation, if any there be, at the present time or in the reasonably immediate future. These are factual matters in connection with which an appellate court should not interfere.

[5] In brief, the matter primarily involved herein may be within the jurisdiction of the Railroad Commission, but is not exclusively so—hence a reversal of the order and decree made in the first alleged cause of action becomes necessary.

[6] It has been suggested that in view of the stipulation of facts this court may pass upon the merits of the controversy. Eliminating the interest of the commission, if any, in the continuance of the strip or part thereof as a matter of necessity for public convenience, we find from the record, including the maps and diagrams submitted, that there is a part of the strip (approximately 200 feet in width along the northerly edge of the franchise area) that may still properly be held by the Company. This possibility is a fact admitted by the City. Appellant City does not contend that the entire franchise referred to in the first cause has been forfeited, but only that covering the unused area. Whether the extent of non-use or disuse, if that should be the fact, was a breach of public duty by the franchise holders, seems to be a question of fact which should be determined by the commission. It is advisable that the trial court proceed in accordance with the views herein expressed.

[7] Coming now to the Company's appeal from that portion of the judgment holding to be void any rights purported to be granted by section 2 of Ordinance 3099 in the area referred to as the south fairway, the ground of the trial court's decision was that this grant violated the provisions of subdivision 29 of section 31 of the charter of the City, as it existed at the time of the passage of the ordinance, to the effect that "no franchise for terminal facilities upon land exceeding 1000 feet of frontage on the waterfront shall be granted

to any one company or corporation, or to any companies or corporations under one management and control," section 1 of the ordinance, it will be recalled, having already conferred a franchise for such facilities upon a full 1,000 feet of water frontage. It is the contention of the Company that the grant of rights contained in said section 2 of the ordinance is not in any sense a franchise or in fact permission to enjoy in the public domain anything more than is of common right, i. e., right of access over navigable waters,—that the City merely contracted thereby not to impede such rights of access to the lands covered by section 1 thereof, and, in any event, that the rights granted are not "upon land." The Company further urges that if the rights granted to the fairway be void, the judgment nevertheless should be reversed for the purpose of determining what considerations the City has received from the transaction in order that restoration be made.

Section 2 of the grant uses the word "franchise." This use of the word may not be determinative but is indicative of intent and the rights of the contracting parties. There is no doubt that the grantee was given the use of 3,000 feet under the original franchise—one thousand of which is the basis of the judgment on count two of the complaint. This 1,000 feet abuts the 1,000 feet referred to in count one. It may be assumed that the extra north and south fairways were incidental to the main franchise. It should be conceded that the grant covering the middle 1,000 feet was valid, and that the franchise to the north and south fairways was granted in order to facilitate the exploitation of such middle portion. That it was in contravention of the charter provisions previously quoted need not be discussed at length. On this point the company is content to argue that there is some doubt whether it was a franchise at all. The grant of the extra widths was valid if not in contravention of the legal capacity of the grantor to bestow. It was not a grant of right over city owned lands as the fairway belonged to the state. It was contemplated to be a part of or an adjunct to the middle portion and as such was greater in width than the law allowed. *City of Oakland v. Hogan*, 41 Cal.App.2d 333, 106 P.2d 987.

The company next contends, assuming the right to be a franchise, that the

proviso of subd. 29 of section 31 of the charter, Stats. 1909, p. 1328, relates merely to terminal facilities, and that as to such facilities the prohibition refers to "land" and not to access over waters.

A franchise to an area definitely specified, though submerged, is upon land. The granting of the right of navigation over the submerged area subjects that area to a servitude. Necessarily a franchise covering a body of water is in the nature of a franchise to the area of land submerged by it.

The company finally urges that if the franchise for the fairway is void, restoration should be made of the considerations moving from it, including the cost of improvements made and rentals paid.

[8-10] When the grant of a franchise is in excess of the powers of the grantor, there is no obligation on its part to restore any real or supposed benefits. "It is scarcely necessary to observe that no contract can be made by a corporation which is *prohibited* by its charter or by the statute law of the State. And it is a general and fundamental principle of law that *all* persons contracting with a municipal corporation must at *their peril inquire into the statutory power* of the corporation or of its officers to make the contract; and a contract beyond the scope of the corporate power granted or conferred by the legislature expressly, or by fair implication, is void, although it be under the seal of the corporation." (Dillon, *Municipal Corporations*, 5th Ed., sec. 777, p. 1154.) "For the purpose of clearly defining the rights and duties of all the parties to a municipal contract, an *ultra vires* contract, as the term will be used herein, and according to its strict and true construction, is a contract which is not within the power of a municipal corporation to make under any circumstances or for any purpose." "Conceding that a contract is *ultra vires*, the question arises as to what is the effect thereof, and the answer is for the most part plain. If a contract is *ultra vires* it is wholly void and (1) no recovery can be had against the municipality thereon; (2) there can be no ratification, except by the legislature; (3) the municipality cannot be estopped to deny the validity of the contract; and (4) there can be no recovery on an implied contract, although it has been executed and the municipality has received the benefit of the contract." (McQuillan, *Municipal Cor-*

porations, 2d Ed., sec. 1274, pp. 1115, 1117, 1118.)

[11-13] A proceeding in quo warranto, being remedial in nature, should be determined so as to make the remedy effective, if possible (44 Am.Jur., sec. 4, pp. 90, 91.) When invoked to remedy the abuse, misuse or non-use of a franchise, the action appears to be similar to an equity proceeding by injunction. It may partake of the essentials of an action to quiet title or of declaratory relief. It is an extraordinary proceeding and may at times be used as a drastic cure of the misuse of a special privilege granted by a governmental agency. It has the aspect of an estate in property. In taking away any part of privileges granted for the benefit of the public, a court should be cautious in the use of its jurisdictional power.

[14,15] In the present proceeding the trial court determined that jurisdiction was primarily with the Railroad Commission and refused to entertain jurisdiction. Herein it is determined that, assuming that jurisdiction was primarily with the commission, it is not exclusively so. There should be no conflict between the courts and the commission. Exclusive control is a question that might well be determined by legislative policy. *Yolo Water & Power Co. v. Superior Court*, 43 Cal.App. 332, 185 P. 195. In the absence of special legislative direction the courts may, in the interests of justice, direct that notice be served upon parties who may probably or possibly be interested in the outcome of the litigation under constitutional or legislative provisions.

Because of the probable or possible interest of the commission in this action, as disclosed by the conclusions of law, that body should be notified of the pendency of this proceeding. The trial court is directed to require plaintiff to notify the commission of such pendency. The form of the notification and the time limit are questions to be determined by the trial court in its discretion in view of the facts of the case.

That portion of the judgment disposing of the first cause of action is reversed, the trial court to proceed in accordance with the views herein expressed. If the Railroad Commission should take action the present proceeding should be held in abeyance until the matter is determined by that body. That portion of the judgment dis-

posing of the second cause of action is affirmed.

PETERS, P. J., and KNIGHT, J., concur.



64 Cal.App.2d 656

MILLS et al. v. SKAGGS et al.

Civ. No. 12665.

District Court of Appeal, First District,
Division 2, California.

June 1, 1944.

1. Specific performance ⇨28(1), 31

An agreement, incomplete or indefinite in its material terms, will not be specifically enforced in equity.

2. Specific performance ⇨30

Where terms to which vendors had agreed called for down payment of \$600 and monthly payments of \$30 upon second deed of trust, and deposit agreement called for down payment of \$200 and for monthly payments of \$40 on first and second deeds of trust, denial of purchasers' demand for specific performance of deposit agreement was not an abuse of discretion.

3. Specific performance ⇨30

Denial of specific performance of agreement to purchase realty evidenced by deposit receipt which called for monthly payments of \$40 on first and second deeds of trust, whereas terms to which vendors agreed called for monthly payments of \$30 upon second deed of trust, was not an abuse of discretion on ground that under usual terms of realty loans agreement should be construed as providing for \$24 per month on first deed of trust and \$16 per month on second deed of trust, where there was no evidence concerning such usual terms.

4. Specific performance ⇨8

The grant of specific performance is discretionary with trial court.

Action by Will G. Mills and another against J. E. Skaggs and another for specific performance of an agreement for purchase of real property, wherein defendants filed a cross-complaint seeking cancellation or reformation of the agreement. From an adverse judgment, the plaintiffs appeal.

Affirmed.

Crist & Beene, of Palo Alto, for appellants Mills and Ingram.

Wm. Petros, of San Francisco, for respondents.

SPENCE, Justice.

Plaintiffs sought specific performance of an agreement for the purchase of real property, which agreement was evidenced by a "Deposit Receipt". Defendants filed an answer and cross-complaint seeking cancellation or reformation of said agreement. The trial court found that defendants had executed said deposit receipt but further found "that said deposit receipt is so indefinite and uncertain in its terms as to be impossible of specific performance * * *". Judgment was entered denying specific performance and from said judgment, plaintiffs appeal.

The deposit receipt was drawn by a real estate broker and the evidence offered by defendants showed that it was signed by the defendants, as sellers, without reading the same and in reliance upon the real estate broker's representation that it contained the terms upon which defendants had agreed to sell. The terms to which defendants had agreed called for a purchase price of \$4,750, as provided in the deposit receipt, but also called for a down payment of at least \$600 and a monthly payment of at least \$30 upon a second deed of trust to be executed in their favor. The deposit agreement, however, called for a down payment of only \$200 and for a total monthly payment of \$40 to cover payments on both the first and second deeds of trust without any specification of the portion of the \$40 to be applied upon either.

The pertinent portion of the deposit receipt read as follows: "The total purchase price is Four Thousand Seven Hundred Fifty (\$4,750.00) Dollars and the balance of same is to be paid within 10 days from date hereof, as follows: \$200.00 cash and 1st deed of trust to American Trust Co. for \$2,750.00 and 2nd deed of trust to James E. Skaggs & wife for \$1,800.00. Interest

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

on notes to be 6% per annum; total monthly payment inc. interest to be \$40.00."

It appears that there was an existing first deed of trust on the property, the balance upon which first deed of trust was approximately \$400 less than the amount provided in the deposit receipt for the first deed of trust with the American Trust Company; and it further appears probable that the real estate broker believed that a deal might be consummated by raising the amount of the first deed of trust by \$400 and adding that amount to the \$200 in cash to make up a cash payment of \$600. But the deposit receipt was silent as to whether the new first deed of trust was to be executed by plaintiffs or defendants; as to what was to be done with the money obtained by increasing the amount thereof; and as to the terms of said first deed of trust and particularly as to the portion of plaintiffs' total monthly payment of \$40 to be applied upon said first deed of trust. The deposit receipt, as above indicated, was likewise silent as to the portion of plaintiffs' total monthly payment of \$40 to be applied upon defendants' second deed of trust. It is of course obvious that the raising of the amount of the first deed of trust would have had the effect of diminishing the security afforded by the second deed of trust and that the terms of the transaction, as set forth in the deposit receipt, were not the same as the terms to which defendants had previously agreed. We will make no further reference to this difference, however, as the trial court made no findings or conclusions with respect to the allegations of the cross-complaint relating thereto. The failure of the trial court to make such findings or conclusions is not an issue on this appeal which is one taken by plaintiffs alone from the judgment denying specific performance.

[1,2] We find no error in the ruling of the trial court denying specific performance. Even if it be assumed that said agreement was valid in law and that an action for damages might have been predicated upon its breach, it is well settled that an agreement that is incomplete, uncertain or indefinite in its material terms will not be specifically enforced in equity and "that the degree of certainty required in an equity action is much greater than is required in an action at law." *Janssen v. Davis*, 219 Cal. 783, 787, 29 P.2d 196, 198; *Pascoe v. Morrison*, 219 Cal. 54, 25 P.2d 9; *Long Beach Drug Co. v. United Drug Co.*, 13

Cal.2d 158, 88 P.2d 698, 89 P.2d 386. This general principle has been applied in denying specific enforcement of agreements which were incomplete, indefinite or uncertain with respect to the terms of payment of deferred balances or the terms of the incumbrances representing such deferred balances. *Mariposa Commercial & Mining Co. v. Peters*, 215 Cal. 134, 8 P.2d 849; *Schellenbach v. Lagasse*, 202 Cal. 665, 262 P. 304; *Buckmaster v. Bertram*, 186 Cal. 673, 200 P. 610; *Klein v. Markarian*, 175 Cal. 37, 165 P. 3; see also cases collected in note in 37 A.L.R. 365. In our opinion the trial court's denial of specific performance was justified by the uncertainty and indefiniteness of the agreement in the particulars to which reference has already been made.

Plaintiffs cite and rely upon *Janssen v. Davis*, 219 Cal. 783, 29 P.2d 196, but we believe that case is distinguishable. The plaintiff in that action was the seller who sought specific performance by the buyer of an oral agreement which had been fully performed on the part of the seller. Specific performance was granted by the trial court but the judgment was reversed upon grounds other than the alleged uncertainty or indefiniteness of the agreement. The situation presented in that case was so unusual as to cause the Supreme Court to express regret that a reversal was required as the case was one "clearly calling for the equitable relief granted." 219 Cal. at page 790, 29 P.2d at page 199. There the plaintiff, a building contractor, had agreed to construct and had constructed a \$13,250 home for defendant, a real estate agent who had previously sold property for plaintiff and to whom plaintiff was indebted in the sum of approximately \$2,500. While defendant had moved into the home upon its completion in 1923 and was still in possession at the time of the trial several years later, he had paid plaintiff nothing on account of the purchase price or on account of taxes or other expenses connected with the property and he had refused to carry out his agreement to sign a note in favor of plaintiff in the sum of \$6,212.50 and a second mortgage to secure said note. There was a conflict in the evidence as to whether said note was to provide for monthly installments of \$50, \$55 or \$100. The trial court made a finding that defendant had agreed to pay said note in monthly installments of \$75 and it was held on appeal that this finding was unsupported by the evidence. On

page 789 of 219 Cal., on page 199 of 29 P. 2d, the court states, "It is to be noted that the point here made is not that the amount of the installments was uncertain, but that the amount fixed by the trial court finds no support in the record. If the court had fixed \$100, \$50, or \$55 as the amount of the monthly installments, such finding would have been amply sustained by the record."

The language of the decision upon which plaintiffs rely is found on page 788 of 219 Cal., on page 198 of 29 P.2d, and reads as follows: "There is no principle of equity requiring all the terms and conditions of the proposed agreement to be set forth in the contract. The usual and reasonable terms found in such contracts are, in contemplation of the parties, a part of such contract. * * * That rule has particular application to the facts of this case, where the evidence shows that defendant was engaged in the business of selling houses for the plaintiff, and that the agreement was that the debt due plaintiff should be evidenced by the type of agreement usual in such cases." It seems clear from a reading of the entire opinion that the quoted language was directed at claims of uncertainty other than the claim that the agreement was uncertain as to the amount of the monthly installment to be paid upon the note secured by the second mortgage.

[3] Relying particularly upon the statement that "The usual and reasonable terms found in such contracts are, in contemplation of the parties, a part of such contract", plaintiffs give in their brief their version of "the usual and customary terms of payments of real estate loans to lending institutions" and argue therefrom that the agreement here should be construed as providing for a monthly installment of \$24 per month on the first deed of trust and of \$16 per month on the second deed of trust. It is a sufficient answer to plaintiffs' argument to state there is no evidence in the record concerning any such "usual and customary terms of payment" and that even plaintiffs' version thereof shows that such terms are not fixed but are variable.

[4] A further distinction between the cited case and the present one is that in the cited case the trial court granted specific performance and in the present case the trial court denied specific performance. The authorities indicate that the trial court is vested with certain discretion in determining whether specific performance should or should not be granted under the facts of

any particular case. As was said in *Lind v. Baker*, 48 Cal.App.2d 234, at page 245, 119 P.2d 806, at page 812, "The enforcement of a contract by a decree of specific performance rests in the sound discretion of the court, a judicial discretion to be exercised in accordance with established principles of equity with reference to the facts of the particular case. The contract may be valid in law and not subject to cancellation in equity and yet the terms thereof and the attendant circumstances may be such as to require the court to deny its specific performance." See also 23 Cal.Jur. 418; 58 Corp.Juris. 855 and cases cited. *Janssen v. Davis*, supra, was a case involving facts clearly calling for equitable relief by way of specific performance but we find no facts in the present case to indicate that the denial of equitable relief by way of specific performance constituted an abuse of discretion on the part of the trial court.

The judgment is affirmed.

NOURSE, P. J., and STURTEVANT, J., concur.



64 Cal.App.2d 631

PETERSON v. PETERSON.

Civ. 7010.

District Court of Appeal, Third District,
California.

May 29, 1944.

I. Divorce ☞303(2)

Generally, request for modification of interlocutory divorce decree with respect to custody of parties' minor child will be refused, in absence of showing of some change in circumstances rendering such modification advisable from standpoint of child's welfare, but courts have jurisdiction to modify such custody orders without such showing. Civ.Code, § 138.

2. Divorce ☞303(2), 312

Where court order respecting custody of divorced spouses' minor child fails to permit one of spouses to see child, it is proper, under ordinary circumstances, to

modify order so as to grant such permission, and question whether such aggravating circumstances and conditions exist as to warrant denial of such privilege is primarily for trial court, with whose determination appellate court should not interfere, unless abuse of trial court's discretion is shown. Civ.Code, § 138.

3. Divorce ⇨303(2)

A trial court, determining in its discretion that there is sufficient showing that welfare of divorced spouses' minor child will be adversely affected by subsequent events, is justified in modifying its previous order respecting such child's custody in interest of what it believes to be for child's welfare. Civ.Code, § 138.

4. Divorce ⇨303(3)

A superior court order, modifying interlocutory divorce decree awarding parties' minor daughter's custody to husband by giving sole custody to wife if and when husband should be inducted into armed forces, was proper, in view of court's finding that both parents were fit and proper persons to have child's custody. Civ.Code, § 138.

5. Parent and child ⇨2(3)

The status of all married, as well as unmarried, men within military age limits should be considered by courts in determining questions as to their minor children's custody. Civ.Code, § 138.

6. Parent and child ⇨2(3)

In case concerning minor child's custody, underlying paramount principle is child's welfare and best interest. Civ.Code, § 138.

7. Divorce ⇨303(3)

An application for modification of award of custody of divorced spouses' minor child is addressed to trial court's sound legal discretion, subject only to statutory qualifications. Civ.Code, § 138.

8. Divorce ⇨303(3)

An order modifying interlocutory divorce decree, awarding parties' minor daughter's custody to husband for three years, by awarding custody to wife if husband should be inducted into armed forces, providing for reasonable visitation by both spouses, and awarding wife child's custody for a month during summer and a week at Christmas time, was not abuse of discretion. Civ.Code, § 138.

Appeal from Superior Court, of Butte County; Harry Deirup, Judge.

Action for divorce by Iva Mae Peterson against S. R. Peterson. From an order granting plaintiff's application for modification of an interlocutory divorce decree with respect to the custody of the parties' minor daughter, defendant appeals.

Affirmed.

J. Oscar Goldstein and Burton J. Goldstein, both of Chico, for appellant.

Ware & Ware, of Chico, for respondent.

PEEK, Justice.

The defendant herein appeals from an order granting plaintiff's application for a modification of an interlocutory decree of divorce with respect to the minor daughter of the parties.

The original order, pursuant to an agreement between the parties, awarded the care and custody of the child to the defendant for a period of three years, and upon the expiration of such period divided the custody equally between the parties.

Plaintiff's affidavit in support of her motion alleged that there was no hearing on the issue of custody nor was any evidence introduced by either party—the previously mentioned agreement being the sole basis for the order. She further alleged that notwithstanding the original agreement it was also the oral agreement of the parties that she was to have the actual custody, care and control of the child, and that in accordance with such oral agreement the child remained in her custody until shortly after the decree when, upon the pretense that he wished to have the child visit him, the defendant took the child to San Francisco, where she has remained ever since, despite plaintiff's requests that the child be returned to her. Plaintiff also alleges that the real purpose of the defendant in desiring the record custody, although under the oral arrangement plaintiff was to have the actual custody was to avoid service in the armed forces of the United States. Further allegations recite the difficulties encountered by plaintiff in endeavoring to see the child, the poisoning of the child's mind against her, and other facts relating to defendant's actions in regard to herself and the child.

An order to show cause issued, and at the conclusion of the hearing thereon, the court, in its order, impliedly found both

parties to be fit and proper persons to have the care and custody of the child; that since the entry of the interlocutory decree the status of the parties had changed, particularly in relation to probable service in the armed forces by the defendant, making it impossible for him to have the care and custody of the child, and that it appeared to the court that in the event such contingency took place the best interests of the child would be served by awarding the care and custody to the mother. The interlocutory decree was modified accordingly. Further provision was made for reasonable visitation by both parents and the mother was awarded custody for a month during the summer and a week at Christmas time. In other respects the two orders remained essentially the same.

The defendant's attack upon the modification order is (1) that a change of circumstances subsequent to the entry of the original decree must be shown; (2) that in order for the trial court to modify its previous order there must be a showing that the defendant was not a fit and proper person to have the custody of the child, and (3) that as plaintiff failed to make such a showing upon either of the issues raised, the modification order was an abuse of discretion on the part of the trial court.

[1] The rule of "changed circumstances" might well be termed a creature of judicial expediency. It is not statutory. It is a means to end the turmoil of litigation so often attendant with matters involving questions of custody and to make it impossible for a dissatisfied party to keep the courts continually occupied with his or her grievances concerning former orders. Accordingly the courts have generally held that in absence of a showing of some change in circumstances making it advisable from the standpoint of the welfare of the child that the former order be modified, a request for a modification will be refused.

However, that is not to say that the courts have no jurisdiction to modify previous orders in the absence of such a showing nor do the decisions wherein the rule is enunciated "deny the power of the court to make such modification of its orders relative to the custody of children." *Bogardus v. Bogardus*, 102 Cal.App. 503, 506, 283 P. 127, 128. It is not an iron-clad rule to which there can be "no possible exception." *Foster v. Foster*, 8 Cal.2d 719, 68 P.2d 719, 723.

[2] The portion of the modification order herein relating to the right of reasonable visitation by both plaintiff and defendant and the giving to the mother the custody of the child during certain designated vacation periods presents a situation comparable to that found in the case of *Bogardus v. Bogardus supra*, wherein this court stated:

"There can be no question that under ordinary circumstances, where the court has failed to permit one of the parents the right to see a minor child, that it is proper to modify the order so as to permit such parent to see the child. Only very aggravating circumstances and conditions would warrant a court in denying such privilege, and whether such conditions exist is primarily a question for the trial court to determine, and, unless it is shown that the trial court has abused its discretion in this particular appellate courts, we think, should not interfere."

The remaining phase of defendant's first contention relates to that portion of the order modifying the former decree by giving the sole custody to the mother if and when the defendant should be inducted into the armed forces. To accept defendant's argument in this regard and blindly follow the rule that changing circumstances must of necessity be shown, would be to limit the powers of the court to the correction of conditions which have already arisen and which have already worked harm to the child.

[3] It is not impossible to conceive of cases where, in the interest of the welfare of a child, a court would be amply justified in modifying a former order despite the fact that there had been no present change in the circumstances of the parties. *Foster v. Foster, supra*. To this might be added a further statement that if the trial court, in its discretion, determines that there is a sufficient showing indicating that the welfare of a child will be adversely affected by subsequent events the court likewise would be justified to intervene and modify its previous order in the interest of what it believes to be for the welfare of the child.

[4,5] The power of a court in such matters cannot be solely negative in character. In other words, it is not limited only to the correction of conditions which have already arisen. Such a construction would be to deny to the courts the power speci-

cally granted under section 138 of the Civil Code to "at any time modify or vacate" orders of custody as may seem necessary and proper for the "best interest of the child in respect to its temporal and its mental and moral welfare." Under such section it cannot be denied that an order such as is herein attacked which seeks to prevent a happening of what the court in its discretion has found would not be for the best interest of the child, is not well founded in equity and in justice.

The status of all married, as well as unmarried, men within the military age limits is something which the courts properly should consider in present custody matters. The modification order herein in no way changes the present status of the defendant in his right of custody of the child. It is only qualified upon his actual entry into the armed services. If he is not inducted there will be no change in the custody. However, if such contingency should arise it is obvious that the defendant would be compelled to place the child with others. Under such circumstances the natural right of the mother to the care of a minor child, if a fit and proper person, would prevail as against strangers. *Stever v. Stever*, 6 Cal.2d 166, 56 P.2d 1229; *Newby v. Newby*, 55 Cal.App. 114, 202 P. 891. If the mother could not be denied her right at that time what valid reason can be advanced to deny her now what she legally could establish if and when such contingency should occur.

The question of fitness of either the father or mother is no more an issue herein than it would be at the conclusion of the three year period contained in the original decree, as the trial court found that both parents were fit and proper persons to have the custody of the child. Appellant's contention in this regard would appear to be without merit. Section 138 of the Civil Code provides that a court in awarding custody is to be guided (1) by what appears to be for the best interests of the child, and (2) as between parents adversely claiming the custody neither parent is entitled to it as of right, but other things being equal if the child is of tender years it should be given to its mother. Further amplification of the quoted portion of said

section is found in the case of *Washburn v. Washburn*, 49 Cal.App.2d 581, 122 P.2d 96, 100, wherein it is stated that the mother is the natural custodian of her young, and that the code exacts that she shall have custody of her child, everything else being equal, and that "in the case of girls it is obvious that they are particularly in need of the sympathy, affection, consideration and tender care which only a mother can give—and so normally they should be in her custody." The contention of defendant is therefore in direct opposition to the statutory law of this state and the decided cases in relation thereto.

The defendant's final contention relates to the question of whether in view of the record before us, the trial court abused its discretion by the modification of the original decree.

[6,7] In custody cases the underlying principle, paramount to all others, is the welfare and best interest of the child. *Washburn v. Washburn*, supra. Therefore an application for a modification of an award of custody must be addressed to the sound legal discretion of the trial court (*Fay v. Fay*, 12 Cal.2d 279, 83 P.2d 716; *Foster v. Foster*, supra), subject only to the qualifications contained in section 138 of the Civil Code.

The Supreme Court in *Taber v. Taber*, 209 Cal. 755, 290 P. 36, 37, quoting with approval from the opinion by the court in *Simmons v. Simmons*, 22 Cal.App. 448, 451, 134 P. 791, stated: "It is manifest that the Legislature * * * intended to confide to trial courts, in the disposition of the minor children of the parties to divorce actions, a very extensive discretion, with a view to the conservation of the highest and best interests of such minors, and the conclusion arrived at by such courts in such cases will not be set aside unless the record discloses a clear abuse of that discretion." See *Prouty v. Prouty*, 16 Cal.2d 190, 105 P.2d 295.

[8] The defendant herein having failed to show a clear abuse of such discretion, the order is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

MORETTI et al. v. ABBOT et al.
Civ. 14343.

**District Court of Appeal, Second District,
Division 2, California.**

June 1, 1944.

Rehearing Denied June 21, 1944.

Hearing Denied July 27, 1944.

1. Joint tenancy ☞3

Substantial evidence supported finding that sisters intended to place their properties in joint tenancy for benefit of survivor, as against contention of heirs of one sister that joint tenancy was created for security reasons alone and that sisters intended their properties to be kept separate.

2. Appeal and error ☞1010(1)

Finding of trial court on issue of fact supported by evidence may not be disturbed on appeal.

3. Executors and administrators ☞29(5)

The mere appointment, without more, of an administrator for estate of deceased joint tenant to assert a claim against surviving joint tenant as to joint tenancy property was not *res judicata* in subsequent quiet title suit on issue as to whether joint tenancy was created for security purposes only with intent that properties be kept separate as between the joint tenants.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Louis R. Moretti against Frank Abbot and others to quiet title to certain realty, wherein defendants cross-complained against plaintiff and Bank of America National Trust & Savings Association and others. From a judgment for plaintiff on the complaint and against defendants on their cross-complaint, defendants appeal.

Affirmed.

Ray Howard and W. W. Comstock, both of Los Angeles, for appellants.

Spray, Davis & Gould, of Los Angeles, for respondent.

Edmund Nelson and William C. Day, both of Los Angeles, for Bank of America.

W. J. WOOD, Justice.

The plaintiff obtained a judgment by which his title was quieted in a parcel of real estate and by which relief was denied

to defendants on their cross-complaint. From this judgment defendants have appealed.

Prior to January 30, 1935, Mercedes Madden was the owner of a parcel of real estate located on Spring Street in Los Angeles of the value of \$7,500, according to the appraisal of the bank which held a lien thereon, to secure the payment of a note on which there was due the sum of \$9,438.15. At the same time Kate Carmen Abbot, a sister of Mercedes Madden, was the owner of a parcel of real estate located on Main Street in Los Angeles of the value of \$19,000, according to the appraisal of the bank which held a lien thereon, to secure the payment of a note on which there was due the sum of \$6,565.25. Mrs. Madden was in danger of foreclosure because of delinquency. There was also a delinquency in the payment of three years taxes on Miss Abbot's property. On the date above mentioned Mrs. Madden and Miss Abbot deeded their respective properties by grant deed to Grace Stoermer, an officer of the bank, who in turn executed a deed in favor of Mrs. Madden and Miss Abbot, by which the record title to both properties was conveyed to them as joint tenants. Simultaneously a deed of trust was executed by the two sisters covering both parcels of property to secure a single promissory note in the sum of \$17,000, the total indebtedness then due on the properties. All of these instruments were placed in escrow and were filed for record on February 18, 1935. Miss Abbot died on March 7, 1937, and on April 16, 1938, Mrs. Madden recorded in the office of the recorder of Los Angeles County an affidavit setting forth the death of Miss Abbot and the description of the property in question for the purpose of vesting legal title in herself. Mercedes Madden died on May 14, 1940. Her estate was probated and distributed to her son, plaintiff herein.

The defendants are the successors in interest of three-fourths of the estate of Miss Abbot. They contend that the joint tenancy deed was executed to the two sisters because of the insistence of the bank; that the arrangement by which the two properties were deeded to Grace Stoermer and thereafter to the sisters in joint tenancy was made for security purposes only and that it was the intention of the two sisters that their properties should be kept separate. In their cross-complaint, they ask

that it be decreed that they have the right to redeem the property which was deeded to Grace Stoermer by Miss Abbot upon the payment of the amount due to the bank and that there be an accounting between the parties covering the collection of rentals received from the two parties.

The trial court made findings favorable to plaintiff on the issues involved, but it is argued by defendants that no findings could properly be made on the evidence except in conformity with their contentions. They refer to the evidence by which it is shown that the Madden property was in great danger of being lost whereas the Abbot property was comparatively safe; to the actions of the bank officials in arranging the joint tenancy deed; to statements made by witnesses to the effect that Miss Abbot had stated that the arrangement was only temporary; and to efforts made by Miss Abbot shortly before her death to have the properties refinanced and separated.

Evidence was presented by plaintiff in conflict with the evidence of defendants' witnesses. From the testimony of plaintiff's witnesses it appears that each of the sisters was entirely informed concerning the effect of the joint tenancy deed and that each expressed a desire to have the deed executed in joint tenancy and after the transaction was completed Miss Abbot expressed her satisfaction with what she had done. Julia Hislop testified that Miss Abbot had told her that she wanted to create the joint tenancy because there were "just the two of them and then who ever lived could get it", and that she had created the joint tenancy to make living easier for both of them. She also testified that Miss Abbot had told her that "Frank (one of the defendants) wanted to see her and tried to coerce her into changing it and she didn't want to"; that "she would not worry about where it was going to go and what was going to happen if she died". Another witness, Anna Bernardini, testified that she had had a conversation with Miss Abbot in 1934 in which Miss Abbot had stated that "she wanted to put it in joint tenancy in favor if she died her sister would get it, but if her sister died she would get it". M. A. Bernardini testified that in the latter part of 1935 he had a conversation with

Mrs. Madden and Miss Abbot in which "both said they were happy they have joint tenancy, said now they don't need to worry any more. Q. Did they say anything about what would happen to the property in case one died? A. They said the tenancy they were making with the bank, she said, 'If I die my property goes to Mercedes, and if Mercedes dies the property go to me.'"

[1,2] The trial court found that: "It was the intention of said Kate Carmen Abbot and Mercedes Madden that upon said loan being paid to the Bank of America National Trust & Savings Association that said property should be reconveyed to the grantors, their heirs or assigns as would be entitled thereto under the law without in any manner whatsoever affecting said joint tenancy hereinabove created." The evidence above mentioned gives substantial support to this finding. It was the duty of the trial court to determine the intention of the sisters when they created the joint tenancy. The finding of the trial court on this issue being favorable to plaintiff and being supported by the evidence, it may not be disturbed on appeal. *Smith v. Lombard*, 201 Cal. 518, 525, 258 P. 55.

[3] Upon the death of Miss Abbot applications were made by Mercedes Madden and Frank Abbot for letters of administration and the petition of Frank Abbot was granted. There is no merit in the contention of defendants that this constituted an adjudication of the issue now before the court. In his application Frank Abbot alleged that the estate of Miss Abbot had a claim against Mrs. Madden as to the property in question and asked that he be appointed so that he could assert that claim. However, an examination of the files of the probate of the Abbot estate reveals that no action was commenced to assert the alleged claim.

The motion of defendants, now pending in this court, to take additional evidence on the subject of the rents collected from the two properties is denied. The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

WHITTEMORE et al. v. LOCKHEED AIRCRAFT CORPORATION.*

Civ. 14185.

District Court of Appeal, Second District,
Division 3, California.

May 25, 1944.

Rehearing Granted June 21, 1944.

1. Appeal and error $\S$ 1066

In action against airplane owner for death of deceased who was killed in crash, giving of an instruction that deceased was in law a "passenger" to whom defendant owed the duty of ordinary care, was reversible error where there was evidence that deceased was a noncompensating guest. Gen.Laws 1937, Act 151, $\S$ 11½.

See Words and Phrases, Permanent Edition, for all other definitions of "Passenger".

2. Negligence $\S$ 121(1)

In action against airplane owner for death of deceased in crash, burden was upon plaintiff to prove that deceased was not a "guest" within Air Navigation Act relieving owner from liability for death or injury of a noncompensating guest. Gen. Laws 1937, Act 151, $\S$ 11½.

See Words and Phrases, Permanent Edition, for all other definitions of "Guest".

3. Trial $\S$ 142

Where a party is unable to introduce evidence directly bearing upon the existence of a fact he is attempting to prove and the evidence available may serve only to establish the existence of certain primary facts that are logically connected with the material fact, and the jury can reasonably infer from the primary facts that the material fact exists, the party has introduced sufficient evidence to entitle him to have the jury decide the issue.

4. Trial $\S$ 142

Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn, in any given case, is a question of fact for the jury.

5. Negligence $\S$ 138(1)

In action against airplane owner for death resulting from crash, giving an instruction that at time of accident deceased was in law a "passenger" was error, in that wording of instruction confused jury in attempting to differentiate between passenger and "guest" as respects the Air Naviga-

* Subsequent opinion 151 P.2d 670.

tion Act which relieves owner of aircraft from liability for death or injury to a non-compensating guest. Gen.Laws 1937, Act 151, $\S$ 11½.

6. Negligence $\S$ 132(1)

In action against airplane owner for death of deceased in a crash of a dual control airplane, proffered evidence that preceding the take off the owner's pilot first seated himself in the cockpit on the left side but gave up his seat to decedent, an experienced pilot, and that it was the general custom for the pilot who was to do the flying of a dual control plane to take the seat on the left-hand side, was improperly rejected, since it had a bearing on question who was operating plane and question of contributory negligence.

7. Negligence $\S$ 132(4)

In action against airplane owner for death resulting from crash of a dual control airplane, evidence that on four previous occasions the deceased, an experienced flyer, had taken the controls and operated the plane on similar trips was incompetent to show that on the trip in question, deceased was operating the plane.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Action by Margaret C. Whittemore and another against Lockheed Aircraft Corporation to recover for the death of plaintiff's intestate who was killed in an airplane crash. The jury returned a verdict for plaintiff and from the judgment entered, defendant appeals.

Reversed.

Joe Crider, Jr. and Frank B. Belcher, both of Los Angeles, for appellant.

Kenneth E. Grant and J. Edward Haley, both of Los Angeles, for respondents.

BISHOP, Justice pro tem.

At 1:40 p. m. on the 16th day of May, 1938, an airplane, which had just been completed by the defendant, Lockheed Aircraft Corporation, tested and found wanting in no detail, took off from the Union Air Terminal at Burbank on a flight to Las Vegas, Nevada, where it was to be delivered to the Northwest Air Lines, Inc. In the seats provided for the pilot and copilot in this dual control ship, sat Fred W. Whittemore, a licensed pilot with more than ten thousand hours of flying experience and the opera-

tions manager of the plane's purchaser, and Sid Willey, one of the defendant's skilled pilots. As passengers, the plane carried Mr. Salsbury, who had been serving as the Northwest Air Lines' resident engineer during the construction of the plane, six other persons, and their one hundred fifty pounds of baggage; not a capacity load. Twenty-five minutes after its take-off the plane, shrouded in fog, circled and then crashed into a mountain side, taking the lives of all on board.

[1] This action was brought by the widow of Mr. Whittemore to recover from the defendant company the damages she suffered by reason of the death of her husband. The theory of her complaint was that her husband's death had been caused by the negligence of the defendant; she did not and does not contend that any one was intoxicated or guilty of wilful misconduct. If Mr. Whittemore was a noncompensating guest, therefore, the plaintiff has no cause of action against the defendant. (Sec. 11½, California Air Navigation Act, Gen.Laws 1937, Act 151.) Upon the first trial of this action the trial court, convinced that as a matter of law Mr. Whittemore was a noncompensating guest, granted a nonsuit. This judgment was reversed on appeal by this court (*Whittemore v. Lockheed Aircraft Corp.*, 1942, 51 Cal.App.2d 605, 125 P.2d 531), and the action was retried, resulting in a verdict and judgment for \$25,000. Defendant's appeal from this judgment is based, in part, upon the giving of an instruction which represents a complete swing of the pendulum from the trial court's position on the first trial, an instruction given at plaintiff's request, which declared "on the flight of defendant's plane from Burbank, California, to Las Vegas, Nevada, the decedent Fred W. Whittemore was in law a passenger, and the defendant therefore owed him the duty of ordinary care and diligence for his safe carriage." It was error, we have concluded, to give this instruction, and for this error, and others, this judgment also is to be reversed.

It was error to give the quoted instruction for two reasons. In the first place, the question was one that should have been left to the jury as one of fact. We do not go so far as to agree with the defendant's contention that the conclusion expressed in the preceding sentence was established as the law of the case on the former appeal. This court, in its first review of this case, held that the evidence warranted the jury

in concluding that Whittemore was a passenger, "meaning one," care was taken to state, "who is not a nonpaying guest and who is not engaged in a joint enterprise." It was not necessary to the decision, and it was not declared, that there was or was not evidence which would have supported the contrary conclusion, that is, that Whittemore was a noncompensating guest. On this appeal we find that there was such evidence.

[2-4] The evidence, in all its paucity, was set out on the former appeal and need not again be detailed by us. It should be borne in mind, as we now consider that evidence in reviewing, not a nonsuit, but an instruction advising the jury that Whittemore "was in law a passenger," that the burden was upon the plaintiff to prove that Whittemore was not a "guest riding in [the] aircraft without giving compensation for such ride or * * * while engaged in a joint enterprise with the airman flying the same," (quoting from section 11½, California Air Navigation Act, which appears in full in our previous opinion). This was stated to be the rule on the former appeal (page 609 of 51 Cal.App.2d and page 533 of 125 P.2d), and is in harmony with the cases announcing the rule under the like provisions of the automobile guest statute. *Kruzie v. Sanders*, 1943, 23 Cal.2d 237, 143 P.2d 704, 705; *Jenkins v. National Paint & Varnish Co.*, 1936, 17 Cal. App.2d 161, 163, 164, 61 P.2d 780, 781. The entire absence of any evidence revealing the reason which brought Mr. Whittemore to Burbank and the failure of the witnesses to report one word, written or spoken, which would explain how Whittemore arranged to board the plane at Burbank, might well have caused the jury to feel that there were too many stones lacking in the foundation to give them a basis for determining that the defendant was in some way being compensated for furnishing Whittemore a plane ride from Burbank to Las Vegas. In support of the thesis of the former opinion the possibility of several reasonable inferences was developed. These inferences, however, as we examine them from the viewpoint of this appeal, are not ineluctable; they do not lead inescapably to the conclusion that the defendant received a benefit of a tangible nature as a consideration for accepting Whittemore as a guest. Not to recognize this as true is to take the untenable position that one may not give a ride to one, with whom

he has and hopes to do business, except as a paying passenger. In this connection we find these words from *Blank v. Coffin*, 1942, 20 Cal.2d 457, 460, 461, 126 P.2d 868, 870, most appropriate: "It is not always possible for a party to a lawsuit to introduce evidence directly bearing upon the existence of a fact that he is attempting to prove. The evidence available to him may serve only to establish the existence of certain primary facts that are logically connected with the material fact. If a jury can reasonably infer from these primary facts that the material fact exists, the party has introduced sufficient evidence to entitle him to have the jury decide the issue. The jury is not compelled to draw the inference, however, even in the absence of contrary evidence and may refuse to do so. Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn, in any given case, is a question of fact for the jury."

[5] Not only was it error to instruct the jury that "Fred W. Whittemore was in law a passenger" for the reason that the issue involved was one of fact, not law, but for the second reason that the wording of the instruction naturally would and actually did confuse the jury. In legal literature the words "guest" and "passenger" have acquired connotations of which jurors, almost without exception laymen, are quite unconscious. The statute itself does not differentiate between "passengers" and "guests" but refers to a "guest" who rides "without giving compensation for such ride." It does not appear that the jurors in this case were aware that there was any question as to whether Whittemore was a "passenger" as distinguished from a "guest." Nothing occurred during the course of the trial that would bring such an issue to focus, and in view of the fact that the court advised counsel before argument that he was going to take the question from the jury it is not to be presumed that it was discussed in argument. But it does clearly appear that one of the important questions of the case was whether Whittemore was a "passenger" as distinguished from the "pilot" flying the plane. Much of the evidence was addressed to this question, and pointing to it were many objections, followed by huddles at the bench and the consequent rulings. That it was regarded by at least one juror as an important issue is evidenced by a question asked upon the occasion of their

first return to the court room after their deliberations had progressed to a point, or points, of confusion. The foreman had requested further light on "negligence" and "contributory negligence," and then another juror inquired of the court: "In your instructions did you state Mr. Whittemore was a passenger or a passenger pilot?" By way of reply the instruction we have been considering was reread to the jurors. Then followed a lengthy discussion in chambers, in turn followed by a return to the court room and a rereading of an instruction which outlined to the jury the order in which they should consider the problems of the defendant's negligence, its proximate effect, Whittemore's negligence, its contributory effect, and the question of damages. Then this colloquy took place between the juror who had previously inquired concerning the subject, the trial judge, and counsel:

"Juror Number 6: Your Honor please, was his status established? That seems to be our worry.

"Mr. Crider: That depends upon what he means by 'established.'

"The Court: I don't understand what you mean by 'established.'

"The Juror: In your instructions at first you said he was a passenger. You have affirmed and denied that since then. Does he still remain a passenger?

"The Court: Yes.

"Mr. Crider: That doesn't determine the question, even though he was a passenger, as to who was driving the plane.

"Mr. Grant: I object to the argument of counsel.

"The Court: Objection sustained. I don't think you should have any argument. It is for the jury to determine, it is their exclusive province to determine the facts in the case, consider and weigh the evidence for that purpose. Of course, it is the duty of the court to instruct you on the law. Any other question? All right, the jury may retire for further deliberation."

Some hours later the jury again appeared in the court room, announced that they had stood seven to five on every ballot, and, upon invitation, an unidentified juror stated: "Your Honor, there still was controversy on the point of what was considered contributory negligence and negligence. That is still being thrashed out. Also a passenger in the plane." Another discus-

sion between court and counsel occurred in chambers, during which defendant's instruction No. X and then plaintiff's instruction XX, were written out in longhand. Once again in the courtroom the trial judge reread some instructions defining negligence and contributory negligence; again, as plaintiff's counsel had repeatedly requested him to do during the conference, he read the instruction which we have quoted, with its statement "Mr. Whittemore was in law a passenger"; and he then concluded with these two new instructions, the first one being defendant's instruction No. X: "You are instructed that it is a question of fact for you to determine who was actually piloting and flying the plane at the time of the accident and at the time the plane left the ground at Burbank"; the second, plaintiff's instruction No. XX: "If you find from the evidence that the decedent Fred W. Whittemore was actually operating the plane at the time of the crash you are instructed that he was not by reason thereof guilty of contributory negligence unless you further find that some negligence on his part in such operation of the plane as distinguished from the general management, direction and control thereof proximately contributed to the accident and to his death."

Even if the evidence permitted of but one conclusion, and that was that Whittemore was a paying guest, it would have been unnecessary and improper to advise the jury that he was a passenger, for all that they need be advised would be that the measure of defendant's duty was that of ordinary care. The repeated giving of the instruction was confusing, and the giving of defendant's instruction No. X, it is our opinion, did not serve to cure the confusion.

The extent of the prejudice which the defendant suffered by the failure of the trial court to clear up the uncertainty created, by its use of the word "passenger," in the minds of the jurors struggling with the questions "Was Whittemore piloting the plane?" and "If so, was he guilty of contributory negligence?" becomes more apparent when we consider the added harm erroneously done to defendant's cause by plaintiff's instruction No. XX. We find the genesis of an important portion of the instruction in plaintiff's amendment to her amended complaint, where she alleged that the defendant "so carelessly and negligently constructed, maintained, cared for, directed, managed and controlled its said

transport airplane that * * * while defendant was flying it to its destination at Las Vegas, Nevada, said airplane crashed to the earth * * *." The evidence utterly fails to substantiate the averments that the defendant was in any way wise negligent in the construction, maintenance or care of the plane, and this the plaintiff now admits. The only negligence of which the jury could have found the defendant guilty was that generally described as having to do with the direction, management and control of its plane, and specifically described, in further averments in the amendment to the amended complaint, as having the plane take off on a combat flight and continue on such flight to the point of the crash, in the face of information that weather conditions did not permit of contact flying.

There was no occasion to touch on this phase of the case, upon the former appeal, and it will be better understood if a background is sketched of the facts which the jury may well have drawn from the evidence which was, in the main, without conflict. The defendant company had originally assigned pilot Downes to fly the plane from Burbank to Las Vegas. Somewhere between 7:30 and 8 a. m. on the day of the fatal flight, Downes inquired about the weather at the United States Weather Bureau, located in the Union Air Terminal at Burbank, and was told that contact flying through the Mint Canyon section to Las Vegas was not possible, at the time, and probably would not be possible during the day. (Contact flying, the jury was informed, is flying in which the pilot is enabled to keep to his course by keeping the earth's surface in view.) Around 11 or 11:30, of the same morning, for personal reasons Downes was relieved of his assignment and Willey was substituted as defendant's pilot in charge of the delivery flight. Willey, incidentally, was licensed to do instrument flying and the plane was equipped for it. At 1:20 Willey telephoned his flight plan to the manager of the airport traffic control tower. In it he stated his destination, identified his plane and furnished other required data, and added: "Flying contact to Palmdale." Whittemore, it was stipulated, was familiar with this flight plan. He and Willey were in a group near the plane, just before or just after the flight plan had been given, and was heard to say to Willey: "Let us go up and check the weather." Thereupon the two went up

to the building where the weather bureau was located, returned shortly, and got into the plane. Willey first occupied the left-hand seat in the cockpit, but relinquished it to Whittemore after the latter arrived and spoke to him. Whittemore then slid the window open, signalled with his arm and received an answering signal indicating that all was clear so that the engines might be started. He then started the engines, let them idle a minute or so, put his head out of the window, looked forward and back, signalled to a member of the ground crew, and finally, a return signal having been given, the plane taxied to the runway, and took off.

[6, 7] From this evidence the jury could have concluded with confidence that Whittemore was at the controls when the plane took off on its fatal flight and was still flying the plane when it crashed, less than a half hour later. Willey, to be sure, was the defendant's agent, in charge of the plane and of the flight, so far as the defendant was concerned, but that fact did not preclude the jury from concluding that Whittemore was flying the plane, of his own will. The defendant may have been negligent because Willey, with weather information much later than that received by Downes early in the morning, did not act as an ordinarily prudent person would have acted, in permitting the plane to take off and continue on a contact flight in the face of the known low to vanishing visibility. Such negligence, of course, falls within plaintiff's accusation that the defendant carelessly directed, managed and controlled its plane. Can it be argued that Willey was negligent in this particular, but that Whittemore, if possessed of equal knowledge of conditions and greater air experience than Willey, was not negligent? Answering our rhetorical question, we admit that such an argument could be made, but believe that it must have fallen on deaf ears. In any event, and this is the extent of our holding, the jury could have concluded that Whittemore was negligent for the same reasons and to the same extent that Willey was.

How reconcile this statement with the jury's verdict? A possible answer is found in the last instruction given them before that verdict was returned. By it they were advised, in effect, that Whittemore, if himself operating the plane, was not to be held guilty of contributory negligence unless he operated it negligently as distinguished from the general management, direction

and control thereof. In other words, any negligence arising from his taking off and continuing on a contact flight, under conditions known to him to be risky for that type of flying, was eliminated from the jury's consideration with respect to Whittemore's contributory negligence; he was to be found contributorily negligent only if in the operation itself there was fault to be found. The defendant criticizes the giving of this instruction "for the reason that it is confusing, meaningless, and inapplicable to the facts of the case." This criticism would be just if the instruction were not susceptible of the interpretation we have ascribed to it, but so understood, it is not meaningless, just erroneous.

It has become obvious that in support of defendant's charge that Whittemore's negligence was a contributing factor in the accident, any competent evidence tending to prove that Whittemore was flying the plane should have been received. Such evidence was offered, by the defendant, but rejected. It will be recalled that Willey first seated himself in the cockpit on the left side, but gave up his seat to Whittemore. By questions, to which objections were sustained, and by offers of proof, which proved futile, the defendant endeavored to show the significance of this maneuver. It tried to prove that it was the general custom among flyers, "an absolutely universal unwritten custom and unwritten law among pilots," for the pilot who was going to do the flying, in a dual control plane, to take the seat on the left-hand side of the cockpit. The defendant also tried to introduce evidence that on each of the four previous trips on which Whittemore had accompanied newly completed planes on the delivery trips to Las Vegas, he had taken the left-hand seat and flown the ship all the way. (The defendant had made and delivered ten or twelve planes to Whittemore's company.) Objections were properly sustained to the questions whose object was to prove that Whittemore had on four occasions done one thing, in the expectation that the jury would infer therefrom that he had done the same thing the fifth time. An inference is not authorized upon so unsubstantial a basis. With respect to the significance of Whittemore's taking Willey's seat quite a different situation is presented. A jury would be fully justified in concluding that the person, who was seated on the left-hand side of the front seat of an ordinary looking automobile moving along Highway

101, was doing the driving. Unless our memory is faulty, a jury could with reason have inferred, in the gay nineties, that the person sitting on the right side of a "dual control," one-horsepowered, buggy, was the driver. Had the defendant been allowed and able to introduce the testimony it announced itself prepared to introduce, the jury could with reason have inferred that Whittemore, because he took the left-hand seat with Willey's acquiescence, was the pilot who was to control the flight of the plane on its take-off and until such time as a reason arose for a change over to the co-pilot.

In the event of a retrial it is unlikely that the plaintiff will repeat her question about insurance, in the jury's presence, so we shall not dwell upon that incident. Nor do we find it necessary to consider other matters that have been brought to our attention. For the reasons already given, the judgment is reversed.

DESMOND, P. J., and SHINN, J.,
concur.



64 Cal.App.2d 449

ABROMS v. NEW YORK LIFE INS. CO.
Civ. 14397.

District Court of Appeal, Second District,
Division 1, California.
May 22, 1944.

I. Appeal and error ☞1195(3)

Holding by court on former appeal that plaintiffs' complaint stated a cause of action did not require that trial court on second trial accept as true plaintiff's evidence.

2. Appeal and error ☞931(1)

On appeal all intendments are in favor of the findings made and judgment rendered, and testimony favorable to respondent must be accepted.

3. Reformation of Instruments ☞45(2)

In action to reform an annuity certificate issued by insurance company so as
149 P.2d—14½

to cause it to provide for a refund annuity with insured's husband as beneficiary instead of life annuity issued to insured, who subsequently died, evidence sustained finding that there was no fraud practiced by defendant, that the life annuity certificate expressed the intention of the parties, and that insured's husband had acquiesced in the issuance of such certificate. Civ.Code, §§ 1573, 1577, 1580.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Action by Abe Abroms, and Abe Abroms as administrator of the estate of Rose Abroms, also known as Rose Abrams, deceased, against the New York Life Insurance Company to reform an annuity certificate issued by defendant so as to cause it to provide for a refund annuity with Abe Abroms, individually, as beneficiary instead of a life annuity certificate issued by defendant. From a judgment for defendant, the plaintiffs appeal.

Judgment affirmed.

John Preston, of San Francisco, and A. Joseph Shapiro, of Los Angeles, for appellants.

Meserve, Mumber & Hughes, of Los Angeles, for respondent.

WHITE, Justice.

Plaintiff Abe Abroms individually and as administrator of the estate of Rose Abroms, his deceased wife, brought this action against defendant New York Life Insurance Company for reformation of an annuity certificate issued by the defendant, so as to cause the same to provide for a refund annuity with plaintiff Abe Abroms, individually, as beneficiary, instead of the life annuity certificate actually issued by defendant.

Trial before the court sitting without a jury resulted in a judgment in favor of defendant insurance company. From such judgment plaintiffs prosecute this appeal.

Prior to the trial of the instant case, defendant interposed a demurrer, both general and special, to the original complaint. The demurrer was sustained without leave to amend. Plaintiffs' request for leave to file a first amended complaint was denied, following which denial judgments of dismissal in favor of defendant were entered

pursuant to the order sustaining the latter's demurrer. An appeal taken from said judgments resulted in a reversal thereof by this court with directions to the trial court to overrule defendant's demurrer and to permit the filing of the proffered first amended complaint should plaintiffs be so advised. *Abroms v. New York Life Ins. Co.*, 53 Cal.App.2d 764, 128 P.2d 391.

Upon the going down of the remittitur, plaintiffs filed their first amended complaint. By its answer, defendant admitted the issuance of the original annuity policy, the surrender thereof when the life annuity certificate was issued on July 1, 1939, and conceded that the certificate actually issued provided for a life annuity. As affirmative defenses, the answer alleged laches and estoppel; and further set forth that Rose Abroms had consented in writing to the issuance of a life annuity certificate.

The factual background surrounding this litigation may be thus epitomized:

Plaintiff Abe Abroms was born in Lithuania in 1875 and his wife in 1879. They were married in England in 1905, coming to the United States in 1914. After Abe Abroms had worked as a cabinet maker in the State of New York for about five years, he and his wife settled in Akron, Ohio, where, in 1919, they commenced the operation of a small neighborhood grocery store. Through their industry and thrift they accumulated a total sum of \$18,000 by 1932. Due to the condition of their health and upon the advice of their doctor, Mr. and Mrs. Abroms liquidated their business and decided to remove their residence to California with the intention not to again engage in any active business or other work. Being desirous of investing a portion of their savings to provide security in their old age, they determined upon an investment of \$10,000 of their competence with the view of receiving an income therefrom in the later years of their lives, retaining the balance of \$8,000 to meet their necessities and requirements during the years intervening until the invested \$10,000 should commence to return them an income. Accordingly, they consulted an agent of the defendant insurance company, unfolded to him their aims, hopes and plans. Acting upon the advice and counsel of defendant's agent, plaintiff Abe Abroms and his wife purchased from the defendant on June 20, 1932, a single premium policy. This policy provided for the payment to Mrs. Rose Abroms of a life

annuity of \$79.10 per month "commencing on the anniversary of this Policy upon which the Annuitant's age at nearest birthday is 60 years; but, at any time prior to the commencement of such Annuity payments, the Annuitant may, provided the policy is then in force, elect in writing to receive in lieu thereof either:

"(1) A Life Annuity, as shown in Schedule I hereof, or

"(2) A Refund Annuity as shown in Schedule II hereof.

"The Company further agrees to pay to Abraham Abroms, husband of the Annuitant, Beneficiary, in the event of the receipt of due proof of the death of the Annuitant, a Death Benefit as shown in Schedule III hereof, if such death shall occur prior to the due date of the first Annuity payment hereunder; or, if a Refund Annuity has been elected and such death shall occur on or after the due date of the first Annuity payment, the Company agrees to pay to said Beneficiary the Annuity payments, if any, becoming due after the death of Annuitant, as set forth in the provision hereof entitled 'Annuity Payments'.

"The Company, upon surrender of this Policy on the anniversary elected for commencement of Annuity payments hereunder, will issue a Certificate in lieu thereof setting forth the rights and benefits as stated herein.

"This contract is made in consideration of the application therefor and of the payment in advance of the single premium of \$10,000.00 representing Ten Premium-Units of \$1,000 each. * * * This Policy takes effect as of the First day of July Nineteen Hundred and Thirty-two. * * *

In the year 1939, when the annuitant, Mrs. Rose Abroms, was approaching the stipulated age of 60 years, she and her husband visited the Los Angeles office of the defendant insurance company with a view of exercising the option provided for in "Schedule I" or "Schedule II" of the above named policy of 1932.

For the purpose of clarity, it might here be explained that the annuitant had the choice of one of two forms of continued annuity insurance when she reached the age of 60 years.

The form of certificate contemplated by "Schedule I" was called a "life annuity". This certificate provided for the payment to the annuitant Rose Abroms of the sum

of \$80.62 per month commencing with the first day of July, 1939, and continuing thereafter during the lifetime of said annuitant. However, all annuity payments under this form of certificate terminated with the death of the annuitant, Mrs. Rose Abroms.

The form of annuity certificate under "Schedule II", and which is called a "refund annuity", would be evidenced by a certificate which would provide for the payment of annuity payments in monthly instalments to the annuitant, Rose Abroms, until her death in the sum of \$71.72, and upon her death there would be payable to the surviving husband, plaintiff Abe Abroms, as beneficiary, the annuity payments becoming due after the death of Rose Abroms.

By the amended complaint it is alleged that when plaintiff Abe Abroms and his wife called upon defendant insurance company at its Los Angeles office in 1939, they then and there informed defendant and its agents and employees that they were desirous of surrendering the 1932 policy according to the terms thereof for a certificate providing for a "refund annuity" which insured to the benefit of said husband, should the latter survive his wife, but that the defendant company issued to plaintiff Abe Abroms and his wife a certificate under "Schedule I" providing for a "life annuity" and that under the provisions of such certificate the annuity payments were to and did cease upon the death of said wife.

As heretofore noted, the life annuity certificate was issued as of July 1, 1939, and Mrs. Abroms died May 16, 1941, whereupon the defendant company refused to pay any further sums as annuities to the surviving husband, the plaintiff herein Abe Abroms.

On November 10, 1941, plaintiff in his individual, as well as in his representative capacity, commenced this action to reform the issued certificate so as to cause the same to provide for a "refund annuity" instead of a "life annuity".

Plaintiffs by their amended complaint specifically charged that on or about July 1, 1939, pursuant to the option or election plan provided for in the annuity policy of July 1, 1932, Abe Abroms and his wife, Rose Abroms, the annuitant named in said policy, went to the office of the defendant "for the purpose of notifying defendant that they were electing the refund annuity provided for in said policy and as shown in

'Schedule II' thereof, whereunder the annuity payments would be payable to Rose Abroms as the annuitant until her death commencing at her age sixty, and upon her death there would be payable to Abe Abroms, in his individual capacity and in his own right, as the designated beneficiary, the annuity payments becoming due after the death of Rose Abroms as set forth in the provisions of said policy entitled 'Annuity Payments'; and that plaintiff and his wife "then and there informed the defendant * * * that they desired to surrender the aforementioned policy for a certificate which would provide for a refund annuity"; that plaintiff and his wife "then and there ordered a certificate of such kind and type", but that defendant issued a different type of certificate, to-wit, one providing for a life annuity; and "falsely and fraudulently represented" that said certificate "provided for the refund annuity ordered by said plaintiff and his wife; that neither the plaintiff nor his wife examined the certificate and were ignorant of the fact that they were defrauded prior to the time when said wife died, because of their reliance upon the representations and statements so made by the defendant". On the issues of fraud thus made by the pleadings, the court found in favor of defendant. It was found that Rose Abroms had not asked for a "refund annuity" but for a "life annuity", and that she had received from the defendant the exact kind of an annuity certificate she ordered.

At the trial plaintiff Abe Abroms testified that neither he nor his wife could read English; that they did not read the original policy after it was issued to them in 1932, nor did they have any one read it to or for them; neither did they read or have read for them the "life annuity" certificate issued to them in 1939. That they relied solely upon the representations made to them by defendant and that at no time did defendant or its agents explain to plaintiff Abe Abroms or his wife the nature and ultimate effect of the annuity certificate issued to them.

A reading of the record in this case at once establishes the fact that plaintiffs' case depends for its virility and strength, in the main, upon the testimony of plaintiff Abe Abroms. That the court did not believe the testimony of said plaintiff is immediately apparent when reference is had to the "memorandum of opinion" rendered by the trial court at the conclusion of the

trial, and wherein we find the following: "There are two phases of his testimony which are so incredible that the Court would not be justified in making any finding based wholly upon his testimony. He testified that he and his wife came to this country in 1914 and after he had worked for several years as a cabinet maker they opened a grocery store in Akron, Ohio, in 1919 which they operated until 1934, doing a business which they built up to a gross income of \$350 to \$400 per week; but that they never learned to read English and always read Jewish papers; and that the only thing that he could decipher so far as English is concerned was figures. I wrote upon a piece of blank paper the figures 1,000 preceded by a dollar sign (\$), all written largely and clearly. This I handed to him and asked him what it said. After seeming great difficulty, frowning, holding the paper in various positions and taking an appreciable time, he said he could make out the figures 1,000. I asked him if there was nothing else he could make out upon the paper. He looked at it and said 'no'. I then pointed to the dollar sign and asked him if he knew what that was. He again looked at it carefully and said 'no'. The only thing he could understand there was the figures 1,000. The idea that this man could be in this country from 1914, could conduct a sizable retail grocery business in connection with which he would naturally deal with many wholesalers as well as retailers and build up of a profit of \$18,000, \$14,000 of which was in the bank, and still at this late date be wholly unable to recognize the dollar mark is so utterly incredible as to be beyond belief. The other circumstance to which I refer and which is almost if not equally preposterous is his testimony that in the talks which he and his wife had with the agent in negotiating for an annuity contract in which they were to deposit \$10,000 in cash with the New York Life Insurance Company neither of them at any time ever asked the agent how much monthly payment they were to receive for it and neither of them had any idea or made any inquiry as to this important feature. Upon his attention being directed to this by the Court he again reiterated that neither of them had ever asked any question along this line but that he and his wife privately had thought that maybe they might receive \$100 a month. The idea that two people who were sufficiently shrewd and capable to go to a strange country, establish a business and

amass a profit of some \$18,000 would be so naive as to turn a major portion of this over to a company with whom they had never had any prior dealings and never make any inquiry as to what they were to receive for it is wholly out of line with human experience."

As the first ground of appeal it is urged that the trial court erred in failing to follow the law of the case as established by the decision of this court in the former appeal herein *Abroms v. New Life Insurance Company*, supra.

In that connection appellants urge that the trial court was bound to follow as the law of the case the following principle enunciated by this court in the former appeal, wherein we said [53 Cal.App.2d 764, 128 P.2d 394]:

"If respondent's agents issued the Annuity Certificate here in question without an explanation to appellant and his wife of its ultimate effect, that act in itself would bring the parties within the provisions of section 3399 of the Civil Code."

[1] However, in giving consideration to the decision on the prior appeal to determine the extent to which the law of the case therein announced is applicable in determining the instant controversy it must be borne in mind that the former appeal was from a judgment based upon an order sustaining a demurrer to the complaint without leave to amend. In that proceeding, being upon demurrer, it was required that the truth of the allegations contained in the complaint be assumed. Acting upon that assumption, this court held on the former appeal that the complaint stated a cause of action, ordered that the demurrer be overruled and that the proffered amended complaint be filed. But, unless the evidence adduced at the trial proved the allegations of the complaint which was considered upon the former appeal, the doctrine of the law of the case does not apply. In other words, if the trial court was justified, as we are persuaded it was, in holding that appellants' evidence failed to substantiate the allegations of the complaint and the amended complaint, then the decision of this court in passing upon the demurrer interposed to the original complaint was not binding upon the trial court as the law of the case, nor is it binding upon this court on this appeal, in passing upon the sufficiency of the evidence to support the allegations of the pleadings. *Allen v. California Mutual Building Loan Associa-*

tion, 22 Cal.2d 474, 481, 482, 139 P.2d 321; *Archer v. City of Los Angeles*, 19 Cal.2d 19, 29, 119 P.2d 1.

There can be no doubt as urged by appellants that the original contract of insurance issued in 1932, providing for an annuity to Mrs. Abroms at age 60, was taken out by the insured upon the advice and counsel of defendant's agent, whose testimony shows that at the request of a friend he called upon them, and Mrs. Abroms explained to him "that they had worked hard for many years in this grocery store and they had been very thrifty, that they had not had a chance to spend any money because the hours were long and that it had taken a lot out of them; and as near as I can recall, Mr. Abroms was sick at the time; that they had bought the building and sold it and had accumulated about \$18,000 in cash, and that they wanted to put some of it in a safe place with the idea that they did not want to lose any of their money and then be poverty stricken, so I recommended this particular contract at age sixty." However, no claim can successfully be made that both Mr. and Mrs. Abroms did not understand the nature of the policy originally issued to them in 1932, or were not satisfied that its terms met their desires and requirements. They both understood that when Mrs. Abroms attained the age of 60 years an annuity would be paid under the terms of this policy. That they so understood and were aware of the option or election afforded them to choose a particular type of annuity certificate is demonstrated by the very allegations of plaintiffs' complaint, wherein it is averred that they went to the Los Angeles office of the defendant insurance company "for the purpose of notifying defendant that they were electing the refund annuity."

With reference to appellants' testimony that neither he nor his wife could read English, it is significant that at the time they contracted for the policy in 1932 they made no such suggestion to the defendant's agent, Mr. Krakover, and the testimony of Elizabeth O. Busch, the defendant's Los Angeles Office employee with whom Mr. and Mrs. Abroms conferred in 1939, when exercising their election, was that neither of them at the time documents were presented for their signature suggested their inability to read English, nor did either of them request Miss Busch to read the documents to them.

Coming now to a consideration of the circumstances immediately preceding, and at the time of the issuance of the life annuity certificate to Mrs. Abroms, we find the evidence highly conflicting. There was, it is true, testimony that Mrs. Abroms was in serious ill health; that she was suffering from a severe heart malady, complicated by other ailments. As her physician testified, "she was warned by me that she had a bad heart and that her condition was not good". The death certificate executed by the doctor gave as the immediate cause of Mrs. Abroms' death, which occurred less than two years after issuance of the life annuity certificate, "cerebral hemorrhage, duration, sudden, due to hypertension and chronic myocarditis, duration, several years". Appellants argue that it is inherently improbable in view of the state of Mrs. Abroms' health, that either she or her husband would understandingly accept a life annuity upon her life when they could have obtained a refund annuity which would have inured to the benefit of Mr. Abroms in the event of the death of his wife. In this regard, however, we must bear in mind that the record is equally clear that Mr. Abroms himself was far from being in good health, and in fact was in rather bad health. As far back as 1914 he was sick in Rochester, New York, and unable to work, about 1930 he underwent an operation for appendicitis which developed into a peritonitis condition and was told by the attending physician that "he had only one chance in a thousand to live". Subsequently in California, and within less than two years prior to the time when Mrs. Abroms was required to make her election under the policy, Mr. Abroms suffered a severe fainting spell which rendered him unconscious and as a result, as stated by the trial court "was advised by the doctor that he should take it easy, that he had trouble with his heart, that he must give up smoking and must even refrain from taking an occasional drink of whiskey to which he had been accustomed for the purpose of giving himself strength". Occurrences at the trial, while Mr. Abroms was upon the witness stand, also indicated that he was in failing health. Furthermore, he was several years older than his wife and testified at the trial "I had it in my mind maybe I will go first".

As we view the record we are impressed that the trial court was justified in con-

cluding that the motive actuating Mrs. Abroms in selecting the life annuity certificate instead of the refund annuity certificate was because "she wanted the most money she could get out of it", as Miss Busch, one of defendant's employees, testified Mrs. Abroms stated to her. And Miss Busch further testified: "I told her if she took a refund annuity she would obtain—if she took a refund annuity, the amount would be smaller and if she took a non-refund it would be greater". This same witness testified unequivocally as follows:

"Q. Did you at any time ever explain to Mrs. Abroms that if a life annuity certificate were taken, that the company would make no further payments even though she died three days after having taken that type of certificate? A. I explained that there would be no refund of any kind. She emphatically insisted that she wanted the most money she could get out of that policy during her lifetime, and I had no right to sway her opinion, her selection. I did tell her under one option she would get less and under the other one she would get more."

A reading of the record in this case furnishes convincing evidence that Mrs. Abroms was at all times the dominating figure in transactions with the defendant insurance company; that she conducted all of the negotiations. In fact, plaintiff Abe Abroms himself testified in the trial court that his wife did all the talking, that he stood alongside, taking no part in the discussion, while in his deposition he said in answer to a question, "I didn't say nothing, the lady was talking to the Mrs. because it was in her name."

[2] While appellants direct our attention to certain testimony given by representatives of the defendant company from which it is argued there is established inferentially at least, fraud, mutual mistake or mistake of one party which the other at the time knew or suspected, we must nevertheless, for the purposes of this appeal, wherein all intendments are in favor of the findings made and the judgment rendered, accept that portion of the testimony favorable to respondent. With that rule in mind, we find in the record further testimony given by Miss Busch, defendant's employee with whom the Abroms dealt at the time they applied for and obtained the annuity certificate, and wherein Miss Busch testified as follows:

"Q. Did you explain to Mr. and Mrs. Abroms on that occasion what a refund type of annuity policy was? A. Yes.

"Q. And what did you tell them in that regard? A. Well, as I said, she wanted the greatest amount that she could possibly get out of that annuity, and I told her that if she wanted that, she would have to leave her dividends, not draw it in cash, and she would have to take what is known as a non-refund annuity, that she would not get anything back in case of her death.

"Q. Did you explain to either of them or both of them, the difference between a refund annuity and a life annuity, or did you just assume that she knew what that was? A. Yes, I explained it to her. I didn't assume she knew what it was, but I didn't get far in my explanation because she was very—when I said anything at all—she would go back and tell me she wanted the most money she could get out of that while she was alive, and I didn't have a chance to make much of an explanation at any time to her.

"Q. Do I understand you to mean by your answer, Miss Busch, when you started your explanation she would interrupt you? A. She would.

"Q. In what form were her interruptions? A. She would put her hand down on the counter and she would say, 'I want all the money I can get out of this policy while I am alive every month'.

"Q. Now, what did you tell her, did you say anything to her about a non-refund annuity, what it was? A. Yes, I went into that quite thoroughly with her."

[3] We have searched the record in vain for any testimony that would contradict the assumption by the court that in all their dealings with defendant insurance company both Mr. and Mrs. Abroms accepted documents tendered them, apparently examined them, and signed them without at any time asking that the contents of such documents be read or explained to them by the representative of the insurance company or by any one else. That such would be the conduct of two illiterate people who had \$10,000 invested is not borne out by human experience with the propensities and habits of people, nor by either the course of business or the course of nature. There isn't a scintilla of evidence that either Mr. or Mrs. Abroms were tricked into signing any documents by

agents or employees of defendant insurance company, and there is a total lack of any showing that they were prevented by defendant's agents from reading such documents, while there is positive testimony that neither Mr. nor Mrs. Abrams at any time made any request to have the documents read to them or that they asked permission to take such documents to any other person for the purpose of having the contents thereof read or explained to them. The finding of the trial court that there was no fraud, either actual or constructive, practiced by the defendant upon plaintiffs finds ample support in the evidence as well as in the inferences fairly and reasonably deducible therefrom.

As heretofore pointed out, because appellants' evidence fails to prove the allegations of the amended complaint or to sustain the issues made by such pleading or raised by the evidence, the doctrine of the law of the case enunciated on the former appeal, wherein the sufficiency of the allegations of the original complaint to state a cause of action was considered, does not apply.

The evidence in this cause fails to establish a case which merits the application of the extraordinary remedy of revising a written contract of the parties herein. Sec. 3399, C.C. The evidence does not establish constructive fraud as that term is defined by section 1573 of the Civil Code; nor a mutual mistake or a mistake as set forth in section 1577 of the Civil Code. Neither does the evidence, taken as a whole, together with the inferences to be reasonably drawn therefrom, establish the fact that there was no meeting of the minds or mutuality of consent between all of the parties concerned. Sec. 1580, C.C. On the other hand, there is substantial evidence in the record to support the conclusion arrived at by the trial court that the "life annuity" certificate expressed the intention of the parties; was what the annuitant desired and gave to her "the most money" of the two alternative certificates available to her under the policy of 1932, which was what she said she wanted and in which her husband, at least by his silence, if not by any spoken word, acquiesced.

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

BOARD OF DENTAL EXAMINERS v.
JAMESON.

Civ. 14479.

District Court of Appeal, Second District,
Division 1, California.

May 29, 1944.

Hearing Denied July 27, 1944.

1. Statutes $\S$ 181(1)

Legislative intent must govern in construing statutes.

2. Statutes $\S$ 205, 217, 225

In attempting to arrive at legislative intent, entire act must be considered, as well as other enactments upon same subject, including history of legislation upon subject matter in question.

3. Physicians and surgeons $\S$ 6(2)

The changes in Dental Practice Act pertaining to laboratory work by unlicensed persons indicates legislative intent to raise standards by extending definition of what constitutes practice of dentistry beyond actual performance of operative work or treatment of gums, jaws, or teeth to include any person who indicates that he will perform any operation upon human teeth or will construct, alter, repair, or sell any bridge, crown, or denture. St.1937, pp. 1243, 1244, $\S$ 1625(b, c), 1626(e).

4. Injunction $\S$ 89

Physicians and surgeons $\S$ 6(2)

Unlicensed operator of dental laboratory, whose advertisement indicated to public that he would construct and sell plates and dentures, was engaged in "practice of dentistry" within definition of Dental Practice Act and subject to injunction against unauthorized practice notwithstanding that without such advertisement his business is specifically exempted from operation of the act. St.1937, pp. 1243, 1244, 1248, 1250, $\S$ 1625(c), 1626(e), 1680, 1705.

See Words and Phrases, Permanent Edition, for all other definitions of "Practice of Dentistry".

5. Physicians and surgeons $\S$ 10

The main objective of legislation prohibiting certain forms of advertising by dentist is to protect public from deception. St.1937, p. 1248, $\S$ 1680.

6. Physicians and surgeons ¶6(2)

The Dental Practice Act, as it pertains to relationship between licensed dentists and dental laboratories operated by unlicensed persons, does not indicate legislative intent to permit dental laboratories or laboratory technicians to engage in practices denied to dentists or to compete with dentists. St.1937, pp. 1243, 1244, 1248, §§ 1625, 1626(e), 1680.

7. Physicians and surgeons ¶10

The right given to laymen to manufacture dental plates under Dental Practice Act does not include right to advertise such products to the public under general rule that right to manufacture implies right to sell and advertise, since act deals with a profession pertaining to public health and is not governed by standards of conduct traditional in competition of the market place. St.1937, pp. 1241-1254, §§ 1600-1752.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Suit by the Board of Dental Examiners of California against E. K. Jameson, individually, and doing business under the firm name and style of E. K. Jameson Dental Laboratories, to enjoin defendant from carrying on or conducting the practice of dentistry. From a judgment for plaintiff, defendant appeals.

Affirmed.

Booth B. Goodman, of Oakland, for appellant.

H. E. Lindersmith, of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal from a judgment permanently enjoining and restraining defendant from carrying on or conducting the practice of dentistry, as that profession is defined and regulated by Chapter 4, Secs. 1600-1752, of the Business and Professions Code, Stats. 1937, Ch. 399, pp. 1229, 1241-1254, and which chapter is commonly known and cited as the "Dental Practice Act". Except as otherwise indicated, section numbers herein referred to are sections of said code. Authority for the commencement and prosecution of this litigation is contained in section 1705.

The cause was submitted to the trial court upon an agreed statement of facts which, in so far as pertinent to the disposition of this appeal, recited that the defendant never has been, and is not now, licensed to practice dentistry in the State of California; that he "caused a certain advertisement to be printed, published and circulated to the public" in the Los Angeles telephone directory on or about September 1, 1941, and again in the issue of June, 1942, reading as follows:

"Perfect

"Dental Plates

"are Not expensive

"If You Arrange to Deal with

"Manufacturing Dental Laboratory

"This is not a dental office, but a laboratory. Our entire facilities are devoted to the building of fine plates which you may arrange to purchase at our low laboratory rates.

"Plates Repaired and Rebuilt

"E. K. Jameson Dental Laboratories

"4157 W. 5th St. at Western

Phone Expstn 1000"

The agreed statement of facts also narrated that defendant is an individual doing business in the City of Los Angeles in his own name and under the firm name and style of Jameson Dental Laboratories; that his business consists of the construction, making, alteration and repairing of bridges and dentures, when the casts or impressions for the work have been made or taken by a licensed dentist and a written authorization signed by a licensed dentist accompanies each order given to appellant for such work; that in some instances appellant does such work at the instance and request of some licensed dentist, delivering the completed work to him; that in instances when a layman approaches with the view of buying the bridges and dentures from him, defendant "refers the layman to dentists, submitting a list of three names together with a statement that he is not a dentist and that he has no authority or authorization by law to supply them with their wants but that the same must be made through a dentist and that the dental fees must be arranged with the dentists; that, however, he does the laboratory work and supplies the material therefor and that the same may be paid by the layman directly to" defendant "for the said laboratory fees, which said fees are wholly removed from

the dental fees which the said layman pays directly to the dentist"; that defendant "has on display in his laboratory various samples of dentures manufactured by him"; and that he shows them "to any and all persons who inquire relative to the same and quotes his price for each sample irrespective of whether the inquiry comes from dentists or from laymen or members of the public, and that the prices for his said dentures are fixed according to the value of each piece of merchandise"; and that "in the case of the layman or member of the public making such inquiry", defendant "advises that the price quoted is a fixed price only for the laboratory work and denture and does not include the fees charged by the dentist".

Based upon such agreed statement of facts, the court found "that it is true that said E. K. Jameson" (an unlicensed person) "at all times mentioned in said complaint has been, and is now, engaged in carrying on and conducting the practice of dentistry, as defined in the Dental Practice Act, in the State of California, in that he did, by causing said printed advertisement * * * to be printed, published and circulated as aforesaid, indicate and now continues to indicate by said printed advertisement that he will construct, alter, repair, and sell dentures and artificial dental plates." (Emphasis added.)

The sole issue presented upon this appeal is whether, because of the publication and circulation of the aforesaid advertisement, defendant is engaged in the practice of dentistry as such practice is defined in section 1625 of the Act, which provides:

"A person practices dentistry within the meaning of this chapter who * * * (c) * * * in any way indicates that he will construct, alter, repair or sell any bridge, crown, denture or other prosthetic appliance or orthodontic appliance."

The industry of counsel has not produced any authorities upon the precise question with which we are here confronted, nor have our efforts in that regard been rewarded with the discovery of an applicable authority. The case is concededly one of first impression.

[1,2] We must, therefore, have recourse to the cardinal rule that in the construction of statutes the legislative intent must govern. In attempting to arrive at the legislative intent, the entire act must

be considered, as well as other enactments upon the same subject, including the legislative history of the legislation upon the subject matter in question; all for the purpose of enabling the court to give the statute the force and effect which the legislature intended, and so as to obviate the evil sought to be remedied.

Applying the rule just announced to the statute here under consideration, in an effort to determine whether the conduct of defendant amounted to the practice of dentistry, we find that in the year 1885 dentistry was, for the first time, regulated in California (Stats.1885, Ch. CXXVII, p. 110). A new act was adopted in 1915, Stats.1915, Ch. 426, p. 698. The original act of 1885 required only that those who were then engaged in the practice of dentistry should, within six months after the effective date of the act, register with the Board of Dental Examiners. Without specifying any educational qualifications, it was also provided that, after the act became effective, all persons other than those then engaged in the practice of the profession should be required, as a prerequisite to entering upon such practice, to submit to an examination by the Board as to their qualifications. By the act of 1915 it was required that all persons desiring to take an examination must be possessed of a high school education, as well as a diploma from a reputable college of dentistry. Subsequently, other amendments were made to the act, and in 1937 the Dental Practice Act was made a part of the Business and Professions Code.

It is interesting and helpful to note that section 11 of the 1915 act provided that:

"Any person shall be understood to be practicing dentistry within the meaning of this act who shall * * * (3) in any way indicate that he will perform by himself or his agents or servants any operation upon the human teeth or jaws, or (4) make an examination of, with intent to perform or cause to be performed any operation on the human teeth or jaws * * * but nothing in this act contained shall prohibit * * * an unlicensed person from performing merely mechanical work upon inert matter in a dental laboratory."

Manifestly, there was not included in the definition of the practice of dentistry just quoted, mechanical operations consisting of the construction, making, altering, or

repairing of bridges and dentures such as characterized the dental laboratory business conducted by defendant herein. Undoubtedly, a dental technician could have contracted and dealt directly with a customer who sought such service. But, in 1933, the legislature further extended the definition of those who "should be understood to be practicing dentistry within the meaning of this act" so as to directly affect the activities of unlicensed persons who were engaged in doing dental work of a mechanical nature, by adding to the foregoing subdivision (3) of section 11 of the 1915 act the following: "or in any way indicates that he will construct, alter, repair, or sell any bridge, crown, denture, or other prosthetic appliance or orthodontic appliance" (Stats. 1933, ch. 84, p. 526). By the same act, the language of section 11 of the 1915 statute relating to what an unlicensed person might do was deleted, and in its place was substituted the language now appearing in subdivision (e) of section 1626 of the Business and Professions Code, reading:

"The following practices, acts and operations, however, are exempt from the operation of this chapter * * * (e) The construction, making, alteration or repairing of bridges, crowns, dentures, or other prosthetic appliances or orthodontic appliances when the casts or impressions for this work have been made or taken by a licensed dentist, but a written authorization signed by a licensed dentist shall accompany the order for the work or it shall be performed in the office of a licensed dentist under his supervision."

[3] It seems clear from a reading of the foregoing legislative changes in the Dental Practice Act that the lawmaking body sought thereby to raise the standards of the profession, and in so doing that they extended the definition of what constituted the practice of dentistry beyond simply the actual performance of operative work or treatments on the gums, jaws or teeth. To that end, it is to be noted that in defining what constitutes the practice of dentistry, section 1625 not only includes one who "performs, or offers to perform, an operation or diagnosis of any kind * * * upon the human teeth, alveolar process, gums or jaws", but, by subdivision (c) of this section provides that any person who "in any way indicates that he will perform * * * any operation upon the

human teeth * * * or in any way indicates that he will construct, alter, repair or sell any bridge, crown, denture * * *" will thereby be practicing dentistry.

[4, 5] An examination of the stipulation of facts herein discloses that appellant, who possessed no license to practice dentistry, was advertising that "our entire facilities are devoted to the building of fine plates which you may arrange to purchase at our low laboratory rates". Manifestly, appellant was thereby indicating to the public that he would "construct and sell" plates and dentures. Subdivision (c) of section 1625 unequivocally declares that such conduct constitutes the practice of dentistry.

Appellant, however, contends that subdivision (e) of section 1626 specifically exempts his business from the operation of the Act by expressly permitting an unlicensed person to engage in the mechanical work done by appellant under the conditions described in said subdivision (e) of section 1626, all of which conditions concededly were met by appellant in the conduct of his business. Without doubt, appellant has the right to engage in the construction, alteration, or repairing of plates and bridges under the conditions which, according to the agreed statement of facts, characterized his operations, without impinging upon the provisions of section 1625, which defines what amounts to the practice of dentistry, but, when he advertises to the public that he will do these things, then he is practicing dentistry. The main objective of the legislation prohibiting certain forms of advertising is to protect the public from deception. If appellant be permitted to advertise as he did then he would be indicating that he will do, or offers to do, that which only a licensed dentist can do, because, under the provisions of subdivision (e) of section 1626, an unlicensed person can only engage in the mechanical work done by appellant "when the casts or impressions for this work have been made or taken by a licensed dentist"; and then only when "a written authorization signed by a licensed dentist shall accompany the order for the work or it shall be performed in the office of a licensed dentist under his supervision".

[6] Furthermore, judged in the light of the inhibitions against certain forms

of advertising by licensed dentists contained in section 1680, which, among other things, prohibits a licensed practitioner from asserting professional superiority, or advertising a guarantee of his dental service, and for the doing of which he may be disciplined for unprofessional conduct (*Barron v. Board of Dental Examiners*, 44 Cal.App.2d 790, 113 P.2d 247; *Webster v. Board of Dental Examiners*, 17 Cal. 2d 534, 110 P.2d 992), it is manifest that appellant's advertisement of "perfect dental plates" would not be allowed to a licensed dentist. We do not regard it as at all reasonable to assume that the legislature intended that dental laboratories, or laboratory technicians, should be allowed to engage in practices denied to licensed practitioners. Neither do we believe that it was ever intended by the legislature that dental laboratories and technicians should be permitted to compete with licensed dentists. The legislative intent in this regard is clearly indicated by the language of section 1625, which declares that any person who "by card, circular, pamphlet, newspaper or in any other way advertises himself or represents himself to be a dentist", or who "offers to perform, an operation or diagnosis of any kind" is practicing dentistry. Whether a dental technician or manufacturer may legitimately, by advertising or otherwise, bring to the attention of licensed dentists the business in which such technician or manufacturer is engaged and the service he is prepared to render, is not before the court in the instant proceeding and need not be determined. True, in the instant case appellant's advertisement states therein that "this is not a dental office, but a labora-

tory". However, taken as a whole, the advertisement is not directed to practicing dentists whose laboratory work appellant is seeking and which work is to be done under the prescription or direction of such licensed practitioner, but the advertisement is an invitation to the public to "arrange to deal with manufacturing dental laboratory". And for what purpose? Manifestly, to secure professional services of the kind and type which, according to subdivision (c) of section 1625, is reserved only to those licensed to practice dentistry, unless it is done by an unlicensed person in conformity with the conditions and restrictions imposed by subdivision (e) of section 1626.

[7] Appellant urges that the right given to manufacture dental plates implies not only the right to sell them, but also the right to advertise such products. Ordinarily this might be true, but in connection with the manufacture and fitting of dentures or plates in the human mouth, "the legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place". *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 612, 55 S.Ct. 570, 572, 79 L.Ed. 1086; *Webster v. Board of Dental Examiners*, *supra*.

For the reasons herein stated, the judgment from which this appeal was taken is affirmed.

YORK, P. J., and DORAN, J., concur.

24 Cal.2d 304

CAMPAGNA v. MARKET STREET RY. CO.
S. F. No. 16985.

Supreme Court of California.
May 25, 1944.

Rehearing Denied June 22, 1944.

1. Negligence ⇨117

Plea of contributory negligence is not sufficient to raise defense of imputed negligence.

2. Pleading ⇨240

Generally, an order granting leave to amend is not an amendment, and in the absence of a written statement of facts concerning the issue, it is not properly pleaded.

3. Appeal and error ⇨195

Where a motion to amend pleading is granted during the trial, and the case is tried as if the amendment had been made, a party may not later complain that no formal amendment was filed.

4. Pleading ⇨236(5)

Trial court has large discretionary power to allow amendment to be made to conform to proof.

5. Appeal and error ⇨1041(3)

Where counsel for plaintiff declared in his opening statement that any negligence on part of driver of truck of which plaintiff was riding was not imputable to plaintiff, and defendant had been given leave to amend answer to raise issue of imputed negligence but failed to file amendment, plaintiff had not been prejudiced and could not complain of defendant's failure to file amended answer.

6. Negligence ⇨93(1)

Where two occupants of an automobile are engaged in a joint venture or enterprise with respect to its operation, the negligence of the driver is imputable to companion, but to constitute such relationship the parties must have community of interest in a joint or common undertaking, each exercising or having the right to exercise equal or joint control.

7. Negligence ⇨93(1)

The relationship of "joint venturers" in the operation of an automobile, so as to make applicable the doctrine of imputed

negligence, is that of mutual agency, akin to a limited partnership.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Venturer".

8. Joint adventures ⇨1

The relationship of joint venturers is founded on contract, and the acts of the parties over a period of time may be sufficient to raise an implied agreement of joint enterprise.

9. Joint adventures ⇨1

Although a joint venture generally contemplates an equal sharing of the profits and losses in the prosecution of the common purpose, the division may be left to the agreement of the parties.

10. Negligence ⇨93(1)

The doctrine of "imputed negligence" is not to be loosely applied, and where there is nothing in common between the passenger and driver of automobile except a common destination and a common purpose in going there, the negligence of the driver is not to be imputed to the passenger.

See Words and Phrases, Permanent Edition, for all other definitions of "Imputed Negligence".

11. Negligence ⇨93(1)

To invoke doctrine of "imputed negligence" against passenger of automobile the passenger must do more than indicate the route to be traveled, a certain plan in common is not sufficient to establish relationship of joint venturers, and neither family relationship nor association together in business is determinative of the question.

12. Negligence ⇨122(1)

The imputation of contributory negligence is an affirmative defense upon which defendant has the burden of proof.

13. Appeal and error ⇨1066

In action against street car company for injuries sustained by an incompetent in a collision between street car and truck in which incompetent was riding and which was operated by incompetent's father, where the incompetent had been assisting his father in the business of selling fruits and vegetables from the truck, but there was no showing that the incompetent had any voice as to the manner in which the

business was conducted or as to the route to be taken, giving an instruction on imputed negligence was prejudicial.

14. Street railroads ⇐118(14)

In action against street car company for injuries sustained by an incompetent in a collision between street car and truck in which incompetent was riding and which was operated by incompetent's father, where there was no showing that incompetent had any authority as to directing operation of the truck, giving an instruction on contributory negligence was improper.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Salvadore Campagna, Jr., an incompetent, by Angellina Sartinni, his guardian ad litem, against Market Street Railway Company for personal injuries. Judgment for defendant, and plaintiff appeals.

Reversed.

Prior opinion, 143 P.2d 43.

Fitz-Gerald Ames, of San Francisco, for appellant.

Cyril Appel, Linforth, Cannon & Miller, and Jesse H. Miller, all of San Francisco, for respondent.

EDMONDS, Justice.

Salvadore Campagna, Jr., was riding on a vegetable truck, driven by his father, when it struck a streetcar. As a result of the collision, the son sustained personal injuries. In the trial of his action for damages the jury returned a verdict in favor of the railroad company and his appeal from the judgment principally concerns an instruction relating to the doctrine of imputed negligence.

For some years prior to the accident, the elder Campagna had been in the produce business, selling fruit and vegetables from door to door. The son, a young man 25 years old, described in the testimony as being mentally deficient, customarily accompanied him. According to one defense relied upon by the railroad company they were joint venturers engaged in a common enterprise.

At the time of the accident, which occurred at about 5:30 in the morning, father and son were on their way to the market. Although the testimony as to the collision is conflicting, there is substantial evidence, the appellant admits, tending to prove that his father, in operating the truck, was guilty of negligence. But the conduct of the father would only absolve the railroad from liability if his negligence may be imputed to the son.

There is no dispute regarding the facts as to the business relations of the father and son. Campagna, Sr., testified that for approximately ten years the boy had been his companion every day. "He helps me lots," the father told the jury. "In going to the market he help to load the truck, and after, on the route, he deliver the stuff, fruit, vegetables, and anything for my customers. * * *" Also, the father continued, the boy would "collect the money sometimes, when he has the right change." When they came home after a day's work, the son would help "clean up the truck; take all the boxes out of the truck. * * *"

The young man lived with his parents, and as a member of the household he did chores such as cutting wood and carrying it upstairs, starting the fire and cleaning. Regarding the earnings from the truck, the father was asked on cross-examination: "Whatever you earned together went into the family pool, didn't it?" Answering affirmatively, the witness added: "Well, the boy is work more voluntary." He paid his son no salary, the father told the jury, although once in a while, when he could spare the money, he gave him a few dollars.

Regarding the son's mental capacity, although a physician testified that the boy is an imbecile, it appears that he can bathe and dress himself and go on errands to the store. "He was okay, that boy," said the father. But Salvadore is not like his other children, the father admitted, and the boy has had no schooling except for a few months when he was about six years of age.

Upon this and other evidence, the trial judge instructed the jury upon the doctrine of imputed negligence. The appellant concedes that the instructions upon this subject correctly state the law but he asserts that the defense to which they relate was not pleaded at such time as to give the

railroad company the right to rely upon it. Assuming, however, that the defense was properly pleaded, says the appellant, there is no evidence justifying the court's charges to the jury concerning it. He also challenges other instructions stating principles of law to be applied by the jury in determining whether the motorman negligently operated the streetcar at the time of the accident. In support of the judgment, the railroad company asserts that the instruction as to imputed negligence was fully justified by pleading and proof and that the court did not err in other rulings.

[1] Concerning the question of pleading, the answer, as filed, did not include the defense of imputed negligence but, in general terms, it was alleged that the appellant was guilty of contributory negligence. Such a plea is not sufficient for one who seeks to charge a person with the negligence of another in the operation of an automobile; a defendant must assert that the injured person controlled, or had the right to control, the vehicle in which he was riding. *Bennett v. Chanslor & Lyon Co.*, 204 Cal. 101, 266 P. 803; *Dover v. Archambeault*, 57 Cal.App. 659, 208 P. 178. But after the railroad company had concluded the presentation of evidence, its counsel asked permission to amend the answer "by adding the specific defense of imputable negligence, upon the ground that at the time of the happening of the accident the plaintiff and his father were engaged in a joint enterprise * * * and that the negligence of the father, the driver of the automobile, is therefore legally imputed to the boy." Over objection the motion was granted upon the ground that the defense of contributory negligence was pleaded and "you may amend by setting up the facts constituting it." No amendment was filed.

[2-5] As a general rule, an order granting leave to amend is not an amendment, and in the absence of a written statement of facts concerning the issue, it is not properly pleaded. *Central Cal. Creditors' Ass'n v. Seeley*, 91 Cal.App. 327, 267 P. 138. But when such a motion is granted during the trial, and the case is tried as if the amendment had been made, a party may not later complain that no formal amendment was filed. *Greenwood v. Greenwood*, 112 Cal.App. 691, 297 P. 589; *Yule v. Mil-*

ler, 80 Cal.App. 609, 252 P. 733; *Morris v. Standard Oil Co.*, 188 Cal. 468, 205 P. 1073; *Parmenter v. McDougall*, 172 Cal. 306, 156 P. 460. Trial courts have large discretionary power to allow amendments to be made to conform to proof and in the present case, as counsel for the appellant, in his opening statement, declared that "in the event the defendant should endeavor to establish any negligence on the part of the father, it is our contention that such negligence is not imputable to the son," the appellant has not been prejudiced and may not complain of the respondent's failure to file an amended answer.

[6-9] When two occupants of a vehicle are engaged in a joint venture or enterprise with respect to its operation, the negligence of the driver is imputable to his companion. But to constitute such a relationship, the parties must have a community of interest in a joint or common undertaking, each exercising or having the right to exercise equal or joint control and direction. *Bryant v. Pacific Elec. R. Co.*, 174 Cal. 737, 164 P. 385; *Pope v. Halpern*, 193 Cal. 168, 223 P. 470. The relationship of joint venturers is that of a mutual agency, akin to a limited partnership. *Butler v. Union Trust Co.*, 178 Cal. 195, 172 P. 601; *Westcott v. Gilman*, 170 Cal. 562, 150 P. 777, Ann.Cas.1916E, 437; *Arnold v. Humphreys*, 138 Cal.App. 637, 33 P.2d 67; *Keyes v. Nims*, 43 Cal.App. 1, 184 P. 695. It is founded on contract; and the acts of the parties over a period of time may be sufficient to raise an implied agreement of joint enterprise. *Universal Sales Corp. v. California Press Mfg. Co.*, 20 Cal.2d 751, 128 P.2d 665. Although a joint venture generally contemplates an equal sharing of the profits and losses in the prosecution of the common purpose (2 Rowley's Modern Law of Partnership, § 975; 33 C.J. 841, § 2), the division may be left to the agreement of the parties. *Hamer v. MacClatchie*, 220 Cal. 720, 32 P.2d 620.

[10-12] The doctrine of imputed negligence is not to be loosely applied, and "where there is nothing in common between the passenger and driver of the vehicle except a common destination and a common purpose in going there the negligence of the driver is not to be imputed to the passenger." *Wessling v. Southern Pac. Co.*,

116 Cal.App. 455, 458, 3 P.2d 25, 26. The passenger must do more than to indicate the route to be traveled, and a certain plan in common is not sufficient to establish the relationship. *Pope v. Halpern*, supra. Neither family relationship between the parties, nor association together in business, is determinative of the question. *Bryant v. Pacific Elec. Ry. Co.*, supra; *Moore v. Franchetti*, 22 Cal.App.2d 75, 70 P.2d 492. And as the imputation of contributory negligence is an affirmative defense, the defendant has the burden of proof upon that issue. *Bennett v. Chanslor & Lyon Co.*, supra; *Huber v. Scott*, 122 Cal.App. 334, 10 P.2d 150.

[13, 14] In the present case there is no evidence relating to the relations of Campagna and his son except the testimony of the father as to the manner in which he operated his produce peddling business and there is nothing to show that the boy had any interest in the business. In the words of the father, the appellant's services were "voluntary" and although the boy was supported by the father's earnings on the truck, there is nothing to show that at the time of the accident the young man controlled or had the right to control the truck Campagna was driving. He had nothing to say as to where the vegetables were to be purchased, or the amounts to be paid for them; what the route should be, what prices were to be charged customers, or how the business should be carried on. Nor did he have the right to share in the profits of the peddling business. According to the undisputed evidence, he merely accompanied his father on the truck and did his bidding. Under these circumstances, the boy's connection with the enterprise was that of an employee working for his living expenses, and it was prejudicial error for the trial court to instruct the jury concerning the principles relating to the doctrine of imputed negligence. *Wessling v. Southern Pac. Co.*, supra. The instruction upon the subject of contributory negligence was also unsupported by evidence and should not have been given.

This conclusion makes it unnecessary to consider the other points presented by the appellant.

The judgment is reversed.

GIBSON, C. J., and SHENK, CURTIS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

PAUL v. WILLIAMS.

Civ. 3144.

District Court of Appeal, Fourth District,
California.

June 2, 1944.

Rehearing Denied June 30, 1944.

1. Sales ⇨272

Where canning company was acting as agent for growers who had agreed to raise tomatoes for sale to it, in entering into contract under which defendant agreed to raise tomato plants to be sold to growers, and it appeared that growers were undisclosed principals at time the contract was entered into but became disclosed before any deliveries were made thereunder, there was an implied warranty that plants should be reasonably fit for purpose of raising tomatoes for market, which was breached by delivery of mongrel plants which did not produce tomatoes of a merchantable quality. Civ.Code, § 1735.

2. Sales ⇨442(11)

The amount of plaintiff's loss on his tomato crop plus rental value of his land was not a proper measure of damages caused by breach of implied warranty that tomato plants sold to him should be reasonably fit for purpose of raising tomatoes for market, but the proper measure was an amount equaling difference between the amount plaintiff would have received for his tomato crop had there been no breach of warranty and the amount he did receive. Civ.Code, §§ 3300, 3358.

3. Appeal and error ⇨1178(6)

Where there appeared no reason why judgment insofar as it fixed liability on defendant for breaches of implied warranty should be set aside, but record contained nothing on which any fairly accurate estimate of plaintiff's damages could be based, District Court of Appeal would reverse the judgment and remand the cause for new trial solely on issue of damages.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Paul Paul against Irving Williams for breach of an implied warranty in selling tomato plants which were unfit for the production of commercial fruit. From

a judgment for plaintiff, the defendant appeals.

Judgment reversed with directions.

Clyde E. Cate and Ralph Robinson, both of Fresno, for appellant.

Chester R. Andrews, of Fresno, for respondent.

MARKS, Justice.

This is an appeal from a judgment awarding plaintiff damages in the sum of \$2054.50 for breach of an implied warranty in selling tomato plants which were unfit for the production of commercial fruit.

Plaintiff is a farmer who, during 1942, planted forty acres of tomatoes. Defendant, under the name of Irving Williams Company, for several years had been engaged in the business of raising tomato plants for sale to farmers who raised tomatoes for commercial purposes.

The Riverbank Canning Company is a corporation engaged in the business of canning tomatoes and making tomato paste. We will hereafter refer to this company as Riverbank.

During the year 1942, Riverbank entered into numerous contracts with farmers who agreed to raise tomatoes for sale to it. Plaintiff agreed to raise forty acres of San Marzanos and Pearsons for Riverbank. The San Marzanos, a pear shaped tomato, was contracted for at \$19.50 per ton and the Pearsons, a round tomato, at \$17.50 per ton.

Riverbank entered into a contract with defendant, evidenced by several letters, under which defendant agreed to raise 3,000,000 tomato plants for \$2.75 a thousand. The negotiations on the part of Riverbank were initiated by a Mr. Brockway. The first letter is from Riverbank to defendant, dated February 10, 1942, and after stating the number of plants to be grown and the price to be paid, adds: "We understand that the plants are to be guaranteed at the time they are pulled and ready for growers." Defendant replied under date of February 11, 1942, in which he confirmed the agreement with Mr. Brockway, and added: "Every effort will be made to produce the desired number of plants but we do not guarantee to supply this quantity if conditions beyond our control interfere, such as frost, insect damage, etc." Riverbank replied to this letter under date of February 12, 1942, and stated that it believed the letter of Williams represented the understanding with Brockway but ex-

pressed the intention of submitting it to him for checking. The next day Riverbank wrote defendant that the contents of the letters, with an exception not material here, had been approved. The writings are none too definite in defining the terms of the contract. There is no specification of the varieties of tomato plants to be raised, and just what was meant by the statement in the first letter concerning the guarantee is not made clear.

Riverbank caused fifty pounds of seeds to be shipped to defendant which was used in planting the seed beds. Riverbank's agents inspected the seed beds during their preparation for planting. They were told that tomato plants and commercial tomatoes had been raised on some of the ground occupied by the seed beds. They also inspected the beds during the growing period and again when the plants were ready to dig and noticed some off variety plants growing among the true types. Williams testified that they told him to have some workmen precede the plant diggers and pull and remove the off variety plants so they would not be mixed with the true types; that he did this before digging the plants for delivery to the various growers.

The deposition of Williams had been taken and was used at the trial. In it he testified as follows:

"Mr. Andrews: And in general the terms of the agreement were what? * * * A. They supplied the seed, and charged me their cost for the seed, and I planted the seed under their direction shortly after the agreement was made.

"Q. And by 'their direction' what do you mean? A. Their field men inspected the land during the preparation of the seed beds and supervised the planting for the first few days.

"Q. Did they have anything to do with the choice of where the—what field you used? A. No. I took the field man to the ranch and showed him what land we had available at that time, and it was acceptable to them. * * *

"Q. I see. And when this contract was made, you contemplated that it was to be for the purpose of furnishing plants to these growers which Riverbank signed up, who were going to grow for Riverbank, is that right? A. That is correct."

We find the following in Williams testimony when called as a witness:

"Q. Did you ever know who Paul Paul was until—or, I will withdraw that. When did you first know anything of Paul Paul? A. The Riverbank Canning Company, at the time we entered into an agreement to grow tomato plants, informed me that they would advise me of the various growers—

"Q. Talk to the Court. A. Pardon me. Who would call for the tomato plants, and in due course of time we were advised that Mr. Paul Paul, or someone, would call for plants, and to keep a record of these growers, to facilitate them billing the growers for the plants.

"Q. Those instructions that you just referred to were received just prior to the delivery of these plants? A. That is correct."

Williams testified that prior to his delivery of the plants to a grower, a representative of Riverbank would call him by telephone and inform him of the deliveries to be made with the name of the grower receiving the plants. He would then dig the plants and make the deliveries at the seed beds. He was paid for the plants by Riverbank.

Three invoices are in the record showing deliveries to plaintiff. We quote the earliest in point of time:

showed the delivery and sale to plaintiff on May 8, 1942, of 24,000 San Marzanos, 1000 Pearsons, and 4000 unnamed tomato plants. A receipt attached to the third invoice shows that 22,000 of the plants went to H. H. Bagdasarian, and that the 4000 tomato plants unnamed in the invoice were Pearsons. This left a total of 83,000 plants delivered to plaintiff.

Plaintiff testified that he planted the 83,000 plants he received from defendant; that they were planted and cared for by Japanese experienced in tomato culture; that they were properly planted and cared for; that he had the vines dusted successfully for mites with the exception of one-half an acre of Pearsons which was deliberately dusted with too heavy a dust which killed the plants in order to kill a bad infestation; that he thought he planted 25 acres of the Pearson variety and 15 acres of the San Marzano variety; that neither variety received from defendant in boxes marked "Pearson" and "San Marzano" were true to type but were a mixture of both varieties; that there were many mongrel plants of no particular variety mixed in with the other plants; that these mongrels did not produce merchantable fruit; that from 15% to 20% of the plants in the

Irving Williams Co.

Commission Merchants

Growers—Shippers—Distributors

California Vegetables

No. 395

Bakersfield, California

Original
This is Your Invoice—No Other Will be Sent

Sold to	Paul Paul		Date	5-7-1942	
Address			Terms		
1942 Date	Tag No.	Description	Price	Amount	
5-4	6154	38,000 Pearson Tom Plants @	\$2.75	\$104.50	
			Total	\$104.50	
How Shipped	Irving Williams Co. By Clarence W. Berg		Received above in good order By		

A second invoice in the same form showed the delivery and sale to plaintiff on May 6, 1942, of 12,000 Pearson and 26,000 San Marzano plants. A third invoice

San Marzano 15 acres were of this mongrel type and Pearsons and that from 50% to 60% of the vines in the Pearson 25 acres were mongrels that did not produce.

Plaintiff testified that he gave his promissory note to Riverbank for the cost of the plants which was paid when he delivered the tomatoes.

There is evidence that it was bad practice to plant a seed bed on ground that had been used to raise tomatoes for market or for seed beds for tomato plants; that unpicked tomatoes would fall to the ground and deposit their seeds in it; that these seeds would germinate and grow with the good seeds planted in the beds; that the mongrel plants in plaintiff's fields probably came from such volunteer plants growing in the seed beds; that it is difficult to tell the various varieties of tomato plants when they are ready for planting in the fields.

In addition of the loss of crop from the mongrel vines, their presence in the field added to the cost of picking as they were scattered through all the rows and the pickers had to pass by those vines. The price for picking ordinary fields of tomatoes ranged from fifteen to twenty-two cents a box, while plaintiff was compelled to pay pickers from fifteen to thirty cents a box, and even at the higher price could not get the last of his crop picked. The record does not disclose the added picking expense caused by the presence of the mongrel vines nor the value of the tomatoes left on the vines.

It seems clear from the evidence that plaintiff suffered a material loss in the returns from his crop by reason of the mongrel type plants delivered to him by defendant which failed to produce tomatoes, or merchantable tomatoes, and that his picking costs were increased by reason of the presence of the mongrel plants in his field.

Defendant maintains that his only liability is under subdivisions one and two of section 1735 of the Civil Code. He argues that Riverbank and not plaintiff was the purchaser of the tomato plants; that plaintiff was unknown to him at the time of his contract to grow the plants; that there was no privity of contract between himself and plaintiff; that there must be privity of contract between the purchaser and the seller before the warranties implied in the two subdivisions of the section come into play. In support of his arguments defendant cites such cases as *Sutter v. Associated Seed Growers*, 31 Cal.App.2d 543, 88 P.2d 144; *Asamen v. Thompson*, 55 Cal.App.2d 661, 131 P.2d 841; *Rachlin v. Libby-Owens-Ford Glass Co.*, 2 Cir., 96

F.2d 597; and *Sears, Roebuck & Co. v. Marhenke*, 9 Cir., 121 F.2d 598.

He also argues that subdivision one of the section cannot apply to the facts here because Riverbank, and not plaintiff, was the buyer, and that plaintiff, not knowing defendant, could not have relied on his skill and judgment in raising the plants; that subdivision two of the section cannot apply here because plaintiff, not being the purchaser, did not buy the plants by description.

We believe that in making this argument counsel does not give due consideration to the testimony of defendant. It is true that the letters evidencing the written agreement were signed by defendant on the one hand and by Riverbank on the other and not by plaintiff. It is equally true that defendant knew that Riverbank was not purchasing the plants for itself but for tomato growers who would contract to grow tomatoes. While the names of those growers were not known to either party when the letters were written they were known and disclosed to defendant before the plants were delivered. The invoices clearly showed that in the instant case 83,000 plants were sold and delivered to plaintiff which were represented to be San Marzanos and Pearsons. This representation was not true as there were many mongrel plants among them. It is true that Riverbank paid defendant for the plants but in doing this it was merely advancing money for the accounts of the growers.

[1] The conclusion follows that Riverbank was acting as agent for the growers who were undisclosed principals at the time the letters were written but became disclosed and were known to defendant before any deliveries were made. Defendant knew that the plants were to be used by the growers for the particular purpose of raising tomatoes for the market and should have known that the tomatoes were to be grown to be sold to Riverbank for use in its cannery, so, under the provisions of subdivision one of section 1735 of the Civil Code there was "an implied warranty that the goods shall be reasonably fit for such purpose." There was a breach of warranty to the extent of the delivery of the mongrel plants. The plants were sold under the name of "Pearson" and "San Marzano" which are descriptions of two particular varieties of tomatoes so there was "an implied warranty that the goods shall be of

merchantable quality." This warranty was breached by the delivery of the mongrel plants. It follows that defendant should respond in damages to plaintiff to the extent he was injured by these breaches of the warranties.

[2] Defendant argues that there is no proper proof of plaintiff's damages to support the judgment. In reply plaintiff points to his own evidence to the effect that he expended \$3414.31 in raising and picking the crop, receiving \$1717.81 for it, making a net cash loss to him of \$1696.50, and his further evidence that the rental value of his land was \$1200. He adds these two sums together and maintains that the result supports the judgment of \$2054.50 in his favor.

The amount of plaintiff's loss on his crop plus the rental value of his land is not a proper measure of his damages caused by the breaches of warranty by defendant. Section 3300 of the Civil Code provides that the measure of damages for breach of contract shall be "the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

Section 3358 of the Civil Code provides that "notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides," except in certain instances not important here.

Under the usual rule applied in cases of this kind, plaintiff should be entitled to damages in an amount equalling the difference between the amount he would have received for his crop, had there been no breach of warranty, and the amount he did receive. *Staub v. Muller*, 7 Cal.2d 221, 60 P.2d 283. This amount should reflect the higher picking costs caused by the presence of the mongrel vines as well as the shortage in the amount of crop produced, and should make allowances for the price of \$2. per ton he received on Pearsons over the price originally fixed for that variety in his contract with Riverbank which was modified during the picking season.

[3] We have searched the record and have found nothing on which we might base any fairly accurate estimate of the loss suffered by plaintiff by reason of the breach of warranties by defendant. While

this is true, no good reason appears why we should set aside the judgment in so far as it fixes liability on defendant for his breaches of warranty. We can reverse the judgment and remand the cause for new trial solely on the issue of the amount of damages. *Pretzer v. California Transit Co.*, 211 Cal. 202, 294 P. 382.

The judgment is reversed and the cause is remanded for a new trial solely upon the issue of the amount of damages, with directions to the trial court to make findings on liability in accordance with the views herein expressed and the evidence already taken, and on the amount of damages in accordance with the evidence to be taken, and enter judgment for plaintiff in that amount.

BARNARD, P. J., and GRIFFIN, J., concur.



64 Cal.App.2d 646

DEAN v. DYER.

Civ. 2889.

**District Court of Appeal, Fourth District,
California.**

May 31, 1944.

Hearing Denied July 27, 1944.

1. Physicians and surgeons ⇨18(8)

While expert evidence is usually essential in malpractice cases, it is not necessary where it is common knowledge that thing which happens is of a kind which does not ordinarily occur in absence of negligence on part of physician.

2. Physicians and surgeons ⇨18(8)

Where patient's eye following removal of cataract was in good condition before physician placed in eye a substance which immediately caused a sudden change including loss of sight of the eye, and physician's own testimony showed that atropine allegedly used, or even an infection or iritis would not have had such immediate effect, it was unnecessary to identify the substance used as basis of recovery.

3. Physicians and surgeons ⇨18(8)

Evidence that eye was in good condition following removal of cataract and that

immediately after physician put a substance in eye, there was a sudden change including loss of sight in the eye, and that atropine allegedly used, or even an infection or iritis would not have had such effect, made out prima facie case of negligence.

4. Physicians and surgeons ⇨18(8)

In action against physician for malpractice in putting a caustic substance into eye when it was in good condition following cataract removal, causing loss of sight in the eye, evidence that atropine allegedly used, or even an infection or iritis would not have caused such immediate effect, and physician's drastic change of method of treatment sustained jury's finding of negligence.

5. Trial ⇨260(1)

A requested instruction, substance of which was covered by instructions given, was properly refused.

6. Trial ⇨250

General instructions as to direct and indirect evidence and as to inferences and presumptions which were correct statements of the law were not erroneous as inapplicable to the issues.

7. Trial ⇨235(7)

An applicable instruction relative to expert witnesses was not improper because expert testimony came from a party to the action.

8. Physicians and surgeons ⇨18(7)

In malpractice action against physician, testimony of plaintiff's wife that physician told her not to get another doctor and not to take plaintiff to a hospital was properly admitted as relevant and material where testimony was brought out in showing physician's actions and statements immediately after the act with which he was charged.

9. Witnesses ⇨276

A physician sued for malpractice was properly required to testify as an expert witness when called under statute permitting examination of adverse party as on cross-examination. Code Civ.Proc. § 2055.

10. Damages ⇨132(14)

\$8,500 as reduced from verdict of \$17,360 to 55 year old man who suffered pain for weeks, was kept in a dark room for 65 days and who lost sight of his right eye

which had been operated on successfully for removal of a cataract was not excessive.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by Lewis W. Dean against Louis Q. Dyer for malpractice in treatment of plaintiff's eye. From a judgment for plaintiff, defendant appeals.

Affirmed.

Monroe & McInnis, of San Diego, for appellant.

Gray, Cary, Ames & Driscoll and Burton D. Wood, all of San Diego, for respondent.

BARNARD, Presiding Justice.

This is a malpractice action. The defendant practiced medicine in San Diego, specializing in the treatment of the eye. On April 15, 1941, he removed a cataract from the plaintiff's right eye. The operation was apparently successful and on April 20 the plaintiff was discharged from a hospital in San Diego and taken to his home near Escondido, some 40 miles away. The defendant testified that at that time the plaintiff's eye "was all healed, as far as I could see" and that on that date the plaintiff "could see very good" and "quite clearly." The plaintiff returned to the defendant's office for inspection on April 22 and on April 24. This action involves only what happened on the latter occasion.

The action was brought and tried upon the theory that on April 24 the defendant negligently put a caustic or corrosive substance into the plaintiff's eye, with the result that the sight thereof was destroyed. As a defense, the defendant contended that on April 24 he discovered a deep infection in plaintiff's eye which had caused "iritis", that he put nothing in the eye other than atropine, and that the loss of sight was caused by this infection. A jury brought in a verdict in favor of the plaintiff and the defendant has appealed from the judgment.

Appellant's main contention is that the evidence is insufficient to establish any negligence on his part. It is argued that there is no evidence to show that the respondent's eye was not infected when he came to appellant's office on April 24; that the appellant's testimony that the only thing he put into respondent's eye on this occasion was a solution of atropine stands uncontra-

dicted; that there is no evidence justifying an inference that some acid or corrosive substance must have been used; that these were all matters which called for expert testimony; and that the evidence is not sufficient to overcome the explanation made by the appellant.

It cannot be said that the appellant's testimony, to the effect that the condition which developed in the respondent's eye was caused by an infection therein and that nothing but atropine was used on the occasion in question, stands uncontradicted. While he testified that the conditions he found in this eye on April 24 would not be observable to a layman and that he then used nothing but an atropine solution, there is evidence, including statements and conduct on his part, which justified contrary inferences and which raised a substantial conflict in the evidence.

The respondent testified that the doctor inspected his eye on April 22 and said it "was doing fine, healing good and clearing up"; that he could then count the fingers the doctor held up and could see the letters on his chart; that he then had no trouble with this eye, there were no secretions and the bandage remained perfectly dry; that on April 24, when his wife changed the bandage, he could see everything in the kitchen; that on the afternoon of April 24 he went to appellant's office; that the appellant removed the bandage, commented on how well he was doing and remarked that he "believed it was doing as good or better than any eye he had ever operated on"; that he could see things in the office and saw the appellant take up an eyedropper and take something out of a bottle and put in the eye; that it "burned terribly" and he has never been able to see anything with that eye since; that the appellant told him it would quit burning in a few minutes; that the appellant then told him to come back on the 26th and said: "I don't think you will have to come back any more until I can fit you with glasses."

He then testified that on his way home his eye kept burning; that something kept running out of his eye and down on his face; that he kept wiping it off from under his mask; that this substance stung and smarted on his face; that this condition of pain existed all the way home and for a long time afterward; that he arrived home about 4 o'clock and laid down; that it pained pretty bad so he got up and walked

the floor; that it was not long before his wife came home and wanted to know what was the matter with him; that he told her "the doctor put some medicine in my eye that burned like fire", and asked her to wash it out; that before she had time to do this someone knocked on the door; that his wife opened the door and the appellant was there; that she asked him "What in the world brings you here?" and the appellant replied: "Something terrible has happened"; that the appellant rushed in, jerked off his coat and threw it on the floor and got out two syringes, telling Mrs. Dean to boil them; that after he had washed his hands the appellant took the bandage off the eye and smelled it; that the bandage was wringing wet; that he told the doctor his eye was blind; that the appellant began working on his eye with a little stick he took from his medicine case; that he then worked something off the eye with the stick and with cotton; that he put the stick, cotton and the bandage in a little paper and put them in his medicine case; that the appellant then washed out his eye with boric acid, using a bulb syringe; that every time he would wash it he would smell it; that after it had been washed three or four times he told the appellant he could stand it no longer; that the appellant told him to let him wash it two or three times and he "would have that stuff all washed out"; that the appellant then gave him a "shot"; that he then suggested to the appellant that perhaps they should have another doctor and that he should go to a hospital; that to each of these suggestions the appellant replied "absolutely no"; that before he left the appellant told him that if he should get worse during the night not to call another doctor but to call him and he would come right out; that before he left the appellant said he would return the next night; that he returned the next morning, however, and also the next night; and that on each of these occasions he attempted to treat this eye.

Mrs. Dean testified that about 12:30 on the 24th she changed the bandage on this eye; that the eye then appeared clear with no cloudiness or redness; that her husband did not then complain of any pain or discomfort in his eye; that when she returned home from her work about 4:30 she found her husband walking the floor and looking pale; that shortly thereafter the appellant appeared at the door; that in response to her inquiry as to what brought him he

stated "Oh, something terrible has happened"; that he asked for hot water and sterilized some syringes; that he removed the bandage, which was dripping wet; that this eye had a film over it, looked white and "just looked cooked"; that there were three or four big red streaks on his cheek which had not been there before and which lasted three or four days; and that the white of the eye had bloodshot threads through it. Her testimony as to what the appellant then did is about the same as that given by her husband. She further testified that while the appellant was forcing boric acid water into the eye she told him he was opening the incision, and that he replied: "That is the way I want it"; that the appellant stated he had inquired his way to the Dean house at the drug store; that when he was preparing to give her husband a "shot" she heard the appellant swearing and asked him what it was about and he replied: "I am so sorry this happened"; that when the appellant returned the next morning he brought "lots of medicine", including seven bottles and a box of pills; that the eye then looked "white, just cooked, and the incision was wide open"; that the appellant returned again about 4:30 that day; and that the appellant directed that Mr. Dean be kept in a dark room where he remained for 65 days.

A neighbor who had taken respondent to the appellant's office on April 24, testified that on the trip there the respondent was in good spirits, laughed and talked and complained of no pain or discomfort; that on the trip home he had little to say, appeared to be in agony and kept wiping under his eyes; and that she was present at the Dean home when the appellant came on the evening of the 25th. When asked how the eye looked at that time she replied: "Well, where the white is it was all red and the blue part was like—oh, the best I could describe it, like a poached egg that has that scum over it."

In his deposition, the appellant testified that when the respondent came to his office on April 24, he found the bandage "pretty dirty" and the eye "pretty red and inflamed". When examined at the trial he did not mention any dirty bandage but said he found evidences of an infection which would not be visible to a layman, that he was then "alarmed", and that he then "envisioned the possibility of the loss of the eye." This is contradicted by the casual manner in which he told the respondent to

come to the office for a final inspection two days later, if the respondent's evidence is to be believed. The fact that the appellant made a sudden trip to the respondent's home 40 miles away, where he had not previously been, arriving approximately half an hour after the respondent reached there, is significant. The appellant's explanation of this was that he had given the respondent instructions as to treatment for the eye but that he was not sure that he had given complete instructions. In view of the other evidence, this explanation is not entirely satisfactory. The appellant also testified that while inspecting the eye on April 24 he found an infection which constituted "iritis". He outlined the treatment for "iritis" and stated that "an eye with iritis must be handled rather gently." He also testified that he had never seen a case of iritis where a person lost his vision instantaneously. The treatment he outlined did not include the drastic washing out which was done immediately after his arrival at the Dean home on the 24th, as testified to by the other witnesses and confirmed by the appellant himself. There were a number of other inconsistencies and contradictions in the appellant's testimony which need not be enumerated, but which contributed to the existing conflict in the evidence. There was also some conflict with respect to the shape and appearance of some of the bottles which were on the appellant's tray when he inspected respondent's eye on April 24th. The appellant further testified that the solution of atropine, which he said he used on this occasion, would not cause the result which seems to have immediately followed.

[1-4] It would serve no useful purpose to review the many cases cited. While expert evidence is usually essential in malpractice cases it is well settled that this is not necessary where it is common knowledge that the thing which happens is of a kind which does not ordinarily occur in the absence of negligence upon the part of the actor. In such cases, the question of negligence may be decided upon the general circumstances as shown by the evidence and in the light of common experience. *Barham v. Widing*, 210 Cal. 206, 291 P. 173; *Ales v. Ryan*, 8 Cal.2d 82, 64 P.2d 409. Under the circumstances appearing here it was unnecessary to identify the substance which was put in the respondent's eye on April 24th. *Ley v. Bishopp*, 88 Cal.App. 313, 263 P. 369; *Gunning v. Cooley*, 281 U.S. 90,

50 S.Ct. 231, 74 L.Ed. 720. No expert evidence was needed to demonstrate that something unusual happened. It was fully shown that the respondent's eye was in good condition before this substance was placed in it and that immediately afterward a sudden change took place, including the loss of sight in the eye. The appellant's own evidence is to the effect that atropine, which he said he used, would not have had that effect and that even an infection or iritis would not have had that immediate effect. The evidence justifies an inference that some caustic substance was used and this is emphasized by the appellant's actions in very shortly thereafter hurrying to the respondent's home and in making unusual efforts to wash something out of the eye, and by what he there said. This, and the other evidence, would fully justify the inference that a mistake was made and that some harmful substance was put in this eye, and was sufficient to make out a *prima facie* case of negligence. The doctor's explanation was unsatisfactory in many ways and did not reasonably explain the sudden change which had taken place in this eye, the drastic change in his method of treatment or his greatly increased efforts to meet what could reasonably be interpreted as an entirely different situation which had arisen. The questions of fact presented were for the jury and the evidence is sufficient to sustain its finding.

What we have already said answers the appellant's second contention that since there was no competent evidence of negligence the court erred in permitting the verdict to stand.

[5-7] It is next contended that the court erred in refusing to give an instruction to the general effect that the question of the character and suitability of the substance used by the appellant on the occasion in question must be determined upon the testimony of expert witnesses. Nothing further need be said in this connection. Also, that the court erred in refusing to give a requested instruction upon the burden of proof. The substance thereof was fully covered in other instructions. It is further argued that the court erred in giving certain general instructions as to direct and indirect evidence and as to inferences and presumptions. While it is conceded that these were correct statements of the law it is claimed that they were not applicable to the issues and that by giving them the court permitted the jury to infer

that the appellant had been guilty of malpractice, basing such inference upon speculation and conjecture and with no competent testimony to support any such conclusion. This contention is without merit. It is also urged that the court erred in giving an instruction relative to expert witnesses. While it is admitted that the instruction was correct in itself it is argued that it was inapplicable here because, while the appellant gave his expert opinion on certain matters, there was no conflict in the expert evidence, and because the effect of the instruction was to single out testimony of the appellant and apply the rules of law to only one witness. There was some expert testimony and the fact that it came from a party to the action could not make an applicable instruction improper, and no possible prejudice appears.

[8,9] It is next contended that the court erred in permitting the respondent's wife to testify that the appellant told them not to get another doctor and not to take the respondent to a hospital, and that it also erred in requiring the appellant to testify as an expert witness when called under section 2055 of the Code of Civil Procedure. With respect to the first two of these matters the only argument is that they were not within the issues. This testimony was brought out in showing the actions and statements of the appellant immediately after the act with which he was charged, and was properly admitted as being both relevant and material. The contention that the appellant could not be required to testify as an expert when called under section 2055 has now been decided to the contrary. *Lawless v. Calaway*, 24 Cal.2d 81, 147 P.2d 604.

[10] The final contention is that the amount of the judgment is excessive. The jury returned a verdict for \$17,360. In connection with a motion for a new trial, and with the consent of the respondent, this amount was reduced to \$8500. It is argued that this amount is excessive because, while the operation to remove the cataract was apparently successful, it does not necessarily appear that the respondent would have enjoyed the sight of this eye regardless of what happened on April 24, and because it does not necessarily appear that the respondent has permanently lost the sight in this eye since he brought in no expert witness to testify to this effect.

The evidence justifies the inference that the operation had been successful and that

the respondent would have had a reasonable use of this eye if the event of April 24 had not occurred. It appears that the respondent has been totally blind in that eye since that occurrence and there is evidence that on June 20, 1941, the appellant expressed the opinion that this eye was "dead" and that he would never see out of it again. The appellant did not dispute this at the trial but then stated that he could not be certain that sight could not be restored without performing a surgical operation for the purpose of ascertaining the exact condition of the eye. The respondent was 55 years old at the time of the injury, he suffered pain for weeks, was kept in a dark room for 65 days and he has lost the sight of the eye. There is some evidence justifying the inference that this loss will be permanent and from the record before us it cannot be held that the amount of the judgment is such as to indicate that it was the result of passion or prejudice.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.



64 Cal.App.2d 752

MASSING v. BABCOCK et al.
Civ. 14408.

District Court of Appeal, Second District,
Division 1, California.
June 8, 1944.

1. Appeal and error ⇐1012(1)

In action for injuries sustained from falling on slippery and sloping sidewalk at entrance to premises occupied by defendant, relative weight to be given opinion testimony as to slippery condition of sidewalk given by architect who examined sidewalk about a year after accident occurred, and factual evidence as to condition of sidewalk at time of accident, were for trial court.

2. Appeal and error ⇐1008(1)

In business invitee's action for personal injuries sustained from fall on sloping and slippery sidewalk at entrance to premises occupied by defendant, under opinion

testimony and factual evidence as to slippery condition of sidewalk, whether sidewalk was slippery was question of fact for trial court.

3. Negligence ⇐134(5)

In business invitee's action for injuries sustained from fall on sloping and slippery sidewalk at entrance to premises occupied by defendant, evidence supported findings that the sidewalk was in a slippery and unfit condition for use.

4. Negligence ⇐135

In business invitee's action for injuries sustained from fall on sloping slippery sidewalk as invitee emerged from entrance to premises occupied by defendant, invitee's testimony that, as she approached door to leave the premises, she was looking at her automobile and had the business in mind she had been talking to defendant's secretary-treasurer about, was not sufficient to warrant a finding of contributory negligence.

5. Appeal and error ⇐1170(10)

In action for injuries sustained from fall on sloping and slippery sidewalk, where finding upon issue of contributory negligence of necessity under the evidence would have been adverse to defendant-appellant, court's omission to make a finding did not result in a miscarriage of justice. Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Jennie Massing against Claire Delano Babcock and Los Angeles National Farm Loan Association for personal injuries. From a judgment for plaintiff and from an order denying a motion for a new trial, second-named defendant appeals.

Judgment affirmed and order dismissed.

Floyd E. Pendell, of El Monte, for appellant.

Lyons & Lyons, Harry Lyons, and David Lyons, all of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an appeal by defendant Los Angeles Farm Loan Association from a judgment awarding damages to plaintiff on account of personal injuries alleged to have been sustained by her when she fell on the sidewalk as she emerged from the

entrance to premises occupied by said defendant. An appeal is also taken from "the ruling of the court upon the motion for a new trial made upon October 29, 1943, which motion was decided in favor of the plaintiff on said date."

The premises in front of which respondent fell are located at 2319 Huntington Drive, San Marino, California, and consist of a one story building. In front of said building is a five foot cement sidewalk which was laid before the building was constructed. The north edge of this sidewalk is parallel with and thirty inches equidistant from the front line of the building. When the building was constructed said thirty inch strip, which runs along the entire front of the building, was laid with cement and converted into an additional sidewalk. However, the floor level of the building being approximately four inches higher than the level of the five foot cement sidewalk, the thirty inch strip has a gradual slope upward from said sidewalk to the building. Ten days before the accident occurred, drill holes or marks had been made by an officer of the association with a Star drill in the cement ramp or incline, "from the top of the incline to the bottom of the incline."

On August 26, 1942, respondent Jennie Massing, accompanied by her son, Louis Massing, went to the office of appellant to obtain information respecting a parcel of real estate for the purchase of which said respondent was negotiating and against which appellant held an incumbrance. Because respondent's son, Louis Massing, was employed, the Massings were unable to call at appellant's office during business hours, and by previous telephonic arrangement, they arrived there at about six o'clock in the afternoon of the day mentioned, for a conference with Mr. Mann, Secretary-Treasurer of appellant association. The Massings waited for about forty-five minutes for Mr. Mann, who lived near by, and upon the latter's arrival he opened the office door from the inside and the Massings entered the office. After half or three-quarters of an hour the Massings prepared to leave: Mr. Massing opened the door for his mother, who proceeded him through the doorway. She took a step and then took a second step when she slipped and fell on the slope or incline. Mr. Massing called to Mr. Mann for help and, according to Mr. Massing's testimony, Mr. Mann came out "stood there

a second, and he took one look at her and he said, 'My God, I was afraid something like this would happen'. And between the two of us, we carried her back to the office and sat her in a chair." Mr. Mann called a doctor at the request of Mr. Massing, and the doctor took respondent to his office. Upon examination it was found that respondent had sustained a bimalleolar fracture of the right ankle with outward and lateral displacement of the ankle joint.

Appellant contends that the "judgment is based primarily upon two findings of fact as follows: (1) '* * * that it is true that immediately adjacent to said doorway defendant Los Angeles National Farm Loan Association maintained an extraordinarily slippery decline immediately to the south of said doorway * * *' (2) '* * * The Court further finds that the defendant Los Angeles National Farm Loan Association permitted said entrance way to remain and exist in a dangerous, improper and unfit state and condition, to be used, traversed and walked upon, * * * and that as a result thereof a nuisance was created and maintained by said defendant.' " And it is urged that since the evidence upon which said findings are based is inherently improbable, weak and unsatisfactory as a matter of law, it is insufficient to support them. In this connection, appellant argues that the only evidence which might support said findings is that of Louis Massing, son of respondent, who testified that he ran his hand over the cement and the walk and that it was *definitely slippery*; and that other uncontradicted evidence not only disproves this testimony but brands it as inherently improbable, if not physically impossible.

The witness Walker, an architect of thirty years' experience, after testifying that he examined the property in question for the first time on July 22, 1943, nearly a year after the accident occurred, was asked: "And Mr. Walker, at the time you examined the building what was the condition of what I term the threshold, being that portion of the entrance to the building between the sidewalk and the level, or near the level, cement entrance, to the door—what was the condition of that?" After objection to the question was overruled by the trial court because the witness "can give me as an expert, some knowledge", the witness Walker replied:

"I would have to say it was slippery. However, it was interrupted with abrasions

apparently made with a diamond drill, that should have made it reasonably safe. If I may amplify a bit: It was a steel trowel cement job, which always leaves a slippery surface unless an abrasive is used—the surface is slippery, but if it had perforations in it, it (they) should have been adequate to make it non-slippery. * * *

"By the Court: Mr. Walker, occasionally contractors sometimes use a dust or something that will give a concrete sidewalk a different shade or color, do they not? A. That is correct. * * *

"Q. Was that done as you saw this property? A. No, apparently it was not. It was apparently merely a steel trowel job, which means it has a *very even, very smooth surface*.

"Q. It could have been done so as to leave the surface rough? A. Yes, they use a wood trowel on the concrete to leave a rough surface.

"Q. They didn't do that in this case? A. They didn't but substituted, apparently, in lieu, the transverse marks which were made apparently with a diamond drill."

Mr. Mann testified that he had placed 200 holes in the cement approach to the building with a Star drill sometime prior to the date of respondent's fall and that subsequent thereto additional abrasions were made on that particular piece of cement. Also that no one had complained to him prior to August 26, 1942, of the improper condition of the entrance to said building. In his deposition taken prior to trial, the witness Mann testified that he examined the incline "within a day or two afterwards. I put this rubber mat outside."

[1-3] It is well settled that the relative weight to be given to the opinion testimony and factual evidence, hereinbefore recited, is for the trial court. *Universal Sales Corp. v. Cal., Etc., Mfg. Co.*, 20 Cal.2d 751, 766, 128 P.2d 665; *Neel v. Mannings, Inc.*, 19 Cal.2d 647, 654, 122 P.2d 576; *Shaw v. Owl Drug Co.*, 4 Cal. App.2d 191, 196, 40 P.2d 588. From such testimony, together with the inferences that could have been drawn therefrom respecting the smooth or slippery condition of the incline, it became a question of fact for the trial court to determine whether or not said incline was slippery at the time of

respondent's fall. And the fact that the first of the findings complained of used the words "extraordinarily slippery" in describing the incline or ramp, while the evidence described it as "very, very smooth" and "definitely slippery", is probably due to the fact that appellant's counsel in questioning the witness Walker used the word "extraordinarily" at least twice. At any rate, the record reveals evidence sufficiently substantial in character to support the findings of fact referred to.

Appellant also urges as a ground for reversal of the judgment the trial court's failure to make a finding of fact on the issue of contributory negligence of respondent which was raised by the answer. It is contended that the following testimony of respondent is sufficient to sustain such issue, to-wit:

"Q. As you approached the door, did you have occasion to look in front of you? Well, I will change that. Where were you looking as you *approached that door*? A. I was looking at my car—the car was parked in front of the door, and I still had the business in mind that I was talking to Mr. Mann about."

[4] The evidence pointed out by appellant is not sufficient to sustain a finding of contributory negligence on the part of respondent, because she did not fall as she *approached* the door, but *after she had walked through it*, her testimony being to the effect that as she looked out toward her car she observed the appearance of the sidewalk and the ramp which "looked level" and that she walked out, took two steps and fell.

[5] In the circumstances, a finding upon the issue of contributory negligence of necessity would have been adverse to appellant, consequently the omission to make such finding may be disregarded since such omission did not result in a miscarriage of justice. Const. Art. VI, sec. 4½. See, also, *Niles v. Louis H. Rapoport & Sons*, 53 Cal.App.2d 644, 651, 128 P.2d 50, and authorities there cited.

For the reasons stated, the judgment is affirmed. The appeal from the order denying motion for new trial is dismissed.

DORAN and WHITE, JJ., concur.

64 Cal.App.2d 487

BECKHAM et al. v. STATE et al.
Civ. 6894; Sac. 5565.District Court of Appeal, Third District,
California.

May 24, 1944.

Hearing Denied July 20, 1944.

1. Highways §86**Municipal corporations** §665

The owner of property fronting on a street or highway has, as appurtenant thereto, certain private easements in street in front of or adjacent to property as distinguished from right of passing to and fro which he enjoys in common with the public.

2. Eminent domain §105, 106**Municipal corporations** §665, 669

Property which an abutting owner has in street in front of his land is right of access and of light and air, and for an infringement of such right he is entitled to compensation.

3. Eminent domain §106

The word "cul-de-sac", within meaning of rule that owner of property fronting on street which has become a cul-de-sac by reason of a street improvement is entitled to compensation as an invasion of right of access, is a passage or place with only one outlet, or a way, street, or alley open only at one end, a blind alley.

See Words and Phrases, Permanent Edition, for all other definitions of "Cul-de-sac".

4. Municipal corporations §669

The right of access of an owner of property fronting on a street extends in both directions to next intersecting street, and any inconveniences which may be suffered or hazards encountered thereafter do not affect his easement.

5. Eminent domain §300

Evidence, as to manner in which subway to effect railroad grade preparation was constructed on street intersecting street on which plaintiffs' properties front, indicated that plaintiffs suffered an inconvenience, but did not warrant finding that street on which plaintiffs' properties front became practically a cul-de-sac and did not authorize recovery for any alleged injury to plaintiffs' property.

6. Eminent domain §102

The necessity for circuitry of travel by reason of construction of improvement on street intersecting street on which plaintiffs' properties front, in absence of anything barring access to intersecting street, does not furnish a basis for recovery of damages.

7. Municipal corporations §665

The property rights of owner of land fronting on street do not embrace a right to protection from hazards of traffic and owner must share such hazards with general public.

8. Eminent domain §295

Where street improvement was designed and constructed according to best engineering thought of time and to lessen traffic hazards, court could not assume that such hazards were increased in absence of testimony to that effect.

9. Eminent domain §100(1)

An award of damages cannot be recovered for every depreciation in value of property by reason of a public street improvement.

10. Eminent domain §100(1)

A property owner, to recover damages by reason of a street improvement, must show infringement of his right of reasonable use of street fronting property in either direction to next intersection.

11. Eminent domain §91

Inconvenience and hazards, which property owners may encounter by reason of street improvements after leaving street on which their properties front, constitute damage of same kind as that shared by general public and furnish no basis for recovery of compensation.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by Noble N. Beckham and others against the State of California, Department of Public Works, and the City of Stockton for damages allegedly sustained by plaintiffs' properties as the result of a construction of an improvement on a street intersecting a street on which plaintiffs' properties front. From a judgment for plaintiffs, the State appeals.

Reversed.

C. C. Carleton, Frank B. Durkee, C. R. Montgomery and Robert E. Reed, all of Sacramento, for appellant.

Robert W. Kenny, Atty. Gen., and Everett W. Mattoon and Chas. W. Johnson, Deputy Attys. Gen., amici curiae.

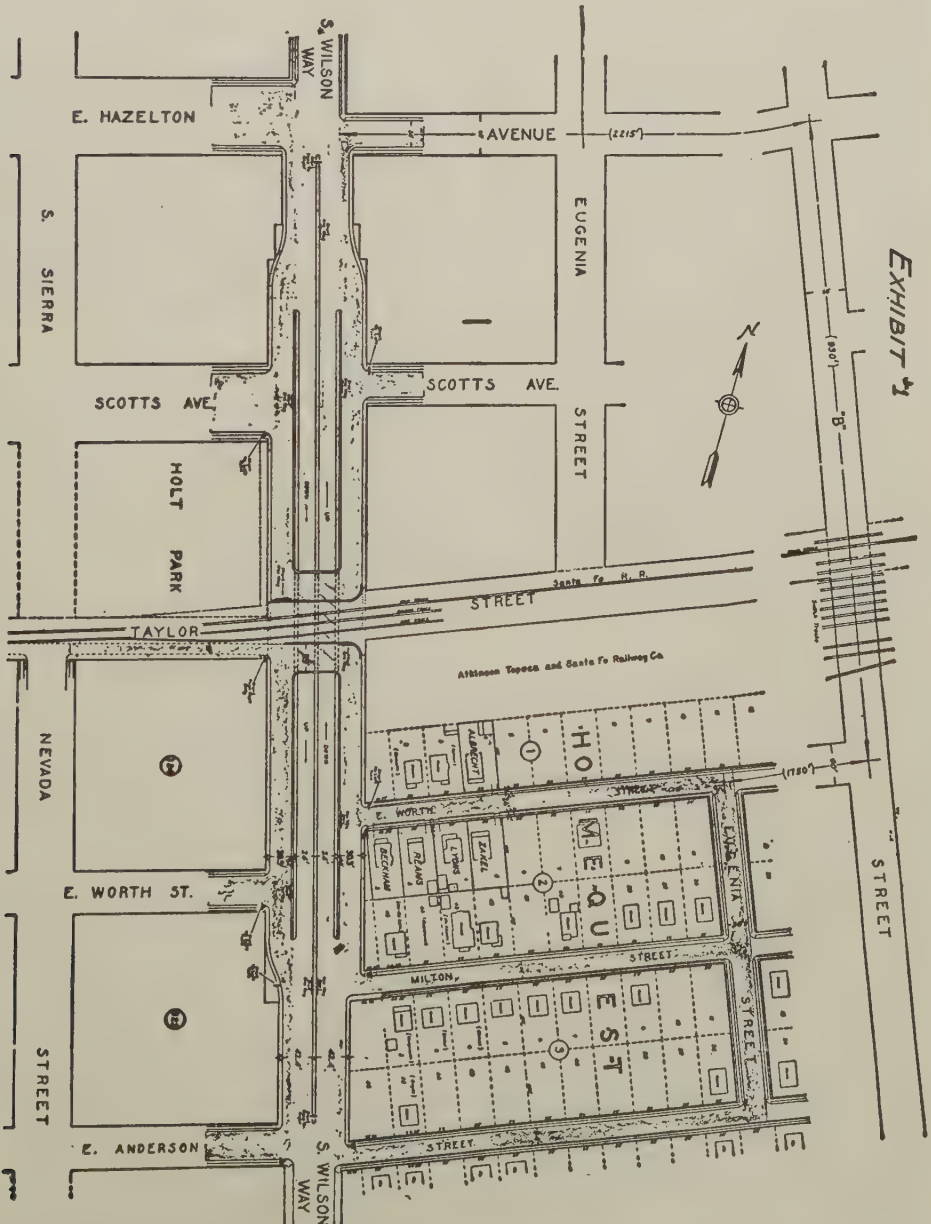
Charles H. Vance and James C. Nichols, both of Stockton, for respondent.

Joseph C. Tope, of Stockton, for defendant City of Stockton.

ADAMS, Presiding Justice.

This is an action brought by five owners of property abutting on East Worth Street in Stockton, to recover damages alleged to have been sustained by them as the result of the construction of an improvement in Wilson Way, a street which intersects East Worth Street at one end of the block in which plaintiffs' properties are situated.

As appears from the map made a part of this opinion, Wilson Way runs approxi-



mately north and south. East Worth Street runs at right angles thereto, and the block in which plaintiffs' property is situated is bounded by Wilson Way on the west, Eugenia Street on the east, and Milton Way on the south. Eugenia Street is a short street extending two blocks, from East Worth Street to East Anderson Street, and the latter street intersects Wilson Way at a point just south of the point of commencement of the improvement thereon. The next street parallel to East Worth Street on the north is Taylor Street upon which are situated the tracks of the Atchison, Topeka & Santa Fe Railway Company. The next street parallel to Wilson Way on the west is Sierra Nevada Street which is intersected by Taylor, East Worth and East Anderson Streets, all of which extend across Wilson Way. The next street beyond Sierra Nevada Street is Ophir (or Pilgrim) Street, referred to in the testimony but not shown on the map.

In the year 1937 the State of California, acting through its Department of Public Works, and under the authority of the Railroad Commission, constructed a subway in Wilson Way for the purpose of eliminating the grade crossing of the railroad tracks on Taylor Street. The depressed portion of this underpass begins at a point between East Worth Street and Milton Way, but a concrete curb along the center of the subway begins just north of the intersection of East Anderson Street and Wilson Way.

As a part of this street improvement defendants widened Wilson Way between East Anderson Street on the south and East Hazelton Street on the north beyond the railroad tracks, as appears on the map. The former width of Wilson Way (48 feet) is indicated by its present width south of East Anderson Street, and north of East Hazelton Avenue. No changes were made in East Worth Street, which now, as formerly, intersects Wilson Way at grade; but after the construction of the underpass, crossing of the railroad tracks at grade northward on Wilson Way was cut off by the erection of a parapet as shown on the map. East Worth, Milton and East Anderson Streets are all 24 feet in width between curbs, Eugenia Street has a width of 30 feet, the portion of Wilson Way on either side of the subway between Taylor and Milton Streets is 30.3 feet to the sidewalk, and the portion of the street that crosses the subway is 39 feet in width. All of these streets are paved and have

sidewalks. East Worth extends easterly beyond Eugenia Street to "B" Street, but its distance therefrom is 1750 feet. As appears upon the map, "B" Street extends north and south from Worth Street, and crosses the tracks of the Atchison, Topeka & Santa Fe Railway Company, but said street is improved only to a secondary extent. A portion, only 15 feet, of Taylor Street is paved where it extends west from Wilson Way across Sierra Nevada Street to Ophir Street. Its grade is the same as the portion of Wilson Way over the subway with which it connects.

The properties of all defendants abut only upon East Worth Street. The triangular shape of the lot which separates the Beckham property from Wilson Way is due to the taking by the state of a portion of a lot which previously occupied the corner, for the purpose of widening Wilson Way as a part of the improvement thereof. The tract in which plaintiffs' homes are located is zoned for residential purposes only.

Plaintiffs, in their amended complaint allege that Wilson Way is the main traffic artery in the easterly part of Stockton connecting the area within which their property is located with the business district, and forms a part of U. S. Highway No. 99; "that there is no ingress or egress from Plaintiffs' said property to any highway or public street in the City of Stockton except over Wilson Way"; that by reason of its access from Worth Street to Wilson Way plaintiffs' property was valuable and suitable for residence purposes prior to the acts of defendants; that in constructing the underpass defendants built the side walls of same "across the intersection of Wilson Way with Worth Street in such a manner as to cut off Plaintiffs' said real property from access to Wilson Way;" that plaintiffs, since said construction, "have been forced to reach their said property over a narrow, unsafe, and impracticable detour leading from Wilson Way over the top and sides of said underpass to Worth Street, and have thereby been cut off from safe or reasonable access to the public streets of Stockton." The value of plaintiffs' properties is alleged to have been depreciated "solely by reason of the construction of said underpass, and the cutting off of said access to Wilson Way and the public system of streets."

The case was tried by the court sitting without a jury and resulted in a judgment for plaintiffs. The court filed a written

opinion and in its findings of fact found that Wilson Way is the main traffic artery in the portion of Stockton in which plaintiffs' properties are located and constitutes the main trunk artery of traffic connecting said portion of the city with the business district and with public travel over state highway No. 4, and Highway 99, of which it forms a part; that at the time plaintiffs purchased their property East Worth Street intersected the main traveled portion of Wilson Way at grade, and that plaintiffs had a ready, free and safe access from Worth Street to the general system of streets of the city and the highway system, and that by reason of local conditions existing in said area Wilson Way "constituted the only reasonably safe, adequate, reasonable and adequate access to the general system of streets." Also, that the State constructed said underpass "so that the sidewalls thereof shut off East Worth Street from Wilson Way; and that after the construction thereof the plaintiffs' real property was and is cut off from access to Wilson Way and to the general system of streets of the City of Stockton, except by a narrow, unsafe, personally hazardous, tortuous, and inadequate detour or bypass leading from Worth Street and plaintiffs' said real property to the top of said underpass above Wilson Way, and thence by a narrow unsafe and personally hazardous detour into Wilson Way. That it is also possible for plaintiffs to reach their real property (but not to emerge from it) by continuing along Wilson Way through said underpass until the same returns to the original grade of Wilson Way at a point several hundred feet south of plaintiffs' said real property, and there making a left turn against traffic to the east on to a side street which connects with East Worth Street. That Wilson Way is a heavily travelled trunk highway and traffic is very fast, and that said left turn can only be made at great personal hazard to any person making the same, and said left turn has been at all times and now is prohibited by local law.* That by reason of said conditions the plaintiffs' real property has sustained a damage other than and differing from that sustained by the general public, and that the same is not a mere inconven-

ience, but a damage peculiar to said real property and to said plaintiffs and differing in kind from that sustained by the general public. That the said real property has been cut off from reasonable access to the public streets of Stockton and the State of California, and that the remaining access is not reasonable, nor safe, but is unreasonable and hazardous to the life and limb of any person residing on said property, who attempts to travel the streets of Stockton, and that plaintiffs' easement of access to Worth Street has thereby been unreasonably and peculiarly impaired by the construction of said underpass; and that as a result thereof the plaintiffs' said real property has been depreciated in market value, and rendered practically unsalable, because the same has been left in what is, from the standpoint of reasonable access, a virtual cul-de-sac."

Defendant State of California has appealed, contending that no injury to any property right of plaintiffs has been shown, and that the findings with respect to the alleged damage and the judgment based thereon are without support in the evidence.

The case was argued before this court prior to the decision of the Supreme Court in *Bacich v. Board of Control*, 144 P.2d 818, and our decision was deferred pending a determination of that case. After its determination we heard further argument, at which time respondents asserted that they rely on the proposition that the construction of the subway on Wilson Way has made a cul-de-sac of Worth Street and that, therefore, on the authority of the *Bacich* case alone, it follows that the judgment in their favor must be affirmed.

From the findings above set forth and from the opinion filed by the trial court it appears that that court concluded that Worth Street has not been entirely closed by the subway but that it has, in effect, become a cul-de-sac because plaintiffs must now follow a more circuitous route than formerly in going to and from their homes, and, in pursuing such course they encounter certain so-called hazards which it says are "peculiar to plaintiffs because they are exposed more frequently thereto than the

* There is no evidence that this left-hand turn has been or is prohibited by local law. As appears from the map, there is, in the center of the highway in front of the intersection of Wilson Way and East Anderson Street, a sign read-

ing "Keep to the right," but said sign does not prohibit a left-hand turn into East Anderson Street by persons going south on Wilson Way, but only applies to northbound traffic.

general public," and that, therefore, plaintiffs' easement of access in Worth Street has been damaged to an extent justifying the recovery of damages.

Appellant contends that such conclusion of the trial court is not sound as matter of law and that factually it is not sustained by the evidence.

[1,2] Preliminarily, then, the nature and extent of the property rights of plaintiffs as abutting owners on Worth Street must be defined and delimited. In *Rose v. State of California*, 19 Cal.2d 713, 123 P.2d 505, it was held that the property right which an abutting owner has in the street in front of his land is the right of access and of light and air; that it is an easement which such abutting owner has to the use of the street fronting upon his lot for the purpose of ingress and egress, which right attaches to the lot itself, and which is peculiar and individual to the abutting owner, differing from the right of passing to and fro which he enjoys in common with the general public. In the *Bacich* case, *supra*, the extent of that easement was under consideration, and it was there held that such abutting owner's easement is more extensive than the mere opportunity to go onto the street immediately in front of his property, and that "the right of access extends in both directions to the next intersecting street." [144 P.2d 825.] And because in that case access to Sterling Street upon which Bacich's property abutted was cut off at one end of the block by the lowering of Harrison Street, the next intersecting street in one direction, and plaintiffs' property was thus left in a cul-de-sac, it was held that his easement of access to his property on Sterling Street had been impaired.

As above stated, plaintiffs in the case before us rely upon the decision in the *Bacich* case, contending that because the improvement on Wilson Way prevents their immediate access to the subway portion of Wilson Way from Worth Street, and, in order to gain access to such subway portion, or otherwise to reach the general system of streets of the city, plaintiffs must pursue a circuitous course which course presents certain hazards, Worth Street has, in effect, become a cul-de-sac, and the easement of access which attaches to plaintiffs' lots on Worth Street has been damaged.

[3] A cul-de-sac is defined to be "a passage or place with only one outlet, as a

blind alley . * * ." (Webster's New International Dictionary); "A way, street or alley open only at one end" Ballantine's Law Dictionary; 10 Words and Phrases, Perm.Ed., 633; 25 C.J.S., Cul De Sac, p. 20.

[4] Obviously the improvement on Wilson Way does not close the end of Worth Street since that street intersects at grade the outer portion of Wilson Way, which portion is 30.3 feet in width. May it then be held that despite this fact plaintiffs' easement in Worth Street has been impaired? To so hold would, we believe, necessitate a definite extension of the abutting owner's right of access as defined in the *Bacich* case; for what the court there held was only that such abutting owner's right extends in both directions to the next intersecting street. The language there used by the court and the authorities cited suggest that such easement does not embrace more than the right to pass *into* such next intersecting street, and that any inconveniences which may be suffered or hazards encountered thereafter do not affect the easement of such property owner. See 4 McQuillan, *Municipal Corporations*, 2nd Ed., sec. 1527; *Lewis on Eminent Domain*, 3rd Ed., sec. 191, cited in *Bacich* case, 144 P.2d at page 824. This construction of the language of the court is consistent with its language in *City of San Mateo v. Railroad Commission*, 9 Cal.2d 1, 11, 68 P.2d 713, 718, where it is said: "We therefore assume that property other than that of the railroad company does not directly abut upon any of the area directed to be closed, and that the private property in question is contiguous to either the county or the state highways which are connected by such public crossings. If such be the case, no obstruction to the ingress and egress from those highways has been created by the order of the commission." While the foregoing may have been dictum it is, nevertheless, persuasive in construing subsequent language of the court. In the *Bacich* case in the District Court of Appeal, 128 P.2d 191, 197, Mr. Justice Peters said that: "The right of the property owner is limited to access and use of the street upon which his property fronts to the next intersection in either direction. Property owners beyond that point have suffered no damage different from that suffered by the general public." Also in that case one of the alleged grounds for recovery was that in approaching plaintiff's property from

Bryant Street, the next intersecting street at the opposite end of the block, it was necessary to pass under one of the approaches to the bridge; but the Supreme Court said (page 826 of 144 P.2d) that "it does not appear that the elevated road between plaintiff's property and Bryant Street in any way interferes with his access to the latter street or impairs any easement, if one exists, to light, air or view."

In *Rose v. State of California*, supra, the improvement in the street upon which plaintiff's property abutted was similar to that upon Wilson Way. As we read that opinion the impairment of plaintiff's easement of ingress or egress was based upon the fact that the portion of the highway left available for plaintiff's use immediately in front of his property (said property being zoned for commercial purposes) was but 14 feet in width and too narrow for two vehicles to pass each other; and there is no suggestion that had such lane been 30.3 feet in width, as are the portions of Wilson Way on either side of the subway, a finding of impairment of plaintiff's easement would have found support in the evidence. And there is certainly nothing in that case suggesting that had the improvement there under consideration been on one of the streets intersecting Jackson Street, any property right of plaintiff would have been invaded. Also, the court there said (page 731 of 19 Cal.2d., page 516 of 123 P.2d) that: "Since every property owner for a great distance therefrom is somewhat inconvenienced by the closing of street, the question of where to stop awarding damages is not only difficult to ascertain, but the payment of damages in every case of this character would place a great burden upon the public whenever such closings are ordered."

In view of the foregoing this court is not disposed to extend the easement of access of an abutting owner beyond the limits defined in the *Bacich* case, or to hold that the easement of access which an abutting owner on Worth Street has in that street extends beyond the intersection of same with the streets at either end of the block.

[5] Nor do we think that the evidence sustains the finding of the trial court that the construction of the improvement on Wilson Way has resulted in other than inconvenience to plaintiffs, or that any damage they may have sustained differs from that sustained by the general public, or that their means of access have been thereby rendered unreasonable or hazardous. In

support of their complaints plaintiffs called Roy S. Akers, an employee of the State Department of Public Works, under whose direction the map herewith (Plaintiffs' Ex. No. 1) was prepared, and who explained same. This witness was asked by plaintiffs' counsel to state how he would now go from plaintiffs' property to the Court House, and stated that one way would be to go from East Worth Street into Wilson Way, thence north on Wilson Way, crossing over the top of the subway, follow Taylor Street west for two blocks (to Ophir Street), then turn north across the railroad tracks and onto Main Street, then westerly to the Court House; and that in returning (he might go south on 'Wilson Way through the subway, then turn east onto the surface area near East Anderson Street, and thence north on the outer portion of Wilson Way to Worth Street. Also that one going to the Court House from Worth Street could turn north on Wilson Way, cross the subway to the west side of Wilson Way, turn thence south to Anderson Street, and there join the northbound traffic through the subway. Also, leaving the property on Worth Street he could go east to Eugenia south to East Anderson, and thence west to Wilson Way and onto the northbound traffic. To go south on Wilson Way he could go around on Wilson Way over the subway, then south on the west side of Wilson Way, thus fitting into the traffic going south. The only other witnesses called by plaintiffs who testified in regard to the effect of the improvement were Mr. Chadek, called as a valuation witness, and plaintiff Zakel. The former testified that plaintiffs' properties had been decreased in value by reason of the construction of the subway, because it is less convenient to get to it, that the difference is that "you could not go or come directly from your property—that you have to go around." Plaintiff Zakel said that he drove a car and that before the subway was built he used to go out on Worth Street to Wilson Way, and when he came back would cross the traffic on Wilson Way and enter Worth Street; that since the construction he has to make ten extra blocks each day; that now he usually goes east on Worth Street, south on Eugenia, and, if going down town, goes over Milton Street to the entrance of the subway; that coming home he comes through the west side of the subway to East Anderson, crosses the traffic there and travels on Anderson Street and then Eugenia Street to Worth Street. Al-

so that there is another way (to go north) and that is to go up Wilson Way, cross the subway and follow Taylor to Ophir and cross the railroad tracks on Ophir; but that Taylor is a "fierce" street, narrow and full of chuck holes; also that if he should go from Worth Street to "B" Street and thence north "there is not the proper outlet" because of poor condition of the streets and the fact that freight trains are sometimes left on the tracks for hours. He admitted that before the subway was built he had to make a left-hand turn across traffic if he was going south, and when going north over Wilson Way had to cross the railroad tracks at grade, and that there were frequent train movements there and "quite frequently" he was held up by trains; also that assuming he went through the subway that would be "a safer traffic then before." When asked: "Well, the only reason why your property has decreased as you claim, in your opinion, is that it is more inconvenient to get to your property now than it was before?" he answered, "Yes, sir; the subway is no asset to me."

No witness testified to any hazards or that the routes to be followed after leaving Worth Street were dangerous. On the contrary, J. W. Vickery, safety engineer for the Division of Highways of the State, called by defendant, testified that the surface roadway of Wilson Way and the depressed portion of the subway are adequate and safe for existing traffic, that the improvement was constructed in conformity with the latest engineering thought on such subways, that the portion of the roadway crossing the depressed portion of the subway serves the purpose of getting traffic from one side of Wilson Way to the other and to permit north and south traffic to avoid crossing the railroad tracks at grade. On cross-examination by plaintiffs' counsel he testified to various methods by which residents on East Worth Street can get into the subway, stating they can go around by Eugenia and Milton or East Anderson Streets, or they can make the U turn over the subway if they desire to go south and thence feed directly into the traffic—that they can now avoid crossing the traffic lanes; that the situation is no more hazardous than it was before; that formerly a driver who wanted to go south from Worth Street had to cross the tracks and then make a U turn over a narrow way.

The testimony of these witnesses and an inspection of the map (Plaintiffs' Ex. 1) show that if plaintiffs desire to go north-

ward from their places of residence they may (1) go west on East Worth Street to Wilson Way, turn north thereon over the level portion thereon (30.3 feet in width) to the portion thereof crossing the subway, there turn west across the portion over subway (39 feet wide) and thence either (a) west over Taylor Street to Ophir (Pilgrim) Street and thence north to the main part of the city, or (b) turn south on the level portion of Wilson Way west of the subway and southward to the intersection of East Anderson Street and Wilson Way where they can cross the southbound traffic and join the northbound traffic through the subway; or (2) they can travel eastward on East Worth Street to Eugenia Street (30 feet wide), thence south to East Anderson (or Milton), thence west to Wilson Way where they can join the northbound traffic through the subway. If they desire to go southward from their places of residence they may (1) follow the latter way and cross the northbound traffic on Wilson Way to the west lane and thence south, or (2) they may go west on East Worth, turn north making the U turn over the portion of Wilson Way over the subway, and join directly the southbound traffic on Wilson Way. By pursuing the latter course they now avoid crossing the traffic, while formerly if they desired to go southward after arriving at the intersection of Wilson Way and East Worth Street it was necessary, by reason of a traffic sign, to go north on Wilson Way over the railroad tracks and make a U turn across traffic at Scotts Avenue or East Hazelton and Wilson Way. Returning from the northern part of the city, plaintiffs may drive south through the west lane of the subway to the intersection of Wilson Way and East Anderson Street, cross the traffic there and proceed to Worth Street either along the easterly portion of Wilson Way or via East Anderson and Eugenia Streets. To be sure this necessitates crossing the northbound traffic on Wilson Way, but it is obvious that this was also necessary prior to the construction of the subway.

[6] Thus analyzed, plaintiffs' situation resolves itself into one of mere circuitry and inconvenience of travel after reaching Wilson Way. Such mere inconvenience and circuitry of travel are held to constitute no grounds for recovery of damages, and we believe that plaintiffs' easement in Worth Street cannot be held to extend to embrace a right, after leaving Worth Street, to pursue the most convenient course from

that street to such destinations as they may seek to reach. Where a cul-de-sac is created, access in one direction is lost. Here it is not lost but after reaching one of the next intersecting streets the route to be pursued is merely rendered less convenient. But circuitry of travel beyond an intersecting street does not furnish a basis for recovery of damages. *People v. Ricciardi*, Cal.Sup., 144 P.2d 799 at page 805; *Rose v. State of California*, supra, 19 Cal.2d at page 737, 123 P.2d 505; 49 A.L.R. 333; 93 A.L.R. 639; *Hitch v. Scholle*, 180 Cal. 467, 470, 181 P. 657.

[7,8] Nor do plaintiffs' property rights embrace a right to protection from hazards of traffic. These they share with the general public, and where, as here, the improvement was designed and constructed according to the best engineering thought of the time, and to *lessen* traffic hazards, it cannot be assumed that such hazards have been increased, especially in the absence of testimony to that effect, and where the safety engineer of the State Highway Division testified that the surface roadway of Wilson Way is adequate and safe, and that the situation is no more hazardous than it was before. We are not unmindful of the fact that the trial judge inspected the premises and that his findings allege that "plaintiffs' property is cut off from access to Wilson Way and to the general system of streets * * * except by a narrow, unsafe, personally hazardous, tortuous and inadequate detour or by-pass leading from Worth Street * * * to the top of the underpass over Wilson Way, and thence by a narrow, unsafe and personally hazardous detour into Wilson Way"; but we can find no support in the testimony for such a finding and it is inconsistent with the situation shown by plaintiffs' map. None of plaintiffs' witnesses gave evidence of the existence of any hazards, except that Zakel said that Taylor Street is a "fierce" street, narrow and full of chuck holes, and that to go from Worth Street to "B" Street, and thence over the railroad tracks north was not a proper outlet because of poor condition of the streets, and the fact that the railroad company left cars standing on the tracks crossing "B" Street. From the opinion of the court we deduce that the hazards he finds are due to what he calls narrow streets, a no-left-turn traffic sign where Worth Street enters Wilson Way (which he states has always existed), and a service station on the corner of Wilson

Way and Milton Street (or East Anderson Street) which interferes with the view of traffic from the south when approaching Wilson Way. But all of these streets are as wide as Worth Street, and some of them are wider, the existence of the traffic sign and the gas station are not attributable to the new construction, and all of these hazards, if such they be, are encountered after leaving Worth Street, are shared by the general public, are not peculiar to plaintiffs, and furnish no basis for compensation. *Simpson v. City of Los Angeles*, 4 Cal.2d 60, 47 P.2d 474. Property owners on Eugenia Street are in an equally unfavorable situation as far as inconvenience and so-called hazards are concerned, yet it could hardly be contended that their easements of access to the street upon which their property abuts have been impaired.

[9] Not every depreciation in the value of property by reason of a public improvement can be made the basis of an award of damages. *Wolff v. City of Los Angeles*, 49 Cal.App. 400, 402, 193 P. 862; *Eachus v. Los Angeles, etc., Ry. Co.*, 103 Cal. 614, 617, 37 P. 750, 42 Am.St.Rep. 149; *People v. Ricciardi*, supra, 144 P.2d at page 802. For instance, diversion of traffic is not a proper element to be considered in computing damages. *Rose v. State of California*, supra, 19 Cal.2d at pages 737, 740, 123 P.2d 505; *City of Stockton v. Marengo*, 137 Cal.App. 760, 764, 31 P.2d 467; *People v. Ricciardi*, supra, 144 P.2d at pages 802, 804. Regulations such as the prescribing of one-way traffic or the prohibiting of left-hand turns may interfere to some extent with right of access without furnishing a basis for recovery of damages even by an abutting owner. See note, 100 A.L.R. 487, 491-493. In *Eachus v. Los Angeles, etc., Ry. Co.*, supra [103 Cal. 614, 37 P. 751, 42 Am.St.Rep. 149] the court said: "The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the constitution; * * *."

[10,11] We think that the trial court, in rendering its decision, lost sight of the legal principle upon which plaintiffs must rely for a recovery, to wit, the infringement of some right which the owner of land possesses *in connection with his property*

(Rose v. State of California, supra, 19 Cal. 2d at page 739, 123 P.2d 505); and such property right is that of reasonable use of *the street fronting the property* in either direction to the next intersection which plaintiffs still have, and inconvenience or even hazards which they may encounter after leaving Worth Street cannot be said to impair their easements, but constitute damage not different in *kind* (though possibly in degree) from those shared by the general public, and furnish no basis for the recovery of compensation.

We conclude that plaintiffs have failed to show any impairment of their easement of access or any injury from the improvement on Wilson Way justifying the recovery of damages. This conclusion renders it unnecessary to consider other errors urged by appellant.

The judgment is reversed.

PEEK and THOMPSON, JJ., concur.

Hearing denied; CARTER AND SCHAUER, JJ., dissenting.



64 Cal.App.2d 691

CALIFORNIA EMPLOYMENT COMMISSION v. MacGREGOR.
Civ. 7045.

District Court of Appeal, Third District,
California.

June 2, 1944.

1. Taxation ☞634

Employer, who failed to raise defense of statute of limitations before Employment Commission in proceedings to determine amount of delinquent unemployment contributions, waived his right to that defense; hence it was too late to raise defense for first time on motion to set aside summary judgment lien, which was entered on order of commission. Gen.Laws Supp. 1939, art. 8780d, § 45.9; Code Civ.Proc. § 338, subd. 1.

2. Limitation of actions ☞182(5)

The statute of limitations is a personal privilege which must be asserted at proper time and in proper manner or it is waived.

3. Taxation ☞634

On appeal from order denying employer's motion to set aside summary judgment entered on order of Employment Commission fixing employer's liability for delinquent unemployment contributions, appellate court was bound to assume that findings and order of commission were supported by evidence, where employer was accorded full hearing before commission and neither findings nor order were before appellate court. Gen.Laws Supp. 1939, art. 8780d, § 45.9.

4. Constitutional law ☞284(2)

Taxation ☞634

On motion to set aside summary judgment based on order of Employment Commission fixing employer's liability for unemployment contributions which was entered in precise manner provided by the act, employer could not complain of lack of notice of judgment nor that he was thereby deprived of due process, where due notice of hearing before commission was given to employer. Gen.Laws Supp. 1939, art. 8780d, § 45.9.

5. Taxation ☞572

While in absence of any other remedy, a suit at law must be used to enforce payment of taxes, it is within power of Legislature to provide special remedies for collection of taxes, and summary proceedings are authorized by law for collection of taxes, and they are not governed by rules applicable to ordinary judicial proceedings, but only by such as statute provides.

6. Taxation ☞59

Contributions paid by employer under Unemployment Insurance Act constitute "excise taxes". Gen.Laws Supp. 1939, art. 8780d, § 45.9.

See Words and Phrases, Permanent Edition, for all other definitions of "Excise Tax".

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

A summary judgment creating a lien for payment of due unemployment contributions was entered by the County Clerk on an order of California Employment Commission, formerly the Unemployment Reserves Commission, against John MacGregor, individually and doing business as Capitol Laundry, pursuant to Gen.Laws

Supp.1939, art. 8780d, § 45.9. From an order dismissing defendant's motion to set aside the judgment, defendant appeals.

Affirmed.

Joseph Lewis, of Los Angeles, for appellant.

Robt. W. Kenny, Atty. Gen., and C. A. Linn, Paul M. Joseph, and Doris H. Maier, Deputy Attys. Gen., for respondent.

THOMPSON, Justice.

The defendant John MacGregor, doing business as "Capitol Laundry", has appealed from an order of the Superior Court of Sacramento County, denying his motion to set aside a judgment creating a lien for payment of unemployment contributions in the sum of \$532.41, due as required by law, from November 1, 1937, to October 12, 1938. The judgment was entered by the Clerk on summary proceedings after a hearing by the Commission pursuant to Section 45.9 of the Unemployment Insurance Act of California. Stats. 1935, p. 1226, as amended in 1939, p. 2056, Deering's Supp. 1939, p. 1697, Act 8780d. The appellant contends that the judgment lien is void because the liability was barred by the provisions of Section 338, Subdivision 1, of the Code of Civil Procedure. The statute of limitations was not raised until the motion to set aside the judgment lien was made.

A summary judgment lien was entered against the appellant July 24, 1942, by the County Clerk of Sacramento County, for unpaid unemployment contributions from November 1, 1937, to October 12, 1938, in the aggregate sum of \$532.41, pursuant to the provisions of Section 45.9 of the Unemployment Insurance Act, *supra*. That summary judgment is based on the prior findings and order of the Commission upon hearing which occurred April 30, 1942, as provided by the fourth paragraph of the section previously referred to. From the affidavit which was filed in opposition to appellant's motion to set aside the judgment it appears that due notice of the hearing before the Commission was given; that the appellant was personally present and failed to plead the statute of limitations; that the only defense which he then made to the liability for payment of delinquent contributions was that he had sold his laundry business on October 12, 1938. It will be observed that the judgment lien does not include delinquent contributions after that

date. The validity of the order of the Commission fixing the amount of delinquent contributions was not subsequently challenged in any proceeding.

[1,2] Having failed to raise the defense of the statute of limitations at the hearing before the Commission, the appellant waived his right to that personal defense. The statute of limitations is a personal privilege which must be asserted at the proper time and in the proper manner or it is deemed to have been waived. 16 Cal.Jur. 603, sec. 199. It is too late to raise the defense of the statute of limitations for the first time on a motion to set aside a summary judgment lien which is entered pursuant to law.

[3] Neither the findings nor the order of the Commission fixing the liability of this appellant for delinquent contributions under the Unemployment Insurance Act are before this court. Its jurisdiction to render the order upon which the summary judgment involved in this appeal is founded has not been challenged. Appellant's affidavit which was filed in support of his motion to set aside the summary judgment does not question the jurisdiction of the Commission or the validity of its order at that hearing. Indeed the only ground assigned for setting aside the judgment was that the defendant had no previous knowledge of the entry of the summary judgment and therefore no opportunity to plead the statute of limitations to the claim represented thereby. It was incumbent upon the defendant to at least make a *prima facie* showing on his motion to set aside the judgment that it was not founded on a valid order of the Commission, or that the summary judgment was not rendered pursuant to Section 45.9, *supra*. The appellant was accorded a full hearing before the Commission on the merits of his liability, and in the absence of either the findings or order of the Commission we are bound to assume they are adequately supported by the evidence. *Sipper v. Urban*, 22 Cal.2d 138, 137 P.2d 425.

[4] On the motion to set aside the summary judgment the appellant may neither complain of a lack of notice of the entry of that judgment nor that he was thereby deprived of due process. *People v. Skinner*, 18 Cal.2d 349, 115 P.2d 488. In the case last cited, in which an attack upon Section 26 of the Retail Sales Tax Act, Stats. 1933, p. 2599. and amendments,

Deering's Gen. Laws of 1937, p. 3892, Act 8493, at page 3900, which is similar to Section 45.9 of the Unemployment Insurance Act, was involved, the court said at pages 354 and 360 of 18 Cal.2d, 115 P.2d at page 491:

"The defendant and the trial court have misapprehended the requirements of due process involved in proceedings for assessment, levy, and collection of taxes, and the significance of the procedure prescribed by section 26 in relation to the constitutional provisions invoked by the defendant.

"Obviously if an action in a court or other judicial tribunal be necessary for a judgment for the collection of taxes, the State is bound by the provisions applicable to the conduct of such action, and by the general law governing jurisdiction of parties and subject matter. But as long standing as the common law itself is the rule that a more summary method may be provided for the collection of taxes due to the sovereign than is provided for the recovery of judgment for debts between private citizens. This power of government received early recognition in this country. (Citing authorities.) * * *

"From all the authorities, it is evident that the state has the power to assess taxes and fix methods for the collection thereof, and it does not matter if these remedies be summary in their nature, so long as the taxpayer is in some way, at some stage of the proceedings, given an opportunity to be heard and to have his rights determined before some competent tribunal." * * *

"Such a [summary] 'judgment', not being ordered by a judicial tribunal, is not governed by provisions of the Code of Civil Procedure in like matters, such as the requirement for notice of entry of judgment, with the right to resort to an appellate tribunal."

The foregoing language is applicable to Section 45.9 of the Unemployment Insurance Act with relation to the summary proceedings to establish the lien and collect the taxes which are involved on this appeal. It determines the issue contended for by the appellant in this case against him.

[5] The principle declaring that summary proceedings for the collection of taxes are controlling where the statute specifically provides for that remedy is concisely stated in 61 Corpus Juris, page 1044, section 1359, as follows:

"While, in the absence of any other remedy, a suit at law must be used to enforce payment of taxes, it is within the power of the legislature to provide special remedies for the collection of taxes. Summary proceedings are commonly authorized by law and resorted to for the collection of taxes, and *they are not governed by the rules applicable to ordinary judicial proceedings, but only by such as the statute prescribes.*" (Italics added)

Assuming, without so deciding, that, notwithstanding the interest which the Federal Government has in the payment of unemployment contributions (Sec. 2, Unemployment Insurance Act), the statute of limitations may be available as a defense in a proceeding to collect the same, that defense must be invoked at the proper time and in the proper manner or it is deemed to have been waived. Section 45.10 of the act provides that no "legal or equitable process shall issue in any suit, action or proceeding, in any court against the State or against any officer thereof to prevent or enjoin under this act the collection of any contribution sought to be collected." It further provides that the only remedy against the collection of contributions, claimed to have been illegally imposed, is for the employer to pay the contributions under protest, and then to commence an action against the Unemployment Reserves Commission to recover the funds. That section also declares that the demand to recover contributions thus paid under protest is deemed to have been waived unless the action referred to as the exclusive remedy is commenced within sixty days from the time of payment.

In the present case the contributions were not paid under protest, or at all. No action was commenced as provided by Section 45.10. The statute of limitations was not invoked at the hearing before the Commission when that opportunity might have been afforded. If the judgment were vacated there is no action or proceeding pending in which the defense of the alleged bar of the statute could be invoked.

[6] Clearly the contributions in question constitute an obligation in the nature of excise taxes. The Supreme Court has definitely decided that contributions paid by an employer under the Unemployment Insurance Act constitute excise taxes. *Gillum v. Johnson*, 7 Cal.2d 744, 763, 62 P.2d 1037, 63 P.2d 810, 108 A.L.R. 595.

Since the contributions, found by the Commission to be due and payable under the Unemployment Insurance Act, consist of taxes due to an agency of the State, and the summary judgment was entered in the precise manner provided by the act, and since the appellant previously had a full hearing on the merits of his obligation before the Commission, he was not entitled to notice of the entry of the judgment, and the motion to set that judgment aside was therefore properly denied.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.



64 Cal.App.2d 794

CITY OF SAN MATEO v. HARDY.
Civ. No. 12650.

District Court of Appeal, First District,
Division 2, California.

June 9, 1944.

As Modified on Denial of Rehearing
July 8, 1944.

Hearing Denied Aug. 7, 1944.

1. Municipal corporations ☞600

Proof that house was used in a manner contrary to zoning ordinance before effective date thereof but failing to show that such use extended to effective date of ordinance did not bring case within provision of ordinance permitting continuance of any use forbidden by ordinance but lawfully existing at its effective date.

2. Injunction ☞130

In suit to enjoin violation of zoning ordinance by conversion of dwelling in first residential district into two-family house, trial court's finding that for many years before adoption of ordinance premises were used as a dwelling house by two families was not in harmony with answer alleging that property for many years prior thereto had been used as presently used by defendant.

3. Injunction ☞130

In suit to enjoin violation of zoning ordinance restricting first residential district to dwellings and public buildings, but permitting continuance of any use forbidden by ordinance but lawfully existing at

effective date thereof, finding that for many years before adoption of ordinance premises in question were used as a dwelling house by two families was directly contrary to evidence.

4. Municipal corporations ☞63(1)

Courts have no jurisdiction to exercise administrative function of modifying municipal zoning ordinance.

5. Municipal corporations ☞626

Zoning ordinance of San Mateo is not unconstitutional as discriminatory, though it permits owner to apply for reclassification of his property and permits city council to relieve owner from any inequitable burden resulting from general classification.

6. Injunction ☞89

City may seek enforcement of zoning ordinance by suit to enjoin violation thereof and require removal of alterations made in building in violation of ordinance.

7. Municipal corporations ☞621

Municipal zoning ordinance may properly permit property owner to apply to city council for a variance from restrictions imposed, and failure to pursue such administrative remedy bars application by property owner for equitable relief.

8. Municipal corporations ☞621

Zoning ordinance of San Mateo which permits owner to apply for reclassification of his property and permits city council to relieve owner from any inequitable burden resulting from general classification is not unconstitutional as depriving owner of property without "due process of law".

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

9. Injunction ☞130

Undisputed evidence and admissions that owner of one-family home in first residential district restricted by zoning ordinance to dwellings containing single kitchen and used to house not more than one family converted second floor into separate apartment containing a kitchen and rented it to separate family without obtaining a reclassification required finding that zoning ordinance had been violated.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Suit by the City of San Mateo, a municipal corporation, against Harry J. Hardy for an injunction to restrain defendants from violating a municipal zoning ordinance and to require him to remove certain alterations in a building which were made in violation of the ordinance. From a judgment denying an injunction, plaintiff appeals.

Judgment reversed, with directions.

Ernest A. Wilson, City Atty., of San Mateo (Kirkbride & Wilson and Arthur J. Harzfeld, all of San Mateo, of counsel), for appellant.

J. W. Coleberd, of South San Francisco, and F. E. Hoffmann, of San Mateo, for respondent.

NOURSE, Presiding Justice.

The plaintiff appeals from a judgment denying an injunction to restrain defendant from violation of a municipal zoning ordinance and requiring him to remove certain alterations in a building which were made in violation of the ordinance.

On June 7, 1937, the City of San Mateo adopted a comprehensive zoning ordinance (Ordinance No. 446) which was a revision and re-enactment of various prior ordinances relating to the zoning of the city for business and residential purposes. By its terms the city was divided into several districts for the regulation of the construction and maintenance of buildings. Section 4 relating to "First Residential District Regulations (Single Family)" specified as particular uses permitted therein: "a. Dwellings. b. Public Buildings". Section 1 of the Ordinance defined "dwelling" as "a residence building containing but one kitchen, designed and/or used to house not more than one family. * * * and not more at anytime than two paying guests of such family". Section 12 provides that any use forbidden by the ordinance but lawfully existing at the effective date may be continued. Section 13 permits an owner to apply for a reclassification of his property and permits the city council to relieve the owner from any inequitable burden resulting from the general classification.

[1] In 1942 defendant purchased a two-story family home in the first residential district and, without applying for a reclassification, and in disregard of the orders and warnings of the city authorities, made alterations in the building by which the upper story of the residence was converted

into a separate apartment consisting of a living room, kitchen, bedrooms and bath. This separate apartment was rented by defendant to a separate family at a substantial monthly rental. On the trial these facts were conceded. In defense there was an abortive attempt to prove that the former owner had violated the ordinance by permitting her grandchildren and other members of her family to live in the home while she occupied it and while she was on vacation. This evidence related to conditions existing in the years 1938 and 1939. The ordinance became effective July 7, 1937, hence the evidence did not pretend to prove a lawfully existing use at the time of the adoption of the ordinance.

The single issue of fact presented for determination is pleaded in paragraph X of the complaint:

"Sometime in said month of November, 1942, the exact date of which is unknown to plaintiff but known to defendant, defendant so altered, repaired and reconstructed said building that said building became, ever since has been, and now is no longer a dwelling as defined by said ordinance, in these respects: that ever since said time, it was, has been and now is designed and used to house more than one family, including all necessary servants and employees of such family; and that ever since said time it did and now does contain more than one kitchen."

"All of said alterations, repairs and reconstructions were made by defendant with full knowledge of the terms of said ordinance and without a building or any permit therefor."

Though all the evidence, as well as the admissions of the respondent on the trial, proved these allegations beyond controversy, the trial court refused to make a finding upon the issue. If such finding had been made in accord with the undisputed evidence appellant would have been entitled to judgment as a matter of law.

[2-4] On the issue of pre-existing use raised in the answer the trial court made no finding in harmony with the pleading and proof. The answer pleaded that the property "was and for many years prior hereto has been used as said property is presently used by this defendant". The trial court found that for many years prior to the adoption of the ordinance the premises were "occupied and used as a dwelling-house by two families". This was not an issue. Furthermore it is directly contrary

to all the evidence, which was that the former owner had had members of her family and guests visit her and occupy rooms as guests, and that all were served from a single kitchen. The issue here was whether the premises following the alterations made by respondent came within the ordinance definition of "dwelling"—having but "one kitchen" and "designed" to house not more than one "family". Such were the regulations enacted by the city council upon the advice of the city planning commission. It may be that a judicial review would suggest some modifications under certain circumstances but our system has not conferred upon the court the power to exercise these administrative functions.

gations of paragraph X of the complaint are true. For the same reason finding number 5 is stricken out. It is so ordered and the findings are amended in those respects.

The judgment is reversed with directions to enter judgment for plaintiff as prayed in the complaint upon the findings as herein amended.

STURTEVANT and SPENCE, J., concur.



64 Cal.App.2d 732

WYATT v. CERF et al.
Civ. 12570.

District Court of Appeal, First District,
Division 2, California.

June 7, 1944.

Hearing Denied Aug. 3, 1944.

1. Mandamus ⇨168(3)

In mandamus proceeding to review an order of State Board of Medical Examiners revoking petitioner's license to practice medicine, court was not limited to evidence considered by Board.

2. Mandamus ⇨168(2)

The findings on which administrative board revokes professional license come before court in mandamus proceeding for restoration of license with strong presumption of their correctness, and burden rests on complaining party to convince court that board's decision was contrary to weight of evidence.

3. Mandamus ⇨168(2)

In mandamus proceeding to review order of State Board of Medical Examiners revoking petitioner's license to practice medicine on ground that he had procured miscarriages where not necessary to preserve life of women involved Board was required to prove that women were pregnant when alleged services were rendered to them by petitioner.

4. Mandamus ⇨187(9)

In mandamus proceeding to review order of State Board of Medical Examiners revoking license to practice medi-

[5] The respondent suggests, in support of the conclusion of the trial court, that the ordinance is unconstitutional as discriminatory. The only evidence on the subject related to premises outside the zoned district. The conclusion of law is contrary to all the authorities. *Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479; *Fourcade v. City and County of San Francisco*, 196 Cal. 655, 238 P. 934; *Feraut v. City of Sacramento*, 204 Cal. 687, 269 P. 537; *Rehfeld v. City and County of San Francisco*, 218 Cal. 83, 21 P.2d 419; *Reynolds v. Barrett*, 12 Cal. 2d 244, 83 P.2d 29; *Rubin v. Board of Directors*, 16 Cal.2d 119, 104 P.2d 1041.

[6-8] The right of the city to seek enforcement of the ordinance by this proceeding is not open to argument. *City of Stockton v. Frisbie & Latta*, 93 Cal.App. 277, 289, 270 P. 270. The provisions of the ordinance permitting the property owner to apply for an exception or variance from the restrictions imposed are sustained by *Rubin v. Board of Directors*, supra; *Metcalf v. County of Los Angeles*, 24 Cal.2d 267, 148 P.2d 645, and similar cases. The failure to pursue such an administrative remedy was there held to bar application by the property owner for equitable relief. We have found no case holding that such an administrative remedy is a bar to the defense in an action by the city to enforce the ordinance. But, when the ordinance has afforded such a remedy, it is a complete answer to all that is said by respondent relating to the denial of due process.

[9] In reversing the judgment, it is not necessary to direct a new trial. The undisputed evidence, and the admissions of the parties, require a finding that the alle-

cine for producing miscarriages, trial court's findings against board on conflicting testimony in record on question whether women involved were pregnant at the time were conclusive and could not be disturbed by appellate court.

5. Mandamus ☞187(9)

Physicians and surgeons ☞11(2)

The fact that physician, while on probation by order of State Board of Medical Examiners, was found guilty by justice of peace of maliciously and willfully disturbing public peace, even if establishing physician's "turpitude", did not ipso facto establish "moral turpitude" within statute authorizing revocation of license to practice medicine of physician convicted of offense involving moral turpitude, but it was for trial court to determine such question after inquiry into facts. Pen.Code, § 415; St.1937, p. 1377, § 2383.

See Words and Phrases, Permanent Edition, for all other definitions of "Moral Turpitude" and "Turpitude".

6. Mandamus ☞187(9)

In mandamus proceeding to review order of State Board of Medical Examiners revoking license to practice medicine, trial court's finding, made after consideration of evidence, that offense of disturbing peace of which physician was convicted by justice of peace, was not an offense involving "moral turpitude" and, therefore, did not authorize revocation of his license to practice, was conclusive on reviewing court. Pen.Code, § 415; St.1937, p. 1377, § 2383.

Appeal from Superior Court, San Francisco County; Edward P. Murphy, Judge.

Proceeding by Thomas Daniel Wyatt against Alvin Cerf and others, as members of the Board of Medical Examiners of the State of California, for a writ of mandamus directing defendants to cancel an order made by defendants canceling and revoking petitioner's license to practice medicine. From a judgment for petitioner, defendants appeal.

Affirmed.

Robert W. Kenny, Atty. Gen., Allen L. Martin, and Carl W. Wynkoop, Deputies Atty. Gen., for appellants.

Bradford M. Melvin and Chas. J. Wiseman, both of San Francisco, and Oliver J. Carter, of Redding, for respondent.

STURTEVANT, Justice.

The defendants, as and constituting the Board of Medical Examiners of the State of California, made an order cancelling and revoking the license authorizing the petitioner to practice medicine. He applied for a writ of mandamus directing the defendants to cancel said order. The trial court granted his application and made findings in his favor. From the judgment of the trial court based on said findings the defendants have appealed.

The controversy arises out of the following facts. On the 18th day of December, 1930, the defendant Board of Medical Examiners issued to the petitioner a license authorizing him to practice medicine. Thereafter charges were filed against the petitioner but the record before us does not show the nature thereof. However, on the 23d day of October, 1940, the defendant Board of Medical Examiners purported to make an order placing the petitioner on probation for a period of five years from and after that date.

On the 29th day of May, 1942, Joseph W. Williams, an investigator for the Board of Medical Examiners, filed with the defendant Board a charge which among other things alleged as follows: "That on or about the 5th day of March, 1942, the said Thomas Daniel Wyatt, did, * * * provide, supply, administer, use or employ an instrument or substances or other means upon the person of one, Matilda Hope, a woman, with the * * * intent * * * to procure a miscarriage * * * said use or employment of said instruments or substances, or other means to procure said miscarriage * * * not then and there being necessary to preserve the life of the said Matilda Hope."

In another count said charge did specify as follows: "That on or about the 24th day of March, 1942, the said Thomas Daniel Wyatt, did * * * provide, supply, administer, use or employ an instrument or substances or other means upon the person of one, Mary Gribble, a woman, with the * * * intent * * * to procure a miscarriage * * * said use or employment of said instruments or substances, or other means to procure said miscarriage * * * not then and there being necessary to preserve the life of the said Mary Gribble."

On the same date another charge was filed against the petitioner which alleged among other things the following: "(c)

That he has since said order of probation violated section 2383 of the Business and Professions Code of the State of California, said violation being a misdemeanor, more particularly in that on or about the 17th day of November, 1941, said Thomas Daniel Wyatt was adjudged guilty of the offense of maliciously and wilfully disturbing the public peace and quiet by the use of profane and indecent language and challenging to fight and interfering with an officer of the law in the performance of his duties, by a judgment of the Justice of the Peace of Big Valley Township of the County of Lassen, State of California, upon a verdict of guilty of such charge in a proceeding in said Justice's court entitled 'The People of the State of California, Plaintiff vs. Thomas D. Wyatt, Defendant.'"

Based on said charges, on the 29th day of May, 1942, an order to show cause was issued directing the petitioner to appear and show cause, if any he had, why his license should not be revoked. The petitioner appeared and filed an answer denying the material allegations of said charges and a trial was had on the issues as framed before the Board of Medical Examiners. At said hearing evidence both oral and documentary was presented to said Board by both parties and the proceedings before the said Board were taken down in shorthand. Thereafter, on July 1, 1942, the defendant Board rendered and caused to be entered its judgment and determination revoking said license theretofore issued to this petitioner. On the 4th day of February, 1943, the petitioner commenced this proceeding in the Superior Court of the State of California in and for the City and County of San Francisco. In due time the appellants made a return and filed an answer to said petition for a writ of mandamus. Later a hearing was had on February 16, 1943, and thereafter the trial court being fully advised of the law and the facts made findings in favor of the petitioner and against the appellants. Thereupon the trial court directed that a peremptory writ of mandamus be issued directing appellants to cease and desist from any act tending to prevent petitioner from practicing medicine and surgery within this state; and directing them to forthwith make an order restoring petitioner's certificate theretofore issued authorizing him to practice as a physician and surgeon; and also ordering that said petitioner recover

his costs and disbursements. From that judgment the appellants have taken this appeal.

The controversy presented to this court involves few questions of fact and they will be specifically set forth as we proceed. However the controversy is a serious dispute as to the procedure in a mandamus case when the subject under attack is a determination of a board having statewide jurisdiction. *Laisne v. California State Bd. of Optometry*, 19 Cal.2d 831, 123 P.2d 457; *Dare v. Board of Medical Examiners*, 21 Cal.2d 790, 136 P.2d 304; *Russell v. Miller*, 21 Cal.2d 817, 136 P.2d 318; *Sipper v. Urban*, 22 Cal.2d 138, 137 P.2d 425. It should be noted that at the time of the trial, February 16, 1943, *Dare v. Board of Medical Examiners*, supra and *Russell v. Miller*, supra, had not been decided.

Not to prolong this decision it may be stated that the appellants do not contend that the trial court violated any rule in the cases we have just cited except as will herein be noted. Indeed it is conceded that the trial court followed said rules with meticulous care.

[1, 2] Speaking of assignments of error, the appellants make one contention, "It is respectfully submitted that the trial court erred in permitting evidence additional to that considered by appellant board to be introduced at the hearing on the petition for writ of mandate. In this connection it is pertinent to observe that the trial court was greatly influenced by the testimony of Dr. Bolin, a witness who did not testify at the proceedings of the appellant board." In support of that contention the appellants state, "The opinions of the supreme court in the *Dare*, *Russell* and *Sipper* cases above cited indicate that evidence additional to that received by the administrative agency may be considered by the reviewing court only in the following instances: (1) where evidence has been offered and improperly rejected by the administrative agency; (2) where pertinent evidence was in existence at the time of the hearing before the administrative agency but could not have been at that time produced by the exercise of due diligence; and (3) evidence discovered subsequent to the hearing before the administrative agency." That is the appellants base their contention specifically on what is said by the supreme court in *Dare v. Board of Medical Examiners*, 21 Cal.2d 790, at pages 796-800, 136 P.2d 304, at

pages 307-309. However it will be noted from a reading of said case that there was not before the court any question about evidence that was received which should not have been received. On the other hand the identical question was before the court in *Laisne v. California State Bd. of Optometry*, 19 Cal.2d 831, 123 P.2d 457. In that case, as in this case, it was strongly urged that the trial court should not have received the additional evidence. On page 835 of 19 Cal.2d, 123 P.2d at page 460, the court said: "If, in the instant case, the superior court in the mandate proceeding were limited to the evidence presented before the board, or if the findings of fact by the board were conclusive on the court, then the board would be exercising the complete judicial power reserved to the enumerated courts." Continuing, that court a little lower down on the same page, said: "This then would be an exercise of the complete judicial power that was contemplated by the framers of the Constitution, and appellant would be deprived of his constitutional right unless he had a right to go into a court of law and question the validity of that order by the introduction of any material evidence to prove that he did not commit the acts alleged." Then, 19 Cal.2d on page 843, 123 P.2d on page 464, the court quotes from *Drummey v. State Board of Funeral Directors*, 13 Cal.2d 75, 87 P.2d 848, and says: "It was there said at page 85 of 13 Cal.2d, at page 854 of 87 P.2d: 'The findings of the board come before the court with a strong presumption of their correctness, and the burden rests on the complaining party to convince the court that the board's decision is contrary to the weight of the evidence.' Undoubtedly, the court in this reference to the 'evidence' contemplated not only the record of the proceedings before the board, but such additional evidence as either party desired to introduce before the trial court." It is clear that in the instant case the trial court did not err in receiving evidence which was not offered on the hearing before the defendant board.

Hereinabove we referred to conflicts in the evidence. As we understand the appellants they do not claim that they are not bound by the findings of the trial court—except as follows: It is their claim that the trial court should not have received the testimony of Dr. Bolin and if it had not received such testimony there would be no conflict. Hence they argue that the

reception of Dr. Bolin's testimony was error, that the record can be treated as though such testimony was not received and, under those circumstances, there was no conflict. However we have shown above that the trial court did not err in receiving the testimony of Dr. Bolin. Moreover as we view the record his testimony created a conflict as to certain factors and that it was the only evidence on certain other material factors.

[3,4] Of course as to Mrs. Hope and also as to Mrs. Gribble, the defendants were bound to prove that both women were pregnant when Dr. Wyatt rendered services to them on the dates alleged in the complaint. On the witness stand both denied they were pregnant. Each had given birth to children and knew the symptoms of pregnancy but neither admitted she was pregnant. Miss Malone, the nurse who assisted Dr. Wyatt in performing said operations, gave testimony regarding what she claimed to have seen. She claimed that the doctor curretted the womb of Mrs. Hope. She testified that the doctor operated on Mrs. Gribble and removed a fetus which she said showed the form of a human being. She also testified that before the operation Mrs. Gribble stated to her that she was pregnant. All of those statements about the removal of a fetus were denied by Dr. Wyatt. Dr. Bolin, the witness mentioned above, testified that a fetus of an age of four weeks, the age of the one removed, would be the size of a buckshot and the nature of the substance could be ascertained only by the use of a microscope. It thus appears there were conflicts in the evidence, that the trial court has decided those conflicts against the appellants, and that a court of review may not disturb those findings.

[5,6] Regarding the charge of disturbing the peace at Bieber, it was the theory of the defendants that under the record as made before the defendant board it was shown that the petitioner did, during his probation period, violate section 415 of the Penal Code, that such act was one of moral turpitude and therefore the petitioner was guilty of an act of unprofessional conduct. (Sec. 2383, Business and Professions Code, St.1937, p. 1377.) The vice in that contention is that it assumes the offense of disturbing the peace is an act of "moral turpitude". That it is an act of turpitude may be conceded, however it is equally clear that it is not ipso facto an immoral act. In

re Disbarment of Rothrock, 16 Cal.2d 449, 456, 106 P.2d 907, 131 A.L.R. 226. If and when it is claimed such an act is one of moral turpitude the trial court may inquire into such facts as show or tend to show the offense complained of was or was not an act of moral turpitude. In re Hatch, 10 Cal.2d 147, 151, 73 P.2d 885. But in the case before us such evidence was produced by the petitioner. Thereafter the court made findings that the offense alleged to have been committed at Bieber was not one of moral turpitude. Under well settled rules that finding is conclusive in a court of review.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concur.

Hearing denied; GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., dissenting; CARTER, J., not participating.



FACKRELL v. CITY OF SAN DIEGO. *
Civ. 3312.

District Court of Appeal, Fourth District,
California.

June 12, 1944.

Hearing Granted Aug. 10, 1944.

1. Municipal corporations $\S$ 819(1)

In pedestrian's action against city for injuries suffered in fall from sidewalk into hole in street, evidence did not support finding that original construction of dirt street and sidewalk or application of oil to prevent erosion was inherently dangerous. Gen.Laws 1937, Act 5619.

2. Municipal corporations $\S$ 789

In absence of conspicuous surface indications that dirt sidewalk, had been undermined by erosion, such condition was a "latent defect" of which city was not charged with constructive notice so as to become liable to pedestrian who was injured when sidewalk gave way. Gen.Laws 1937, Act 5619.

See Words and Phrases, Permanent Edition, for all other definitions of "Latent Defect".

3. Municipal corporations $\S$ 788(1)

Knowledge or notice is essential to show city's culpability in failing to remedy

defective street or sidewalk, and proof of one or the other is necessary to recover. Gen.Laws 1937, Act 5619.

4. Municipal corporations $\S$ 763(1)

A city is not an insurer of its public ways, and is not bound to keep them so as to preclude a possibility of injury or accident therefrom. Gen.Laws 1937, Act 5619.

5. Municipal corporations $\S$ 791(1)

The continued existence of a minor defect is of itself insufficient to make city liable for resulting injuries. Gen.Laws 1937, Act 5619.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by Ida Fackrell against the City of San Diego for injuries resulting from defective street and sidewalk improvements. From a judgment for plaintiff, defendant appeals.

Reversed.

J. F. DuPaul, City Atty., and J. H. McKinney and Edward H. Law, Deputy City Attys., all of San Diego, for appellant.

S. G. North and Edgar G. Langford, both of San Diego, for respondent.

GRIFFIN, Justice.

Defendant and appellant The City of San Diego appeals from a judgment rendered by the trial court sitting without a jury, in the sum of \$3,500 in favor of plaintiff and respondent Ida Fackrell. The action is based upon the Public Liability Act of 1923 (Stats.1923, p. 675, Deering's Gen. Laws 1937, Act 5619), for injuries claimed to have been caused to plaintiff as a result of a defective street and sidewalk improvement.

On this appeal, no complaint is made as to the amount of damages awarded. No question of the contributory negligence of plaintiff is here presented. The sole question turns on the liability of the city.

West Palm Street in the City of San Diego is a short street sloping from the east to the west, connecting part of the uptown areas of San Diego with direct routes to the Consolidated Aircraft factory. For many years prior to the winter of 1940-1941, this street had been closed to traffic, both for the motorist and pedestrian. The soil was in its virgin state.

Late in November, 1940, the city undertook to grade and oil this street in order to facilitate the movement of workers in the aircraft industry to and from their work at the factory. The grading and oiling was finished on January 8, 1941. The work was not done on contract but directly by the city. Milton Rader, a witness for the city, was in charge of this improvement. He was street foreman and had been so engaged for several years prior to the trial. He worked directly under the City Superintendent of Streets in charge of new construction and general maintenance of all unimproved streets in the city. It was also his duty to inspect unimproved streets. The result of the grading done on West Palm Street was that at the intersection with Kettner Boulevard no more than a few inches were cut from the land in its natural state; but at the railroad crossing at the intersection of West Palm and California Streets the cut deepened to a maximum of 12 to 13 feet. At California Street the lot level was left above the street about ten feet on the south side of West Palm. On the north side the cut was 12 to 13 feet. A sidewalk of virgin soil was left above the street level on either side, 10 feet wide and slanting from the bank near the property line toward the street, which sidewalk was bordered with a curb graded out of the soil.

There was a conflict in the testimony as to the character and height of the curb. Rader and the witnesses for the plaintiff were in agreement that there were no concrete curbs, or curbs of any substance except the soil left by the grading. Rader contended that the curbs did not exceed 8 or 10 inches in height from the level of the street and that they were beveled from the street back to the sidewalk for the purpose of holding the oil which was afterwards put on the street. Witnesses for the plaintiff, on the other hand, testified that the curbs were 12 to 18 inches high and that there was a perpendicular drop from the sidewalk to the street level at the point where the plaintiff fell.

After the street was graded oil was applied thereto. This was a light penetrating oil sprayed on from a truck with a power pump on it under pressure at a temperature of 450 degrees. The oil was purposely sprayed on the curb to provide a seal against erosion and to prevent dust from blowing into the street. Rader insisted that it was not intended that the oil

sprayed on the curb should result in producing a sidewalk with an oiled surface.

There was a conflict in the evidence as to the width of the oiled surface produced by the wind spreading oil upon the dirt sidewalk near the curb or gutter. Rader testified that the overlap on the curbing was limited to "four to six, sometimes eight inches". The evidence produced by plaintiff indicated that the oil strip on the sidewalk bordering the curb was approximately 18 inches wide at the point of the accident.

After the conclusion of the work, on January 8, 1941, Rader was in charge of inspection of the street. He disclaimed responsibility for inspection of the sidewalk. The sidewalk was considered by his department to be wholly unimproved, and that no repairs would be made on it unless someone in the neighborhood called attention to a condition which was unsafe and dangerous. However, he inspected the oiled street up to the first part of February, 1941. He then testified that it is usual for streets treated as West Palm Street had been treated to show pot holes after traffic "hits the street"; that upon his last inspection in February, 1941, the usual number of pot holes appeared in the street; that he did not notice any large holes at that time, and that it was late in January and in March, 1941, when the rains came.

On March 21, 1941, at about 1 p. m., plaintiff was walking westerly along a strip about 12 inches from the curb, on the north dirt sidewalk bordering on West Palm Street and toward her home when the part of the sidewalk covered with the overflowed or overlapping oiled surfacing gave way under her; apparently from erosion, and she fell into a hole in the street which was about 18 inches from the curb and in the street opposite to the place where the oiled surface of the dirt sidewalk near the curb gave way. The hole was described by her as having the appearance of a "mud pie", formed in the crust of the street; that it was small and about 5 inches across, but she did not notice any depth to it. The fall caused a fracture of her right leg at the ankle.

Plaintiff testified that after she fell the hole appeared to be larger than before; that "it seemed like everything gave way and it all just crumbled in"; that when she finished falling, her body was in the bottom of a hole about 3 feet below the level of the dirt sidewalk; that there had

been no appreciable change in the condition of the sidewalk or around "this point in the street" from the time it was put in until the month of March, 1941; that the hole in the street where she slipped had only been there, to her knowledge, "about a couple of days before the accident"; and that "hundreds of aircraft workers" would go up and down this sidewalk each day.

Upon the issue of the dangerous character of the street and upon the issue of notice to the city, the plaintiff produced a witness, Margaret Crawford, who testified that in January, 1941, she rented a room from plaintiff at 1330 West Palm Street; that at that time West Palm Street was "very bad"; that there were a few small holes all along the side where the curbs were supposed to be; that the sidewalk was in a very bad condition; that "there was supposed to be oil and gravel, but most of it was done way with; I guess, worn away". She was then shown a picture of West Palm Street taken after the accident and a hole in the street was pointed out by her. She was asked whether there "was such a hole there during the time she lived in plaintiff's house" and she replied: "Yes, it was very small, around the first of January, but, then, after the rains, why, then it became larger". (The evidence conclusively shows that the street and sidewalk were not completely graded until January 8, 1941.) She then testified that she thought it was about a foot and a half drop from the level of the sidewalk to the street, but on cross-examination she testified that the distance could have been 9, 10, 12, or 18 inches,—"I was just guessing"; that the hole "dropped" still farther; that "before the rains it was about 3 or 4 inches down but after the rains"—"it was another foot". She then testified that about one week before plaintiff fell she had an accident on the same dirt sidewalk "about 30 or 40 feet down from the corner of Kettner * * * about that same location" where plaintiff had her accident. She testified that she "couldn't swear it was at that same spot, but it was right in that neighborhood"; that she "slid down right into the hole where she went"; that the "sidewalk crumpled"; that "there was just a little hole" and "my ankle went in it"; that she did not report her injury or the condition of the sidewalk to the city officials; that the rain came in March and washed out these holes.

Plaintiff testified that the place pointed out by Mrs. Crawford as the place where she fell was not the place where plaintiff fell.

Defendant's superintendent testified that the purpose of the oil was to seal the street from "ordinary erosion"; that the oil from the "spray bar will spray or spread—from 4 to 8 inches" over onto the dirt sidewalk, depending on the amount of wind blowing, type of curbing, etc.; that the oil "went up there accidentally"; that no attempt was made to spray or oil the sidewalks in any way; that during February, 1941, he was "over the street several times", watching it; that he saw nothing "wrong with the street at any place", nothing more than happens to any oiled street—a few "little pot holes shows up"; that he noticed no large holes at the curb or otherwise; that he didn't recall whether he inspected it in March; that "we don't expect any work to last forever, and when we put a dirt sidewalk in we more or less always expect to have to do work on it"; that there is bound to be more erosion on a hill than there is on a level piece of ground; that "there is bound to be, on new work, erosion. On our policy that we have tried to follow, the only thing that we ever repair on unimproved sidewalks is something that is reported to us as dangerous. We don't try to maintain or keep up unimproved sidewalks, only when there is a bad wash or something that somebody has reported to us as dangerous".

This is about the only evidence of possible constructive or actual notice to the city of the defective condition of the street and sidewalk.

Upon this evidence the trial court found that the defendant city had control of the street and sidewalk involved; that it "negligently maintained" them and that they were "in a dangerous and defective condition"; that defendant on January 8, 1941, improved the street and sidewalk by grading the sidewalk and street and oiling the same and that by reason of said work the sidewalk and street were left in a condition which was inherently dangerous; that said inherently dangerous condition was known to the defendant and was not known to the plaintiff; that a hole in the street adjacent to the sidewalk had existed for sometime prior to March 21, 1941; that thereby the street and sidewalk were made dangerous and defective; that defendant

had notice and knowledge of the defective and dangerous condition of said street and sidewalk; that a reasonable time had elapsed after the defendant and its said officers acquired knowledge and received notice of the said defective and dangerous condition during which time the defendant could have remedied said dangerous and defective condition; that the defendant and its officers who had authority to remedy said defective and dangerous condition failed and neglected for a reasonable time after acquiring said knowledge and receiving said notice to remedy said defective and dangerous condition; that as a direct and proximate result of said dangerous and defective condition of said sidewalk and of the negligence of defendant, plaintiff fell upon said sidewalk and street and into and upon said hole and was thereby injured. Judgment was rendered accordingly.

Defendant appealed and argues that the evidence is insufficient to support the findings and judgment in that (1) the defective and dangerous condition complained of was, according to the evidence, a latent defect of which the defendant had no knowledge or notice, and could not, by a reasonable inspection, have acquired knowledge or notice of said defect; (2) that plaintiff failed to show that the sidewalk was in a dangerous and defective condition, and failed to show that the city had notice either actual or constructive of any dangerous or defective condition for any such length of time as would reasonably enable it to fix or repair the same.

[1] We will first consider the evidence supporting the finding that the manner of grading and oiling of the street and the partial oiling of the sidewalk was "inherently dangerous". There was nothing unusual in the manner in which the street and sidewalk were graded. Placing the penetrating oil on the dirt street was according to adopted standards and in itself could not be considered dangerous. Placing the penetrating oil in and upon the street gutter and curb to prevent erosion of the dirt street and dirt sidewalk could not be said to be inherently dangerous. The only argument that plaintiff offers in this respect is that the city negligently applied penetrating oil and allowed it to be "blown onto the dirt portion of the sidewalk" thereby creating a "crust" which might thereafter cave in if rains came and caused erosion of the dirt from under it.

It is apparent from the undisputed testimony that it was good practice to apply such an oil to the curb or embankment of the dirt sidewalk to prevent erosion. Plaintiff produced no evidence to the contrary. The oil surfacing had to terminate at some appropriate point on the dirt sidewalk. It was not intended that any part of the sprayed area of the dirt sidewalk was to be used or considered by pedestrians as a part or portion of any paved sidewalk. It was clearly intended as a binder to prevent erosion. We see nothing in the original improvement, i. e., the construction of the street and sidewalk or in the nature of the application of the penetrating oil that could be considered inherently dangerous. The claimed defective condition subsequently arose from erosion due to the action of the elements. The finding of the court in this respect is therefore not supported by the evidence.

In *City of Phoenix v. Clem*, 28 Ariz. 315, 237 P. 168, 172, where a trench in a public street had been back-filled in the usual way, so as to be safe for use by the public, and the city had no knowledge of a hole therein, due to rains causing settling, and the hole had not existed long enough to give the city constructive notice thereof, it was held that the city was not liable for personal injuries caused when a taxicab struck the hole and injured an occupant. The court there discusses many of the cases from other states and quotes the general rule: "Generally speaking, when a particular kind or class of work is done in the usual and customary way, its conformity to the rule may be granted. When a city improvement is not defective when made, but later becomes so, the rule is that the city must have actual notice of a defect, or the defect must have existed a sufficient length of time to imply notice before it is guilty of actionable negligence. True, the city in the progress of making an improvement must take steps to guard the public against the dangers incident thereto. It is not entitled to notice of a dangerous condition that it has created or caused to be created during the course of the improvement, but, where the improvement is finished or completed to the extent of being safe for use by the public, as in this case, we think to hold the city not entitled to notice but liable at all events is not the law." See also, *National Laundry Co. v. City of Newton*, 300 Mass. 126, 14 N.E.2d 108; *Frisk v. City of Des Moines*, 196 Iowa

606, 193 N.W. 570; Ward v. Salt Lake City, 46 Utah 616, 151 P. 905.

The next question that arises is whether the evidence supports the finding that the city "negligently maintained the street and sidewalk in a dangerous and defective condition" and whether the city had constructive notice of such condition.

[2, 3] In Cook v. Superior Court, 12 Cal. App.2d 608, 55 P.2d 1227, cited in Whiting v. City of National City, 9 Cal.2d 163, at page 165, 69 P.2d 990, at page 991, it was stated that the constructive notice necessary to fasten liability on the city under the statute and the authorities must be constructive notice not only of the condition of the sidewalk, but also of the *dangerous character* of such condition. The crust formed over the portion of the dirt sidewalk here involved gave no patent appearance, from any approach to it, of being dangerous to pedestrians who might walk over and upon any portion of the sidewalk. The defective character or condition, if any, was latent and not conspicuous. Plaintiff herself, who had walked over and upon this particular dirt sidewalk almost daily for several weeks immediately prior to the accident, testified that she never noticed any hole in the dirt sidewalk or any such defect as here indicated. She only noticed a "little hole about a foot and a half out in the street", at a place where it would not be anticipated that she would be walking. There was nothing apparent about the character of that hole in the street, where pedestrians were not expected to be walking, that would in any manner give notice to a pedestrian walking on the dirt sidewalk, that the so-called crust formed thereon and in the street had been undermined by erosion. In other words, the so-called defective condition of the dirt sidewalk was not of such a character as to be conspicuous to the plaintiff or the general public using it. It was a latent defect which was unnoticed by and unknown to the city authorities as well. The fact that a pot hole or mud hole may have been present, at some given point in the street, did not necessarily give notice to the city of the dangerous character of the latent defect in the dirt sidewalk. Plaintiff herself saw the hole in the street but did not conclude from that fact that the sidewalk had been undermined. The street foreman made several examinations of various pot holes in the street during the months of January and February, and he discovered

no evidence of erosion or undermining of the dirt sidewalk. The elements of knowledge or notice are logically essential to show culpability in failure to remedy the condition of a defective street or sidewalk, and proof of one or the other is necessary to recover. Watson v. City of Alameda, 219 Cal. 331, 26 P.2d 286. The evidence does not disclose any actual notice to the city of such defective condition. Plaintiff therefore must rely upon constructive notice, if any, to support the court's finding on that issue.

It has been well established in this state that, under the conditions here prevailing, liability may be imposed upon a city only by showing (1) dangerous and defective condition; (2) knowledge or notice of the defective condition; (3) failure to remedy it upon knowledge or notice thereof. Nicholson v. City of Los Angeles, 5 Cal.2d 361, 363, 54 P.2d 725. It is not enough to show a dangerous condition of the sidewalk. Little consideration can be given to the testimony of plaintiff's witness Mrs. Crawford. It was apparent that the condition she described was at a place other than that described by plaintiff. She observed no defective condition of the dirt sidewalk either. Her testimony that there was a small hole in the street "around the first of January", is conclusively established as being unworthy of credence because the work was not completed until January 8, 1941. However, her testimony in relation to what she said she observed is subject to the same criticism as that of plaintiff in respect to establishing any constructive notice to the city of a defective condition of the dirt sidewalk.

From the record before us it plainly appears that there was no element of conspicuousness or notoriety showing any danger apparent to a person exercising ordinary care in using the dirt sidewalk on the occasion here described which could possibly give to the city authorities constructive notice of any *dangerous condition* of the sidewalk or of the *dangerous character* of such condition.

[4] It has been well established in this state that a city is not an insurer of its public ways and is not bound to keep them so as to preclude a possibility of injury or accident therefrom. Whiting v. City of National City, supra.

If plaintiff's argument that defendant city's failure to make adequate inspection of the unimproved streets and sidewalks

in that city with its many miles of unimproved streets and dirt sidewalks, constituted negligence on its part, and that the existence of any defective condition in such streets with a resultant latent defect in the adjacent dirt sidewalks, for a period of a few days or a few weeks, constitutes constructive notice to the city of such dangerous condition of the sidewalk, then cities and counties must hereafter proceed at their peril and such a construction of the statute would prevent public agencies from building and constructing unimproved dirt streets and dirt sidewalks.

The rule as to the duty to inspect has been applied in *Nicholson v. City of Los Angeles*, supra, 5 Cal.2d at page 367, 54 P.2d at page 728, where it is said (quoting from *Davanza v. City of Bridgeport*, 118 Conn. 23, 170 A. 484): "'in order to charge a municipality with implied or presumptive notice of a defect, it must be shown that, had it exercised a reasonable supervision over its streets and sidewalks, it would have discovered the condition a sufficient time before the accident to have had a reasonable opportunity to guard against injury from it. That test is * * * would it have been discovered had the municipality exercised reasonable supervision over its streets * * * in view of the whole problem with which it was confronted." * * * This, in common with the other elements of municipal liability for defective streets and sidewalks, contemplates consideration of all the existing circumstances, including, not only the cause and nature of the defect and the length of time it had existed, but also the location, extent, and character of the use of the walk in question, the magnitude of the problem of inspection, and remedy presented by the conditions, and the resources in men and money available to cope with the problem.'"

It is also said, 5 Cal.2d at page 367, 54 P.2d at page 728: "The plaintiff herself testified, and relies upon this testimony to show an absence of contributory negligence, that from the direction from which she approached the sidewalk appeared to be perfectly level. This testimony also tends to show that the defect was not conspicuous, and might also go far toward

establishing that it might have been overlooked in a reasonable inspection of the city streets."

In *Whiting v. City of National City*, supra, 9 Cal.2d at page 165, 69 P.2d at page 991, it is said: "It is a matter of common knowledge that it is impossible to maintain a sidewalk in a perfect condition. Minor defects are bound to exist. A municipality cannot be expected to maintain the surface of its sidewalks free from all inequalities and from every possible obstruction to travel. Minor defects due to continued use, or action of the elements, or other cause, will not necessarily make the city liable for injuries caused thereby. What constitutes a minor defect is not always a mere question of fact. If the rule were otherwise, the city could be held liable upon a showing of a trivial defect." (Italics ours.)

[5] The holding in the *Nicholson* case that the continued existence of a minor defect is of itself insufficient to impose liability on the city for injuries resulting therefrom is recognized as the law in this state. In view of the nature and character of the claimed latent defect in the dirt sidewalk, the cases cited by plaintiff are factually distinguishable. Many of those cases are adequately distinguished in *Watson v. City of Alameda*, supra; *Wise v. City of Los Angeles*, 9 Cal.App.2d 364, 49 P.2d 1122, 50 P.2d 1079; and *Nicholson v. City of Los Angeles*, supra. We conclude that the constructive notice found by the court is insufficient to support the judgment. *Dineen v. City and County of San Francisco*, 38 Cal.App.2d 486, 101 P.2d 736; *Silva v. City of Somerville*, 253 Mass. 545, 149 N.E. 410; *Taylor v. Town of Sterling*, 250 Mass. 123, 145 N.E. 40; *Stone v. City of Boston*, 280 Mass. 31, 181 N.E. 746; *Malone v. Union Pav. Co.*, 306 Pa. 111, 159 A. 21; *Reinhard v. Lawrence Warehouse Co.*, 41 Cal.App.2d 741, 107 P.2d 501; *Hembling v. City of Grand Rapids*, 99 Mich. 292, 58 N.W. 310; *Burns v. City of Bradford*, 137 Pa. 361, 20 A. 997, 11 L. R.A. 726.

Judgment reversed.

BARNARD, P. J., and MARKS, J., concur.

64 Cal.App.2d 757

In re KENNEDY'S ESTATE

KENNEDY v. ROGERS et al.

SAME v. WALDRON et al.

Civ. 14195, 14306.

June 8, 1944.

District Court of Appeal, Second District,
Division 3, California.

1. Executors and administrators $\S$ 196

A finding that dismissals of claims with prejudice rendered decedent's estate solvent did not in itself require that a second family allowance to widow be granted, but second allowance could be denied if first allowance was reasonable. Probate Code, $\S$ 680.

2. Executors and administrators $\S$ 194(7)

The Court of Appeal would not be justified in reversing order denying a second family allowance to widow unless court was satisfied that trial court had abused its discretion. Probate Code, $\S$ 680.

3. Executors and administrators $\S$ 196

Where devisee, to keep intact her interest in devised lot appraised at \$4,600, paid family allowance of \$1,200 to widow and funeral expenses of about \$500, and claims against the estate appraised at \$4,940.75 were dismissed, denial of second allowance to widow was not an abuse of discretion. Probate Code, $\S$ 680.

4. Executors and administrators $\S$ 194(7)

Where appellate court had affirmed order making family allowance to widow without remanding the case, doctrine of law of the case did not apply to subsequent petition for additional family allowance. Probate Code, $\S$ 680.

5. Courts $\S$ 202(3)

Findings are required in trial of contested probate matters where issues of fact are joined.

6. Courts $\S$ 202(4)

While facts found in trial of contested probate matters may be stated in the order or decree, they should be stated as clearly and fully as in decision of civil actions.

7. Executors and administrators $\S$ 314(12), 510(8)

An order settling executor's final account and for distribution was not reversi-

ble for failure to make specific findings, where only ground of objection was based upon widow's application for further family allowance which had been denied, and an appeal taken, and there was no issue of fact concerning her claim which required a decision upon settlement of the account. Probate Code, $\S$ 680.

8. Executors and administrators $\S$ 194(7)

An order denying new trial in proceeding by which further family allowance to widow was denied was not appealable. Probate Code, $\S$ 680.

Appeals from Superior Court, Los Angeles County; Florence M. Bischoff, Judge pro tem.

Proceeding in the matter of the estate of John E. Kennedy, deceased, wherein Celia Kennedy, the deceased's widow, filed a petition for family allowance which was contested by A. B. Rogers and another, and wherein Celia Kennedy, as the widow, contested the first and final account and also a supplemental account of Jack Waldron, executor named in the deceased's will which named Laura K. Rogers and her husband as beneficiaries. From an order which denied the family allowance, and from another order settling the accounts over the widow's objections, and from an order denying a new trial, Celia Kennedy appeals.

Appeal from order denying new trial dismissed, and probate orders affirmed.

See also 51 Cal.App.2d 714, 125 P.2d 508.

Wyckoff Westover and Steadman G. Smith, both of Los Angeles, for appellant.

Richard H. Forster and Edward A. Penprase, both of Los Angeles, for respondent Jack Waldron.

John P. Tobin and Dennis E. Bowman, both of Los Angeles, for respondents Rogers.

DESMOND, Presiding Justice.

This case presents two appeals by Celia Kennedy, widow of John E. Kennedy, from orders in probate, which are to be disposed of as a single appeal, under order heretofore made. By the first order she was denied a family allowance requested after an earlier allowance had expired; by the second, the first and final account, and also a supplemental account, of the executor named in her deceased husband's will were settled over appellant's objec-

tions and the property of the estate on hand was distributed to Laura K. Rogers, sister of the deceased.

John E. Kennedy died on October 23, 1940, leaving an estate appraised at \$4940.75, consisting of \$340.75 cash and one parcel of real estate, appraised at \$4600. In his will, dated September 30, 1935, Mr. Kennedy nominated his friend, Jack Waldron, executor without bond, and bequeathed his entire estate to his sister, and in the event she predeceased him, to her husband, A. B. Rogers. The will specifically disinherited testator's wife, "because of her abandonment of me shortly after our marriage in 1918, and with whom I have not lived or cohabited since 1918." There were no children, issue of this marriage. Petition for probate of will was filed November 6, 1940, and it was admitted December 3, 1940.

The application for family allowance above mentioned was filed on September 21, 1942, two days before the date set for hearing upon the executor's first and final account and petition for distribution. At the same time, appellant filed her exceptions to the account and petition, reciting that a family allowance of \$100 per month for a period of one year from date of death of decedent had been granted on July 1, 1941, to expire October 23, 1941, and praying that the hearing upon the first and final account and petition for distribution be ordered off calendar "until objector herein is granted a family allowance for the period from October 23, 1941 to date of closing said estate and the same paid for in full." The hearing on the final account was postponed from time to time and, ultimately, to March 23, 1943. Meanwhile, on October 14, 1942, an amendment to the exceptions was filed, in which the following recital appears: "That said first and final account, etc. shows on its face that certain alleged liabilities of the above entitled estate are still outstanding and have not as yet been liquidated and/or determined as follows to wit: determination as to the validity of the alleged claims for \$4,320.00 filed by A. B. Rogers and Laura Rogers for alleged board and room furnished the decedent, for the sum of \$4,000.00 on an alleged note and mortgage filed by Laura K. Rogers and for a note in the sum of \$1,000.00 filed by Laura K. Rogers." On that same date, a hearing on the petition for family allowance was had before the same judge pro

tempore who had granted the first allowance, namely, Miss Florence Bischoff, a probate commissioner, and the petition was, by her, denied on December 29, 1942.

On March 1, 1943, a supplement to the first and final account was filed and, in her objection and exception to that supplement, appellant notified the court that on February 26, 1943, she had filed a notice of appeal from the order denying the family allowance and that if her appeal proved successful it would be necessary that the real property be sold and the proceeds of sale used to pay the sum so allowed her as a family allowance. Notwithstanding this objection, the court, as we have stated heretofore, ordered the real property, which was found to be the separate property of the deceased, distributed to the respondent, Laura K. Rogers, requiring the distributee, as a condition to distribution, to "post a surety bond in the sum of \$3,000.00 indemnifying the executor against any and all claims, demands, costs and attorneys' fees to which he may be subject by reason of said distribution having been made prior to a final adjudication of the claims of said Celia Kennedy."

The first and final account, instead of following the usual course, declaring that all claims against the estate had been paid and that the estate was, therefore, ready for distribution, contained the following statement: "That the time for filing creditor's claims has expired and the only claims filed against this estate are those on behalf of Laura K. Rogers, sole legatee and devisee, and A. B. Rogers, her husband. That the said Laura K. Rogers and A. B. Rogers, by and through their attorney, John P. Tobin, have executed and delivered to your petitioner a certain document purporting to withdraw each and all of said claims in accordance with the terms of said document; that a true copy of the same is attached hereto marked Exhibit 'A' and made a part hereof by this reference, and the same is submitted to the Court for its consideration and such action thereon as to the Court seems just and proper in the premises." The document referred to as Exhibit "A", reads as follows:

"To the Honorable, the Superior Court of the State of California, in and for the County of Los Angeles:

"The undersigned Laura K. Rogers, devisee and legatee of the above described estate, and A. B. Rogers, her husband, con-

tingent devisee and legatee of above described estate, having heretofore filed certain lawsuits against the executor of said estate on claims rejected by him, together with an action for foreclosure of a mortgage on the only piece of real estate in said estate, and they, and each of them, being the only legal beneficiaries under said estate, agree to file a dismissal of each of said actions, being numbered 464248 and 472-684 in above court, with the Honorable Jess Stephens, Judge Presiding in the Probate department of above court, upon the following conditions: 1. That the Petition for Distribution and the accounting of the Executor be approved; 2. That there be no further claims of any or all nature be filed or approved by Executor or by the Court, including any claim for Family Allowance or continuance thereof in any way shape or form; it is understood and agreed, however, that the payment of the statutory fee for counsel or the fee acceptable to Executor or such taxes as may be levied are not to be included in the first portion of No. 2, hereof. 3. It is distinctly made a part of this agreement to enter dismissal that this agreement shall not constitute a dismissal of any rights actions or potential rights or potential actions by the signatories hereof, nor is it intended by these presents to constitute a waiver of any and all rights therein, but that it is an agreement to file, in futuro, as aforesaid, dismissals in accordance with provisions of law relevant thereto forever relieving said Executor or said estate from any or all liability thereunder upon the happening of the foregoing contingencies.

"A. B. Rogers

"Laura K. Rogers"

When this account was filed, August 27, 1942, notice of hearing thereon, fixed for September 23, 1942, was served by the executor upon the contending parties. On September 21, 1942, two days before the date of the scheduled hearing, appellant filed her exceptions to that account and petition for distribution. Hearing upon the first and final account was postponed, as we have stated, to March 23, 1943. Meanwhile, Miss Bischoff had heard the petition for the extra family allowance and at that time the dismissals of suits, mentioned in Exhibit "A", were discussed by the court, Honorable John Gee Clark, then handling the probate calendar, Miss Bischoff, and counsel. Following are excerpts from the transcript of proceedings had at that time:

"Mr. Tobin: * * * Counsel for the widow objected to the final account and his basis of objection at that time was that there were certain outstanding claims which had not been paid and that there were suits on those claims and that those suits were still on file. He never had filed objections to the account prior to that, but has since filed objections and Judge Stephens therefore continued the matter over [hearing on objections to final account] and I had before, and I have now, dismissals ready to be filed insofar as those suits are concerned. * * * However, Mr. Penprase [one of the attorneys for the executor] contended he should have some type of dismissal and I refused to file a dismissal of those suits for the simple reason that we did not want to lose our protection under that right. For that reason, I offered to dismiss those suits or to file a dismissal with the court, but do not care to do so unless this matter is approved, and Mr. Penprase, attorney for the Executor, incorporated that document and that paper in this petition for Final Accounting and that is part of the record here. * * *

"Mr. Smith: * * * Involved in the second petition, is the question of solvency of the estate under Section 680 of the Probate Code. I believe there were three claims filed which were rejected. * * * As to whether or not those claims are valid or not is the determining feature as to whether the estate is or is not solvent. That being the case, I couldn't come in at any time and say we were entitled to a family allowance until the validity of those claims are determined, that is the reason why we did not file our Petition for Family Allowance [the second one] some time ago. * * * In order to protect ourselves, we filed exceptions to the First and Final account. * * * Mr. Tobin or the beneficiaries entered into some sort of arrangement whereby if the Final Account were approved, they would agree to dismiss the suit, because of the fact that they were the heirs. * * *

"Mr. Tobin: The only reason the claims were not prosecuted was because it would entail further expense on their part. If they were going to get money, they would get it any way, that is the reason for not prosecuting the claims.

"Miss Bischoff: Whether or not it was their reason or whether it is a valid reason or not, it has considerable to do with the

status of the estate as to whether it becomes solvent or insolvent.

"Mr. Tobin: That is correct.

"Miss Bischoff: You will have to determine whether you are going to dismiss those claims and make it solvent or whether you are going to prosecute them.

"Mr. Tobin: The claims are on file, Your Honor. * * *

"Mr. Smith: * * * Those [claims] which have been allowed, leave the estate solvent; those which are rejected are the ones which would make the estate insolvent. On those claims rejected, suits have been filed. The rejecting of the claims and the filing of the suits, do not tend to make the estate insolvent; as the record stands, the estate is solvent. The presumption is as to solvency, not as to insolvency. Therefore, this estate is solvent until it is proved to be insolvent by the establishment of the validity of those suits on file in the Superior Court. * * * Is it the feeling of the court that our Petition for Family Allowance will have to go off calendar and the executor instructed to litigate these claims?

"Miss Bischoff: I think so, if those claims are good, the estate is insolvent. We cannot say it is not insolvent and spend out money that belongs to creditors. There are cases where the family allowance is only good for one year, automatically it would cease at the end of one year. I put that in probably to avoid any confusion because I thought they might think it could keep right on, I put in that order something that is a matter of law. * * *

"Mr. Tobin: We are willing to dismiss all of our claims, those two lawsuits and I am willing to file with Your Honor right now, dismissals of those two lawsuits and let the matter be submitted to Miss Bischoff.

"The Court: When you file those dismissals, does that make the estate solvent or insolvent?

"Mr. Tobin: We can't stipulate as to that, but we are willing to dismiss the lawsuits—

"The Court: Are there any undetermined claims upon which suit has been filed?

"Mr. Tobin: No.

"Miss Bischoff: Are there any in the file? We will have to have written withdrawal of those.

"Mr. Tobin: I will file that, Your Honor. I will take care of the withdrawal of claims on those matters, those are the lawsuits that were on file against the estate. * * *

"The Court: Let the record further show that in the case of A. B. Rogers et ux. v. John Waldron, Defendant, No. 472684 in the Superior Court of this county, and that the case of Laura K. Rogers v. John Waldron, No. 464248, have been filed with the court, with prejudice, against all defendants, dated August 21, 1942. * * * And that these dismissals may be filed, they are not actually filed, they were handed to the court.

"Mr. Smith: Do we have any information that will tie those into the action on the rejected claims?

"Mr. Tobin: I can obviate the necessity of all of that by complying with Miss Bischoff's request to me, she asked me to file a withdrawal of those claims.

"Mr. Smith: Stipulate that the withdrawal of the claims be filed.

"The Court: Withdrawals of the rejected claims will be filed by—

"Mr. Smith: Laura K. Rogers and A. B. Rogers.

"Mr. Tobin: Yes, they are the only legal heirs of the estate."

[1-3] It appears from the findings entered by Miss Bischoff in the second proceeding for family allowance that the "suits pending and claims on file were dismissed and withdrawn on or about the 14th day of October, 1942." Since these were dismissals with prejudice, Miss Bischoff, when they were filed, was in a position to find the estate solvent, as she did; but, in our opinion, this finding did not, in itself, require that a second allowance be granted. The estate was then ready to be closed by reason of the filing of the dismissals, and while, in our opinion, Miss Bischoff could have granted a second allowance to cover the period from October 23, 1941, to the date of closing the estate, she was also empowered to deny that request if she considered that the amount granted as the first allowance was "reasonable" within the meaning of section 680, Probate Code. See *Estate of Coffin*, 1936, 16 Cal.App.2d 532, 534, 61 P.2d 81. In determining that question she had many facts before her. She knew, from having conducted a hearing at the bedside of Mrs. Kennedy when the first petition for a family allowance

was under consideration, that Mrs. Kennedy was and had been a paralytic for many years. She knew, also, that Mr. and Mrs. Kennedy had lived separate and apart for a period of at least fifteen years prior to his death and that during that time Mrs. Kennedy had never received or claimed support from him, the record indicating that she had received support regularly from her brother. Prior to the first hearing, the claims of Mr. and Mrs. Rogers had been filed, as had the inventory of the estate showing assets less than the amount of the claims. It appeared from the objections filed by Mrs. Rogers to the petition for the second allowance that she, personally, had paid the amount thereof in a lump sum a few weeks before the first and final account was filed and that the payment reduced, by an equivalent amount, her equity in the estate, which had been bequeathed to her by her brother. With all these facts before her, Miss Bischoff, on October 14, 1942, took under advisement the petition for the second allowance, counsel stipulating that she might consider, as evidence, the entire file in the Kennedy Estate and the transcript of testimony taken at the time of the hearing upon the petition for the first allowance. When, two months later, on December 29, 1942, she entered the order denying the petition for the second allowance, she merely affirmed her earlier decision by which she limited the total allowance in this estate to the sum of \$1200. This clearly appears from the conclusion of law which she filed in the following language: "the petitioning widow has already received an award of family allowance, which said award of family allowance has been fully paid and satisfied and that said widow has received as much of the estate of deceased to which she is entitled by way of family allowance." We would not be justified in reversing the order unless we were satisfied that the trial court had abused its discretion. 11A Cal.Jur., page 527. It is quite apparent to us from the record, and it must have been to Miss Bischoff, that Mrs. Rogers, in order to keep intact her interest in the lot bequeathed to her by her brother, paid not only the family allowance of \$1200, but also charges against the estate for funeral expenses amounting to approximately \$500. In view of the conditions to which we have alluded, and especially the small size of the estate, and the dismissals filed by Mr. and Mrs. Rogers, we cannot say that the denial

of the second petition constituted an abuse of discretion.

[4] It is contended that the findings made by Miss Bischoff in considering the petition for second allowance constituted a departure from the "law of the case" as established by the appeal which was taken from the order granting the first allowance in 1941. Estate of Kennedy, 1942, 51 Cal. App.2d 714, 125 P.2d 508. It may be that certain findings upon the two petitions are irreconcilable, but we are not impressed by appellant's argument that no departure from the earlier findings is possible or permissible under the doctrine of the "law of the case", for, in our opinion, that doctrine does not apply in the present situation. In 42 Harvard Law Review at page 938, we find this comment upon the doctrine: "The rule is simple enough to state: the decision of an appellate court resulting in a remand for a new trial is binding on the parties in all subsequent stages of the litigation, and is conclusive in the event of a second appeal to the same court." No proceeding was remanded by the appellate court in passing upon the merits of the appeal from the order granting the allowance in 1941. The present petition for family allowance is an entirely separate proceeding. Furthermore, the facts upon which it was held proper to grant a family allowance for the period of one year would not necessarily, and did not in the present case, compel the court to extend the allowance.

Since all claims against the estate had been disposed of prior to the hearing upon the final account before Honorable Thomas C. Gould, the judge sitting in probate at that time, nothing remained for him to do at that hearing except to consider the objections filed by appellant, to pass upon the correctness of certain charges against the estate and, since the objections were overruled, to order distribution according to the terms of the will. We have examined the order made by the court and believe that it disposed satisfactorily of all matters then to be adjudicated.

[5-7] Appellant insists that the order settling the final account and for distribution must be reversed for the failure to make specific findings as to the matters in issue. Findings are required in the trial of contested probate matters where issues of fact are joined. Estate of Baird, 1943, 59 Cal.App.2d 303, 138 P.2d 698. While the facts found may be stated in the order or

decree, *Estate of Janes*, 1941, 18 Cal.2d 512, 116 P.2d 438, they should be stated as clearly and fully as in the decision of civil actions. But the only ground of objection was based upon appellant's application for further family allowance which had been denied, and an appeal taken. There was no issue of fact concerning her claim which required a decision by the court upon the settlement of the account and, in the final distribution, only questions of law. The recitals in the order were sufficient.

[8] The purported appeal from the order denying a new trial in the proceedings by which the family allowance was denied on December 29, 1942, is hereby dismissed. See 2 Cal.Jur. 173; *Estate of McCarthy*, 1939, 36 Cal.App.2d 194, 195, 97 P.2d 480.

Each of the probate orders appealed from is hereby affirmed.

SHINN and PARKER WOOD, JJ., concur.

64 Cal.App.2d 830

**LaTELLE et al. v. AMERICAN TRUST
CO. et al.**

AMERICAN TRUST CO. v. LaTELLE et al.
Civ. No. 12670.

District Court of Appeal, First District,
Division 1, California.

June 14, 1944.

Hearing Denied Aug. 10, 1944.

Payment 87(5)

Where bank acquired an undisbursed balance of a loan secured by a deed of trust on a house as result of erroneously requiring purchaser of the house at sale foreclosing a mechanic's lien to pay entire amount of agreed loan to secure release of the deed of trust, though bank had advanced only three-fourths of the amount agreed upon, purchaser's assignee was entitled to the sum as a recovery of an involuntary overpayment, as against original owners of house who entered into the agreement for the loan.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Burton S. LaTelle and another against the American Trust Company and another to enjoin a sale under a deed of trust and to compel named defendant to render an accounting to determine what was due under note secured by deed of trust, wherein the named defendant filed a cross-complaint against the plaintiff and Santa Fe Lumber Company and A. J. Wilbe to determine to whom named defendant should pay undisbursed balance of a loan. From a judgment that the Santa Fe Lumber Company, as assignee of A. J. Wilbe, was entitled to the undisbursed balance of the loan, the original plaintiffs appeal.

Affirmed.

Leslie C. Gillen and Herbert Chamberlin, both of San Francisco, for appellants.

Brobeck, Phleger & Harrison, of San Francisco, for respondent American Trust Co.

Walter S. Brann, of San Francisco, and Frank L. Crist, of Palo Alto, for respondent Santa Fe Lumber Co.

PETERS, Presiding Justice.

This action involves a dispute between the plaintiffs and cross-defendants Mr. and Mrs. LaTelle and the cross-defendant Santa Fe Lumber Company over the sum of \$1,836.45 held by the American Trust Company as a portion of an undisbursed building loan made by the bank to the LaTelles. The lumber company was awarded the money by the trial court. The LaTelles appeal.

This controversy involves a somewhat complicated set of facts. In 1938 the LaTelles purchased a lot in Redwood City on which they desired to build a house. The Redwood City branch of the American Trust Company agreed to lend them \$7,700 on an F. H. A. insured construction loan. The loan was to be paid to the LaTelles in four installments of \$1,925 each as designated points in the construction. The third payment was payable upon filing the notice of completion and the fourth became payable at a designated period thereafter if no mechanics' liens were filed, and if the house passed F. H. A. inspection. The LaTelles signed a promissory note for the amount of the loan secured by a deed of trust on the real property on which the house was to be constructed.

The contractor—A. J. Wilbe—agreed to construct the house for \$7,700. The bank made two of the \$1,925 payments to the LaTelles, who in turn paid them over to Wilbe. On June 16 or 17, 1939, the LaTelles moved in to the house after having been notified by Wilbe that the house was completed. On June 18, 1939, Wilbe presented for their signatures a notice of completion which averred, among other things, that the house was "actually" completed. The LaTelles were reluctant to sign the notice because they contended that the house was defective in several respects. Wilbe assured them that he would remedy the defects. The LaTelles, nevertheless, refused to sign the notice of completion as it was presented to them. Mr. LaTelle drew a pencil line through the word "actually" and printed in ink above it the word "virtually." The LaTelles then signed and acknowledged the notice, and Mrs. LaTelle took it to the bank to deliver it and to get the third installment of the loan. There is a dispute as to what happened at the bank. The testimony most favorable to the respondents is that the branch manager

told Mrs. LaTelle that the notice could not be recorded as changed, and that Mrs. LaTelle agreed that he might change the wording by erasing the pencil line through the word "actually" and blacking out the word "virtually." Mrs. LaTelle testified that she did not consent to the change. This conflict was for the trial court. At any rate, the notice of completion was filed with the words "actually completed" contained therein, and the third installment of \$1,925 was paid to Mrs. LaTelle. She indorsed the check and delivered it to Wilbe.

On August 18, 1939, the contractor Wilbe, not having received his fourth payment, filed a mechanic's lien on the premises for \$2,327.36. The bank did not pay over the fourth installment because the house did not pass the final F. H. A. inspection and because there was a mechanic's lien thereon. The LaTelles failed to pay off the lien and the contractor proceeded to foreclose. At the lien foreclosure hearing, the LaTelles defended on the ground that the house was defective in many respects. After a full hearing the trial court allowed the LaTelles a \$100 set off for such defects, and entered judgment for Wilbe in the sum of \$2,246.41. Thereafter, and on April 7, 1941, the house was sold to Wilbe at the sheriff's sale for the amount of his judgment, subject to the \$7,700 deed of trust. No appeal was taken from the judgment in the foreclosure proceedings, and it has long since become final.

The LaTelles defaulted in their payments on their note and deed of trust. On March 10, 1941, the American Trust Company filed and recorded a notice of default and gave notice that it would sell the property on August 27, 1941. On August 26, 1941, the LaTelles filed the present action asking that the sale under the deed of trust be enjoined, and that the bank be compelled to render an accounting to determine what was due under the promissory note secured by the deed of trust. The bank filed its answer on August 11, 1942. In the meantime, the LaTelles, by lapse of time, had lost their right to redeem the house from the judgment rendered in the mechanic's lien foreclosure proceedings. The sheriff issued his deed to Wilbe on April 9, 1942. Wilbe found a purchaser for the property, but, before he sold the property to such purchaser, he paid off the deed of trust in full. Based on the fact that the bank actually had paid

out only three installments of the loan, he contended that all he had to pay the bank to get it to release the deed of trust was these three payments. The bank insisted that he pay to it the full amount of the loan—\$7,700. This Wilbe did, and sold the property to third parties. The LaTelles were evicted. Wilbe claimed that the unexpended balance of the LaTelle loan, which, with certain deductions, amounted to \$1,836.45, belonged to him. He assigned his claim against the bank to the Santa Fe Lumber Company. It will be noticed that this claim is for the difference between what was actually lent by the bank to the LaTelles and the amount it had been repaid by Wilbe.

The bank thereafter filed a cross-complaint joining the LaTelles and the Santa Fe Lumber Company as cross-defendants, and asking the court to determine to whom it should pay the undisbursed balance of the loan. The bank's answer to the LaTelles' complaint set forth an accounting showing an undisbursed balance of \$1,836.45. It will be noted that the bank admits that it holds \$1,836.45, and that it makes no claim of ownership to this fund. Both the lumber company and the LaTelles lay claim to the fund.

The two main issues raised by the original complaint of the LaTelles were no longer at issue by the time of trial. The request for injunctive relief had become moot since, by the LaTelles' failure to redeem the property after the sale by the sheriff in his foreclosure of the mechanic's lien, all of their interests in the property were cut off. The accounting issue was taken care of by the accounting of the bank set forth in its answer, the correctness of which is not challenged. Thus, the only remaining issue at the trial was the one presented by the cross-complaint and the answers thereto, namely, the ownership of the undisbursed balance of the loan.

As already indicated, the trial court found that the Santa Fe Lumber Company, as assignee of Wilbe, was entitled to this fund. The correctness of this conclusion seems clear. It is somewhat difficult to follow the exact theory of appellants. Their various contentions seem to be based on the argument that the bank agreed to lend them \$7,700, and that since \$1,836.45 of that amount was not delivered to them, they are now entitled to receive it. They also argue that equitably they are entitled

to damages against the bank because they lost their home for the reason that the bank refused to pay over to them the fourth installment.

These arguments are unsound. The bank agreed to lend the LaTelles money in installments provided certain conditions were fulfilled, one of which was that the house should pass F. H. A. inspection, and another was that the fourth installment would not be paid if mechanics' liens were filed. Since neither of these conditions were met, the bank very properly refused to pay over the fourth installment. Then, instead of removing the lien, the LaTelles permitted the property to be sold, and they failed to redeem. They also defaulted on their payments on the deed of trust. It was judicially determined in the first action that the defects in the premises could be corrected for \$100, and they were allowed a credit for that amount. They now own no interest at all in the property. Under such circumstances there is no sound legal theory that supports their contention that they are entitled to the balance of the loan. The money was to be lent to them to build a house. Since they have allowed the house to go out of their hands, and, since the loan has been fully paid off, they have no further interest in the undisbursed balance of the loan. Moreover, they do not claim the undisbursed balance of \$1,836.45 as a loan at all. They do not contend that this sum should be lent to them and that they should be required to repay it. They seek a judgment which would give them the right to retain that amount without the obligation to repay.

The right of the Santa Fe Lumber Company to this money is clear. It is the assignee of Wilbe. Wilbe, by virtue of the foreclosure sale, owned the premises subject to the deed of trust. He offered to pay off the deed of trust, but the bank refused to give him a clear title unless he paid off the full amount of \$7,700. At that time that was \$1,836.45 in excess of what was owed the bank. There can be no doubt that Wilbe was entitled to a cancellation of the deed of trust upon payment of the amount actually owed the bank. The bank erroneously compelled him to make an overpayment. This overpayment was an involuntary one made under business compulsion in order that Wilbe would not lose his sale of the property. Under elementary principles such involuntary overpayment may be recovered. *Young v.*

Hoagland, 212 Cal. 426, 298 P. 996, 75 A.L.R. 654; *Millsap v. National Funding Corp.*, 57 Cal.App.2d 772, 135 P.2d 407. It is that very overpayment—the undisbursed balance of the loan—that is the subject of this action.

The judgment appealed from is affirmed.

KNIGHT, J., and DOOLING, Justice pro tem., concur.



64 Cal.App.2d 783

TEARNEY v. RIDDLE et al.

Civ. No. 3319.

District Court of Appeal, Fourth District,
California.

June 8, 1944.

1. Judgment ⇐174

Denial of defendant's first motion to set aside default judgment was not res judicata precluding consideration of defendant's second motion, where order granting defendant's second motion also vacated order denying the first motion. Code Civ. Proc. § 473.

2. Judgment ⇐177

Trial judge did not abuse his discretion in vacating prior order which denied defendant's first motion to set aside default judgment, where it could be found that defendant's attorneys failed to appear to present the motion because they had no notice of the hearing thereon. Code Civ.Proc. § 473.

3. Judgment ⇐143(3)

The statute providing for setting aside of a default judgment for excusable neglect is remedial and should be liberally construed so as to bring about trial of a case on its merits. Code Civ.Proc. § 473.

4. Appeal and error ⇐957(1)

Judgment ⇐139

A motion to set aside a default judgment is addressed to discretion of trial court, and in absence of a clear showing of abuse of discretion, an appellate court will

not disturb the order of the court below. Code Civ.Proc. § 473.

5. Judgment $\Rightarrow$ 143(3)

Trial judge did not abuse his discretion in vacating default judgment against defendant wife in automobile accident case brought against husband and wife and their minor son who was operating automobile at time of accident, on ground of excusable neglect, where it appeared that wife was named as defendant for first time when third amended complaint was filed, that husband mailed service of summons to attorneys who were representing himself and son but failed to instruct attorneys to appear for wife, and attorneys, not knowing they were to appear for her, made no appearance and default judgment was taken against wife. Vehicle Code, §§ 350, 351, St.1937, pp. 1596, 1597; § 352, St.1935, p. 145; Code Civ.Proc. § 473.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by John A. Tearney against Clarence F. Riddle, a minor, and Mrs. Frank N. Riddle for damages alleged to have been caused by the willful conduct of the defendant Clarence F. Riddle in the operation of an automobile. From an order setting aside and vacating a prior order, the default of defendant Mrs. Frank N. Riddle and a default judgment against her, the plaintiff appeals.

Affirmed.

Albeck & Albeck, of Los Angeles, for appellant.

Higgs, Fletcher & Glen and John W. Holler, all of San Diego, for respondent.

MARKS, Justice.

This is an appeal from an order setting aside and vacating a prior order, the default of respondent, and a judgment against her, and ordering her answer to the third amended complaint to be filed.

This was an action for damages alleged to have been caused by the wilful misconduct of Clarence F. Riddle, a minor, in the operation of his automobile. Frank N. Riddle and Mrs. Frank N. Riddle were father and mother of the minor and had signed his application for the operator's license which was issued to him. Their alleged liability arises because of that fact.

Secs. 350, 351, 352, Vehicle Code, St.1937, pp. 1596, 157, St.1935, p. 145.

A third amended complaint was filed on September 25, 1942, which for the first time named Mrs. Riddle as defendant. An alias summons was issued. Service was had on Mrs. Riddle on September 29, 1942. Her present counsel had been retained to represent the minor defendant who was represented by Mr. Riddle as guardian ad litem. Mrs. Riddle gave the alias summons and third amended complaint to Mr. Riddle upon his representation that his attorneys would take care of her interests and appear for her. He mailed the documents to the attorneys without any instructions to appear for Mrs. Riddle. The attorneys, not knowing they were to appear for her, made no appearance and her default was entered and a default judgment in the sum of \$5,000 was taken against her.

On January 6, 1943, Mrs. Riddle being advised of these facts filed a notice of motion to set aside and vacate the default. The motion was noticed for January 18, 1943, and was supported by the affidavit of Mrs. Riddle setting forth the foregoing facts and also by her verified answer.

On February 6, 1943, the firm of Albeck and Albeck were associated with Robert L. Beveridge as counsel for plaintiff.

The motion was heard and denied on March 12, 1943, Albert A. Albeck appearing as counsel for plaintiff. No one appeared as counsel for Mrs. Riddle.

On or about May 3, 1943, Mrs. Riddle filed a notice of motion to vacate the order denying the former motion and to vacate and set aside her default and the default judgment against her. Supporting the motion she specified her former affidavit and verified answer, and the affidavit of John W. Holler, one of her attorneys. Besides reciting some of the facts already detailed the affidavit of Mr. Holler contained the following:

"That on or about January 13, 1943, affiant received a copy of a letter addressed to Honorable L. N. Turrentine from plaintiff's attorney, Robert L. Beveridge, stating that the said attorney was then confined to the hospital and asking for a four weeks' continuance of the hearing of said motion.

"That about February 10, 1943, affiant received a copy of a letter from Attorneys Albeck & Albeck addressed to Honorable L. N. Turrentine, requesting that the matter

be continued to be set during the week of March 8, 1943; that no further notice of any nature was received by affiant or his associates, or anyone connected with affiant's office. That the first time affiant knew the matter had been heard and passed upon was on the 27th day of April, 1943, when he reviewed the file in the office of the clerk of this court."

It is recited in the bill of exceptions that at the hearing of the second motion, "Defendant, Mrs. Frank N. Riddle, moved the above court orally and in writing, for an 'Order setting aside the order of the above court denying defendant's Mrs. Frank N. Riddle's motion to set aside default, and for an order setting aside default and default judgment entered thereon against said defendant Mrs. Frank N. Riddle'."

The documents we have already mentioned were admitted in evidence. In addition there were also admitted in evidence the first notice of motion, an affidavit of Robert L. Beveridge filed in opposition to the first motion, an affidavit of Albert A. Albeck, a notice dated February 11, 1943, informing Mrs. Riddle and John Holler that the first motion had been continued to March 12, 1943, an affidavit of the mailing of this notice in Los Angeles on February 11th, the order of March 12, 1943, denying the first motion, a notice to Mrs. Riddle and her attorneys dated March 16, 1943, to the effect that the first motion had been denied, and an affidavit of the mailing of this notice in Los Angeles.

It is recited in the bill of exceptions that "the court did at said time (May 18, 1943) grant defendant's motions."

It should be noted that in the affidavit of Mr. Holler it is stated that in the copy of the letter from Albeck & Albeck he was advised that the first motion would "be continued to be set during the week of March 8, 1943"; that no notice of the hearing held on March 12, 1943, was received; that neither he nor his associates knew such hearing was to be held; that the first information received that the motion had been heard and granted was on April 27, 1943. In conflict with this are the notices and affidavits of mailing already mentioned. This presents the familiar question of a conflict in the evidence, which was resolved in favor of Mrs. Riddle by the trial court. Thus we must conclude that Mrs. Riddle and her attorneys had no notice of the hearing of their first motion on March 12,

1943, as all conflicts in the evidence are addressed to and settled by the trial court which is binding upon us.

[1] Plaintiff argues that the denial of the first motion became *res judicata* on that question. He cites cases supporting the argument. However, they are not controlling here.

Under the second motion, which was granted, not only the default of Mrs. Riddle and the judgment against her, but the order of March 12, 1943, denying her first motion were vacated and set aside. Section 473 of the Code of Civil Procedure gives a court the same power to relieve a party from an order as it does from a judgment taken against him. Vacating the order denying the first motion destroyed its effect so the question of *res judicata* does not arise at this time.

[2] The evidence amply supports the portion of the order vacating the prior order of March 12, 1943. If, as was evidently concluded by the trial court, Mrs. Riddle and her attorneys had no notice of the hearing of the first motion on March 12, 1943, counsel should be excused for not attending to present their motion. Certainly under these facts the trial court was fully justified in concluding that this order was made through the "inadvertence, surprise or excusable neglect" (Sec. 473, Code Civ.Proc.) of counsel for Mrs. Riddle.

[3, 4] It is well settled in California that section 473 of the Code of Civil Procedure is remedial in its nature and should be liberally construed; that it is the policy of the law to bring about the trial of a case on its merits where that may be done; that a motion made under the provisions of section 473 of the Code of Civil Procedure is addressed to the sound discretion of the trial court and in the absence of a clear showing of an abuse of such discretion an appellate court will not disturb an order of the court below. *Brill v. Fox*, 211 Cal. 739, 297 P. 25; *Salazar v. Steelman*, 4 Cal.App.2d 637, 41 P.2d 571; *Stub v. Harrison*, 35 Cal.App.2d 685, 96 P.2d 979.

[5] Under the facts before us we can find no abuse of discretion on the part of the trial judge in granting the motion before us for review.

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

64 Cal.App.2d 911

HARBY v. CITY OF LOS ANGELES et al.

Civ. 14339.

District Court of Appeal, Second District,
Division 1, California.

June 16, 1944.

Rehearing Denied July 6, 1944.

Hearing Denied Aug. 14, 1944.

1. Municipal corporations ⇨79

Provisions of charter of City of Los Angeles for recall of elected city officers and provision of general laws for removal of officers are not conflicting and the charter provisions are not exclusive. Pen. Code, §§ 758 to 772.

2. Municipal corporations ⇨79

The general laws for the recall of city officials do not apply where the city charter contains recall provisions.

3. Municipal corporations ⇨79

Where in acts of Legislature and provisions of municipal charter there are modes of procedure for removal of city officers which are inconsistent with each other, the charter will control.

4. Municipal corporations ⇨149(1)

Under section of Los Angeles Charter providing that an office becomes vacant when the incumbent thereof is convicted of an offense involving violation of his official duties, when incumbent is so convicted or removed the office he occupies becomes vacant and no recall is necessary. Const. art. 4, § 18.

5. Municipal corporations ⇨162(5)

Councilman of City of Los Angeles who had been removed in proceedings instituted under Penal Code was not entitled to salary for unexpired portion of his term as councilman, on theory that recall provision of the Los Angeles Charter provided exclusive method of removal. Pen.Code, §§ 758 to 772.

Morris Lavine, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., and Frederick von Schrader, Asst. City Atty., both of Los Angeles, for respondents.

DORAN, Justice.

Under proceedings taken pursuant to Chapter 2, Title, 2, Part 2, of the Penal Code, sections 758 to 772 thereof, appellant was removed from his office as a councilman of the City of Los Angeles. The judgment rendered in said proceeding was affirmed upon appeal. *People v. Harby*, 51 Cal.App.2d 759, 125 P.2d 874. Appellant now seeks to compel payment to him of the salary for the unexpired portion of his term as councilman, on the ground that his removal from office by the proceeding aforesaid was illegal, in that the court was without jurisdiction to thus order the removal of an elective official of the City of Los Angeles. The court below denied appellant's application for alternative writ of mandate. Appellant contends that an incumbent of an elective office of the City of Los Angeles may only be removed from office by the qualified electors of said city as provided by section 290 of the city charter. In this connection it is argued that the method provided by the city charter is exclusive. *Betskouski v. Superior Court*, 34 Cal.App. 117, 166 P. 1027, is relied upon by appellant to support such contention.

In principle, the *Betskouski* case and appellant's case are identical. In the *Betskouski* case, supra, the petitioner sought a writ of prohibition to prevent his trial under an accusation presented by the grand jury pursuant to the provisions of sections 758-772 of the Penal Code, above mentioned. The petitioner in that case was also a member of the council of the City of Los Angeles, and was charged by the accusation with a violation of the provisions of former section 18 of the city charter, the provisions of which section are now embodied in section 28 of the said charter, and which provide that no member of the council shall be financially interested in any contract, sale or transaction to which the city is a party, under penalty of forfeiture of his office. Petitioner in the *Betskouski* case, supra, contended that the right to remove a member of the council under section 18 of the charter was superseded by the right given in the charter to removal by the recall. Inasmuch as it was

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Proceeding for a writ of mandate by Harold Harby against the City of Los Angeles and others to compel the payment of salary. From an order denying application for alternative writ of mandate, the petitioner appeals.

Affirmed.

held in the Betkouski case that the appropriate method of removal from office under section 18 of the city charter was by proceedings instituted pursuant to section 758 et seq. of the Penal Code, what the court there said relative to the recall provisions of the city charter applies with equal force here.

[1] It is there stated, 34 Cal.App. at page 121, 166 P. at page 1029: "The recall provides for the removal of officers at the will of the electors of the municipality, upon reasons, good or bad, satisfactory to the individual consciences of the electors. Even if a recall petition should state, as reason for recall, the same matters which might be made the subject of investigation under section 18, any elector might vote for recall upon entirely distinct and different reasons appearing to him to be equally or more cogent and convincing. If a recall should result at the polls in such a case and, at or near the same time, an acquittal of the same officer should result from an investigation under section 18 of the charges specified in the recall petition, it could not be said and could never be shown that the results were conflicting or even inconsistent. The judicial inquiry would have ended an investigation into specific charges against the officer. The recall election would have thrown open the entire range of the official life of the individual, and made his incumbency of the office depend upon the accumulated judgment of the electorate based upon, not only his minutest official acts, but also upon his private reputation and character." There is no conflict between the provisions of the city charter and the Code provisions. There is nothing in the charter that, by the application of any rule of construction, indicates an intention to make its provisions exclusive. The procedure of each is entirely different in every respect. The "recall" is a governmental process, whereas the "accusation", under the Penal Code provisions, in substance and effect is an action at law. The variety of phases that distinguish them are too numerous to mention. Neither misfeasance nor malfeasance need be necessarily involved in a recall election. On the other hand, the judicial procedure and requirements incidental to the removal proceedings take the form and substance of an action at law.

[2,3] Of the Betkouski case, supra, appellant's brief states: "Thus the Bet-

kouski opinion contrasts the alleged scheme of removal under section 18 with that provided by the recall. It shows that the recall scheme meets the requirement as to designating the cause and also provides the mode of removal 'with great care' whereas section 18, now 28, states the cause but utterly fails to provide the method or mode. It definitely recognizes that where, as in the recall, both cause and mode are found, the charter provision is exclusive of state laws, and it does this both by its plain language and the citation, as illustrations, of such cases as *Dinan v. Superior Court*, 6 Cal.App. 217, 91 P. 806, and *Craig v. Superior Court*, 157 Cal. 481, 108 P. 310." However, appellant completely overlooks the fact that section 290 of the Los Angeles charter is exclusive of state laws only so far as the recall of a city official is concerned. In other words, the general laws do not apply where the charter contains such provisions. Appellant has failed to show wherein the Los Angeles city charter provides, either expressly or impliedly, that the recall shall be the only method of removal of an incumbent from an elective city office. The rule as followed in the Betkouski case, supra, is, as there stated, "that where, in the acts of the Legislature and in the provisions of municipal charters there are set down modes of procedure for the removal of officers *which are inconsistent with each other*, the charters will control." (Italics added.)

Appellant has not pointed out wherein the charter of the City of Los Angeles either expressly or impliedly provides that elected officials of the city shall only be removed from office as in said charter provided. In the Betkouski case, supra, it is stated with respect to section 758 et seq. of the Penal Code (at p. 126): "There is no conflict between those sections and the charter, for they occupy a field which it does not invade. There is apparently no other procedure than that outlined in the sections mentioned to which resort may be had in order to render section 18 of the charter effective and the language of section 758 expressly countenances such a resort, for it provides for the presentation by the grand jury of 'an accusation in writing against any * * * municipal officer, for willful or corrupt misconduct in office.'" Appellant misconstrues the purport of the Betkouski case. As to section 290 of the city charter, the Betkouski case holds that the recall provisions of the charter do not

conflict with the provisions of section 18, now section 28 of said charter, nor with the method of removal of a city councilman from office under section 758 et seq. of the Penal Code for violation of the provisions of section 18. The opinion in the Betkouski case, as above quoted, expressly states as a general proposition that there is no conflict between the provisions of the Penal Code, in question, and the recall provisions of the charter. And it is obvious that if removal of a city official may be had under section 758 et seq. of the Penal Code, for a violation of section 18 of the charter without conflicting with the recall provisions, the said sections of the Penal Code may be applied to removal of a city official in any circumstances where appropriate, without conflicting with the recall provisions.

[4] Section 9 of the Los Angeles charter states: "An office becomes vacant when the incumbent thereof * * * is * * * convicted * * * of an offense involving a violation of his official duties, or is removed from office, * * *." Appellant argues at length that this section gives no authority to remove any officer from his office; that it is a mere "eligibility and exclusion act". Regardless of what the section may be termed, it follows from the express provisions thereof that when an incumbent is so convicted or removed the office he occupies becomes vacant. No recall is necessary. The office becomes vacant, ipso facto, upon the conditions specified. Whether this is termed "removal from office" or a "specification of eligibility" to hold or continue in office, the effect is the same. The incumbent is no longer "in office"; and nothing further is needed to render vacant the office hitherto occupied by the incumbent. If the incumbent may not be said to have been "removed" he is nonetheless "out" as effectively as if he were "removed". It is reasonable to infer from the language employed in section 9 of the charter that the possibility of proceedings under section 758 et seq. of the Penal Code was contemplated when this charter provision was drawn. Section 18 of Article IV of the Constitution of California is also pertinent in this regard. That section, after setting forth who shall be liable to impeachment for misdemeanor in office, states: "All other civil officers shall be tried for misdemeanor in office in such manner as the Legislature may provide."

[5] However, it is not necessary to decide here whether removal of an incumbent of an elective city office for misconduct in office, for a violation of official duties, or for any such cause, may or may not be made strictly a municipal affair by the provisions of a city charter. In this connection see *Coffey v. Superior Court*, 147 Cal. 525, at page 535, 82 P. 75. Appellant has based the appeal herein solely on the ground that section 290 of the Los Angeles city charter conflicts with the provisions of the Penal Code above mentioned, through providing the exclusive method for removal of an elected official of that city. It has been shown that there is no such conflict between the charter provision and the particular provisions of the Penal Code; and that alone is sufficient to provide the basis for the decision here.

For the foregoing reasons the order denying the application for an alternative writ of mandate is affirmed.

YORK, P. J., and WHITE, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



64 Cal.App.2d 897

HUGHES v. WRIGHT.

Civ. 14359.

District Court of Appeal, Second District,
Division 1, California.

June 15, 1944.

1. Judgment ⇐ 138(2)

Although the law looks with favor upon settlement of controversies rather than litigation and will not permit a litigant to be deprived of his right to plead his cause when lulled into a sense of security concerning necessity for filing formal pleading, the law also frowns upon setting aside default judgments which are the result of inexcusable inadvertence or neglect of defendants or their attorneys. Code Civ. Proc. § 473.

2. Judgment ⇐ 143(3)

The situation which statute relating to setting aside defaults seeks to remedy is one in which a party to a cause is unex-

pectedly placed to his injury without any fault or negligence of his which ordinary prudence could not have guarded against. Code Civ.Proc. § 473.

3. Judgment ☞ 143(3)

It is not every inadvertence or negligence that warrants judicial relief in the form of setting aside default, but only such inadvertence or negligence as may reasonably be characterized as excusable. Code Civ.Proc. § 473.

4. Judgment ☞ 138(2)

Where defendant's counsel was given additional time in which to plead with the understanding that if further time not exceeding 10 days be desired request therefor should be made, an attempt to negotiate settlement failed after several weeks, defendant was informed that his counsel was withdrawing from the case and of the necessity of obtaining other counsel to avoid default, but defendant made no attempt to obtain other counsel for several weeks, refusing to set aside default judgment entered about 10 weeks after summons was served was not an abuse of discretion. Code Civ.Proc. § 473.

5. Judgment ☞ 136, 138(1)

Although statute relating to setting aside a default judgment is remedial and should be liberally construed, the policy of the courts is to relieve parties from their defaults only when a proper showing is made warranting such relief. Code Civ. Proc. § 473.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett and Joseph W. Vickers, Judges.

Action by Paul B. Hughes against Charles Wright, individually and doing business under the name and style of Butane, Limited, to quiet title, cancel a lease, and to recover certain moneys allegedly due. From a default judgment and from an order refusing to set the same aside, defendant appeals.

Affirmed.

Louis Elowitt, of Los Angeles, for appellant.

Peyton H. Moore, of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal from a default judgment and from an order refusing to set the same aside.

The action was commenced by plaintiff against defendant to quiet title to property, cancel a lease, and to recover certain moneys allegedly due from defendant pursuant to the terms of said lease and of an oral agreement allegedly made in connection therewith.

Service of summons and complaint was made upon the defendant April 30, 1943. He employed counsel (not his present attorney), and an oral agreement was entered into between counsel for plaintiff and defendant extending the time within which the latter might plead to the former's complaint. The term of such extension is in conflict. The affidavit of plaintiff's attorney avers that counsel retained by defendant sought and was granted a 10-day stay of time within which to appear in the action. That no further extension of time was given but that plaintiff's counsel did state to defendant's attorney that should the latter require additional time and forward to plaintiff's counsel a written stipulation providing for a further extension, not exceeding 10 days, such stipulation would be signed, but that no written stipulation was ever presented. That two personal conferences and several telephone conversations were held by respective counsel between service of summons and complaint on April 30th and June 15, 1943. That on or about June 20, 1943, plaintiff's counsel attempted to communicate with defendant's attorney by telephone but was advised that the latter was absent from the city. After two or three subsequent telephone calls, the office of defendant's counsel informed plaintiff's counsel, on or about June 27th, that he was going to retire from the case. That on June 30, plaintiff's counsel received from defendant's attorney a letter stating that the latter was not going to appear in the case and had so notified his client, the defendant Wright. The letter in question was attached to the affidavit of plaintiff's counsel and is not denied. The affidavit of plaintiff's counsel also sets forth that a conversation was had with defendant's attorney on July 2nd in which reference was made to the aforesaid letter and defendant's counsel was informed that no one else had up to that time appeared for the defendant. That

upon this occasion defendant's counsel replied "I have told him two or three times to get a new attorney, and I feel under no obligation to him". According to his affidavit plaintiff's counsel then said "What do you think about my taking a default?" to which defendant's attorney replied "I can't ask you not to", and thereupon plaintiff's counsel said "If he doesn't appear by the first of the coming week I'll have it entered". According to his affidavit, plaintiff's counsel then waited until July 7th, or Wednesday of the following week when, no appearance having been made in behalf of defendant, plaintiff's attorney caused the default of said defendant to be entered. That thereafter, not having heard from the defendant or any attorney representing him, plaintiff's counsel brought the matter on for hearing by the court on July 20th, following which hearing a default judgment was ordered entered. That on the following day, July 21st, the defendant personally called upon plaintiff's counsel and was informed by the latter that said judgment had been entered.

The affidavit of the attorney who represented the defendant at the time here pertinent states that he contacted plaintiff's counsel and in conjunction with the latter "tried diligently for several months to effect an amicable settlement between the parties to the action; that during this time there was an indefinite extension granted to defendant by Mr. Moore (plaintiff's counsel), pending the negotiations; that during the week of June 28, 1943, it became apparent to Mr. Moore and to affiant that the matter could not be settled amicably and would have to go to trial; that affiant, for personal reasons, wrote a letter to Mr. Wright (the defendant) on June 29, and withdrew from the case; that this letter stated, in part, as follows: 'Your new attorney should get in touch with Mr. Moore immediately and either get a further extension of time or file whatever type of pleading you desire'. That on the same date affiant wrote to Mr. Moore, advising him that he had requested Mr. Wright to obtain the services of other counsel; that subsequently on one or two occasions, Mr. Wright telephoned affiant and it was understood that he would employ other counsel."

In his affidavit defendant's counsel further states that on July 2nd he talked with plaintiff's attorney on the telephone, during which conversation the latter inquired

whether "it was all right to take Mr. Wright's default"; that defendant's counsel informed plaintiff's attorney that "while there was no moral obligation on his part" not to take such default, that defendant's counsel would appreciate it if plaintiff's attorney would wait until the first of the following week "because Mr. Wright had been very busy down in San Diego," and in which request plaintiff's counsel acquiesced. Defendant's attorney then sets forth in his affidavit that by reason of an injury sustained by him he was confined to his home on July 8th and 9th, 1943; that sometime during the day of July 8th, the defendant personally telephoned him at his home and talked with his wife, who after consultation with him, informed the defendant that her husband would try to get a further extension to the first of the following week, which would be July 12th. Defendant's counsel then sets forth in his affidavit that he communicated with his office secretary but that he and his secretary "cannot now agree whether affiant neglected to ask her to call Mr. Moore or whether affiant informed her and the secretary neglected to call Mr. Moore". In any event, it is admitted that defendant's counsel did not make a request of plaintiff's counsel for a further extension.

The affidavit of Charles Wright, the defendant, states that he left the City of Los Angeles on a business trip to San Diego June 26, 1943, at which time "he was under the impression that negotiations for settlement were still pending"; that he remained at San Diego until the evening of July 7th, when he returned to Los Angeles. That on the following morning, upon going to his office, he found there the letter from his attorney written on June 29th requesting that the defendant retain other counsel. In his affidavit defendant further avers that immediately thereafter he communicated with the attorney who had represented him, informed the latter that he had been out of the city for several days and had just received the aforesaid letter; that he would like to have the attorney obtain an additional ten days within which to file his answer so that he could obtain the services of another attorney. That his former counsel "promised to obtain additional time for defendant to plead". That several days thereafter the defendant went to the office of plaintiff's counsel "with the purpose of further discussing a settlement; that not until he had

conversed with Mr. Moore for some time did he know that a default judgment * * * had been taken against him". By his affidavit the defendant further avers that he has been advised that he has a good and valid defense to the action herein "as indicated by the proposed answer, counterclaim and cross-complaint attached hereto".

[1-3] While it is true as contended by appellant that the law looks with favor upon the settlement of controversies rather than litigation and will not permit a litigant to be deprived of his right to plead his cause when, by reason of continued negotiations looking toward a settlement, he is lulled into a sense of security concerning the necessity for his filing a formal pleading (Beard v. Beard, 16 Cal.2d 645, 107 P.2d 385), nevertheless, the law also frowns upon setting aside default judgments which are the result of inexcusable inadvertence, surprise or neglect of defendants, themselves, or of their attorneys in the performance of the latter's obligations to their clients. The condition or situation which section 473 of the Code of Civil Procedure seeks to remedy is one in which a party to a cause is unexpectedly placed, to his injury without any fault or negligence of his own which ordinary prudence could not have guarded against. It is not every inadvertence or negligence that warrants judicial relief, but only such inadvertence or negligence as may reasonably be characterized as excusable. In the instant case we are confronted with a situation wherein appellant's attorney had two or three times told him to retain the services of another lawyer. Manifestly, from the facts contained in the record and narrated herein, it cannot be said that there was any misunderstanding between respective counsel, but on the contrary it appears that respondent's counsel was unusually lenient with and considerate of appellant's counsel. Indeed, when the latter's counsel was asked by respondent's lawyer what he thought about a default being entered he replied "I cannot ask you not to".

[4,5] As to appellant, himself, the record indicates that on July 8, 1943, when he received the letter from his attorney advising that the latter had withdrawn from the case, he did nothing except to communicate with counsel who had represented him and was informed by the latter's wife that her husband would attempt to secure an additional 10 days extension.

Notwithstanding this precarious condition in the affairs of his case, appellant did nothing to ascertain whether such extension had been granted until July 21st. Even had such 10 day extension been granted on July 8th, it would have expired on July 18th, or two days before the default judgment was entered. Nothing contained in the affidavits on behalf of appellant shows any fault or omission of duty on the part of respondent or his counsel. We are unable to perceive wherein appellant can claim to have suffered accident or been surprised, when he knew, or might have expected, the result which followed the withdrawal of his attorney and his own failure to secure other counsel or to solicit a further extension of time from respondent's counsel. The urgency of respondent's business in San Diego does not appear, but so far as the record discloses, his absence from Los Angeles was a matter of choice. Having chosen to consider his interest at San Diego of more concern than his interest in this action, he cannot now avail himself of his neglect of the latter as something that ought to be excused. Furthermore, upon his return from San Diego on July 7th, there yet remained several days within which he could have engaged other counsel or have sought further extension of time to answer, but he chose to rely solely upon his request of counsel who had withdrawn from his case to attempt to secure a further extension, and beyond that, appellant manifested no further interest until some ten days later, at which time he learned that on the day previous to his inquiry of respondent's counsel, a default judgment had been entered against him. We cannot therefore say that the court, upon the showing made by appellant in his affidavits, committed error in refusing to set aside the default and judgment. Courts are clothed with a broad discretion in granting or refusing relief against default, and only in cases where the lower court has abused its discretion will the appellate tribunal reverse its action. While section 473 of the Code of Civil Procedure is remedial, should be liberally construed and applied to the end that one who has a meritorious defense may be given an opportunity to present it, nevertheless, the policy of the courts is to relieve parties from their defaults only when a *proper* showing is made warranting such relief. In the instant case we cannot say that such a "proper showing" was made by appellant as to justify us in hold-

ing that the trial court abused the broad discretion vested in it by denying the relief herein prayed for.

For the foregoing reasons, the judgment and the order denying defendant's motion to vacate the default taken against him are, and each is, affirmed.

YORK, P. J., and DORAN, J., concur.



64 Cal.App.2d 848

BALKINS et al. v. NORRBY et al.
Civ. No. 14262.

District Court of Appeal, Second District,
Division 3, California.
June 14, 1944.

1. Partition $\S$ 100, 111(3)

Where mortgage lien was not against the entire parcel being sold in lieu of physical partition, but attached only to an undivided two-thirds interest therein, statement in notice of sale that sale would be made subject to the mortgage lien was unnecessary, and decree properly provided that payments on account of the lien should come from the two-thirds interest in proceeds of the sale.

2. Appeal and error $\S$ 870(3)

Where partition decree had become final by dismissal of an appeal therefrom, the decree was not subject to attack in subsequent appeal from order denying motion to vacate decree on grounds urged in support of prior appeal from the decree.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt and Joseph W. Vickers, Judges.

Action by Lester Balkins and another against Alvin L. Norrby, as executor of the estate of Mary Dargit Trowbridge, deceased, and others to partition land, wherein a decree was entered providing for a sale of the property and directing distribution of proceeds so as to provide for the payment of a lien of the County of Los Angeles against an undivided portion

of the land. The executor filed motion to vacate the sale for failure of the notice to state that the sale would be made subject to the mortgage lien. From an order denying the motion to vacate and also granting motion of another party to affirm the sale, the executor appeals.

Affirmed.

See, also, 142 P.2d 958.

M. J. Gordon and C. S. Mauk, both of Los Angeles, for appellant.

Henry P. Leavitt, Robert E. Austin, John N. Helmick, and Van Lee Hood, all of Los Angeles, for respondents Lester Balkins, Elva L. Balkins and Cleon E. Balkins.

BISHOP, Justice pro tem.

The defendant, Alvin L. Norrby, appearing as executor of the estate of Mary Dargit Trowbridge, has appealed from an order which denied his motion to vacate, and also granted the motion of another party to confirm, the sale of a parcel of real estate, the sale having taken place pursuant to an interlocutory decree entered in this partition suit. The only ground of appeal upon which appellant now relies was the principal ground of his motion to vacate the sale, that is, the admitted failure of the notice of the sale to state that the sale would be made subject to a mortgage lien in favor of the defendant Los Angeles County.

[1,2] The silence of the notice on the subject referred to was neither inadvertent nor incorrect. The county's lien, the interlocutory decree declared, was not against the whole parcel being sold in lieu of physical partition, but attached only to the undivided two-thirds interest held by the estate. In such a situation it would have been improper to have ordered the property sold subject to the county's lien (*Wernse v. Dorsey*, 1935, 2 Cal.2d 513, 515, 41 P.2d 935) and the interlocutory decree that was entered did not so direct. It ordered the parcel sold, not subject to the lien, but providing that payments on account of the lien should come from the estate's two-thirds interest in the proceeds of the sale, after the deduction of some general charges.

Such criticisms of the interlocutory decree as appear in appellant's opening brief were doubtless made in support of the appeal, from the decree, which has been dismissed. *Balkins v. Norrby*, 1943, 61 Cal.

App.2d 413, 142 P.2d 958. The decree, now being final, is not subject to attack on this appeal. *Oliver v. Sperry*, 1934, 220 Cal. 327, 329, 330, 30 P.2d 402.

The order appealed from is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.



64 Cal.App.2d 858

**SWARS v. COUNCIL OF CITY OF
VALLEJO et al.**
Civ. 7034.

District Court of Appeal, Third District,
California.
June 14, 1944.

1. Certiorari ⚡42(8), 60

The sufficiency of a petition for a writ of review should be raised by demurrer or by motion to dismiss.

2. Municipal corporations ⚡185(12)

The city civil service commission in proceedings before it on petitioner's application for review of his dismissal from police department sat as an inferior tribunal or board exercising judicial functions whose proceedings were special and limited by city charter to determination of correctness of the order of dismissal, and if its proceedings were in excess of jurisdiction, they were subject to review by certiorari. *St.1941, p. 3370, § 11.*

3. Municipal corporations ⚡185(10)

If there was no evidence adduced before city civil service commission to support charges against petitioner, commission lacked jurisdiction to enter order dismissing petitioner from police department. *St. 1941, p. 3370, § 11.*

4. Municipal corporations ⚡185(13)

In certiorari to review decision of city civil service commission approving dismissal of police officer, burden was on respondents of showing that commission had jurisdiction, and no presumptions could be indulged in favor of commission's order. *St.1941, p. 3370, § 11.*

5. Pleading ⚡68

Although a plaintiff may not allege facts known to him or ascertainable from public record upon information and belief, he may so allege matters which are peculiarly within knowledge of the other party or which he can learn only from statements made to him by others. *Code Civ. Proc. § 446.*

6. Municipal corporations ⚡185(13)

In certiorari to review decision of city civil service commission approving dismissal of police officer, petitioner could allege upon information and belief that no evidence was presented before the commission. *Code Civ.Proc. § 446.*

7. Certiorari ⚡9, 31, 41

Generally, a writ of review may be denied where granting of it would work injustice, where applicant has been guilty of laches or his inexcusable neglect has made it impossible for the parties to be placed in statu quo, or where there is no miscarriage of justice, but the discretion exercised by trial court must be a sound judicial discretion.

8. Municipal corporations ⚡185(13)

Denial of certiorari to review order of city civil service commission approving dismissal of petitioner from police department on ground that the law would presume that the commission acted legally and upon sufficient evidence and that therefore petitioner could not have record before commission reviewed in order to prove the contrary was an abuse of discretion. *St.1941, p. 3370, § 11.*

Appeal from Superior Court, Solano County; Stanley Murray, Judge.

Certiorari by William J. Swars against the Council of the City of Vallejo and the Civil Service Commission of the City of Vallejo to review an order dismissing petitioner from the police department of the City of Vallejo. From an order denying petition for the writ of certiorari, the petitioner appeals.

Reversed with directions.

J. W. O'Neill, of Oakland, for appellant.

Rolland L. Pope, of Vallejo, for respondents.

ADAMS, Presiding Justice.

This is an appeal from an order of the Superior Court of Solano County denying

a petition for a writ of certiorari filed therein by appellant. The petition alleged that petitioner was and had been since September 2, 1941, a sergeant of police in the city of Vallejo, qualified under the civil service rules and regulations of the city; that on October 10, 1942, the Chief of the Police Department had presented to the city council a written recommendation that petitioner be dismissed from the police department for the reason that petitioner had conducted himself in a manner unbecoming a police officer in that he had unnecessarily and unmercifully beaten an intoxicated person; that the city council had then and there, without notice to petitioner, and without a hearing of any charges, dismissed petitioner from the police department; that on October 12, 1942, notice of his dismissal was served upon petitioner, and on October 20th petitioner filed with the Civil Service Commission of the city an answer, appeal and demand for a review of his dismissal; that the Commission thereupon set a time and place for the hearing of petitioner's appeal, at which time and place petitioner, with counsel, appeared before said Commission and demanded that he be given a public hearing, which demand was denied; that petitioner and his counsel thereupon left said hearing, which hearing then proceeded behind closed and locked doors, but that at said hearing a stenographic reporter was present who reported all testimony and evidence introduced thereat; on information and belief, that at said hearing there was no testimony or evidence offered or received that petitioner had ever inflicted personal injuries by the use of unreasonable and unwarranted physical force and violence upon the person of any one nor was there received or offered any evidence of any conduct on his part unbecoming a police officer or otherwise; that on November 5th the said Commission filed with the city council its "Findings and Conclusions" which read: "After due consideration of the evidence presented in this case, we, the Vallejo Civil Service Commission, uphold the action taken by the City Council in the adoption of Resolution 28191 N. S., dated October 10th, 1942, wherein the office of Police Sergeant held by William J. Swars, is hereby declared vacant and he is hereby dismissed from the services of the City of Vallejo effective the 10th day of October, 1942."

The petition further alleged that in dismissing petitioner respondents exceeded

their jurisdiction, particularly because no evidence was introduced before the Commission to sustain its purported findings and conclusions, and that the purported findings and conclusions are arbitrary and do not set forth either the facts or the evidence to support same.

Upon the filing of the petition in the lower court an order to show cause was issued, and at the time set for hearing thereon the city attorney of Vallejo appeared for respondents but filed no answer, demurrer, motion to dismiss or points and authorities in opposition. However, he argued, orally, that the issuance of a writ of certiorari is in the discretion of the court, and that the allegations of the petition did not justify the issuance of such writ or even an alternative writ in the case, and therefore the petition should be denied. He admitted that the charter of the city of Vallejo gave petitioner the right to a hearing on appeal to the Civil Service Commission, but urged that the allegation on information and belief that no evidence was introduced before the Commission was insufficient, that the denial of an open hearing by the Commission was in accordance with an ordinance of the city providing that hearings conducted by the Commission may by unanimous vote of the members be closed if it be deemed necessary to secure all the facts, and that the findings of the Commission "were complete and were sufficient to inform the petitioner in this matter as to the action taken by them and as to their findings in the matter." He admitted that petitioner has no appeal and no plain, speedy or adequate remedy.

The trial court took the position that the law presumes that the Commission acted legally and also presumes that there was sufficient evidence before it. Also it was apparently of the opinion that petitioner had some other remedy, for in response to a statement by petitioner's counsel that he had no other method or procedure in the law that he knew of, the court stated: "Well, he has. Now, I have been hearing these matters before the Supervisors for these writs, and City Councils for the writs, and Board of Civil Service, and the law is pretty well defined, and the procedure." The petition was thereupon denied, and this appeal followed.

[1] The sufficiency of a petition for a writ of review should be raised by demurrer or by motion to dismiss. *Pacific Home B. R. Co. v. Daugherty*, 75 Cal.App. 623,

243 P. 473. Neither course was pursued in the court below, nor did the court, at the hearing on the order to show cause why the writ should not issue, resort to evidence without the record for the purpose of determining whether or not injustice might be done by the issuance of the writ, as it has been said may be done (Donovan v. Board of Police Commissioners, 32 Cal. App. 392, 396, 163 P. 69); and no points and authorities in opposition were filed by respondents as Rule 56(b) of the New Rules on Appeals and Original Proceedings now provides may be done. However, as the arguments presented there and here are directed to the sufficiency of the petition the case is determinable as if a demurrer had been filed.

The charter of the city of Vallejo which was adopted in 1911, Stats.1911, p. 1958, provided for a city council. An amendment thereto adopted in 1941, Stats.1941, p. 3370, created a Civil Service Commission. Section 11 of said amendment provides:

"The City Council is hereby vested with the right to exercise the disciplinary and removal powers hereinafter provided.

"An employee holding a position in the Classified Service shall be subject to demotion or removal from office * * * for misconduct, incompetency, inefficiency, failure to perform the duties, or to observe the rules and regulations of the department, office or board, or for failure to co-operate reasonably with the Department Head or with his fellow employees, but subject to the right of the employee to appeal to the Civil Service Commission in the manner set forth in its rules and regulations. An employee shall be entitled to receive a written statement of the reasons for removal from office * * * and a copy of such statement shall be filed immediately with the Civil Service Commission. Such statement shall include in item form the specific instances in support of the cause of dismissal. An employee who has been dismissed shall have ten days after the receipt of such statement within which to file an answer to the same. * * * Within ten days after the filing of his answer * * * an employee who has been * * * removed from office may file a written demand with the Executive Secretary requesting the Civil Service Commission to review such suspension, demotion or removal. In which event the Executive Secretary without delay shall file with the Civil Service Commission any copy of

statement of reasons and answer of the employee together with such other information as may be provided for in the rules and regulations of the Civil Service Commission. Said Civil Service Commission may make, or cause to be made, such investigation as it shall deem necessary and thereafter shall hold a hearing; at which time it shall hear evidence for and against such employee. Hearings may be conducted informally and the rules of evidence need not apply. Written findings and conclusions shall be made by the Civil Service Commission within ten days after the matter has been submitted and thereupon the same shall be certified to the City Council and to the official from whose order the appeal had been taken. * * * Said findings of Civil Service Commission shall be final."

The allegations of appellant's petition for writ of review show that after his dismissal by the city council he appealed to the Civil Service Commission, filed an answer to the charges against him denying same, and appeared at the time and place set for a hearing before the Commission; that he demanded an open hearing which was denied, and that he thereupon left said hearing; that the hearing continued in his absence and behind closed doors; that no evidence was introduced at said hearing to support the charges against him; that the Commission thereafter filed what are designated as "Findings and Conclusions" (in the form hereinbefore set forth) sustaining the action of the city council in dismissing petitioner. His contentions before the trial court and before this court are that the Commission in holding such hearing sat as an inferior tribunal or board exercising judicial functions, that in rendering its decision without the introduction of evidence in support of the charges against appellant it acted without or in excess of its jurisdiction, and that its purported findings are insufficient to support its conclusion in that they do not set forth any facts whatsoever; that the jurisdiction of the Commission was limited to hearing and determining upon evidence before it, whether petitioner was or was not guilty of misconduct made grounds for removal by the charter; that in the absence of a denial thereof the allegations of his petition must be taken as true, and that he is entitled to have the proceedings of the Commission reviewed by way of certiorari and to have the order of the Commission annulled if it be re-

vealed that it acted without or in excess of its jurisdiction. Respondents' contentions here are the same as those made in the lower court, that the allegation of the petition that no evidence was produced before the Commission is insufficient because made on information and belief, and that the findings of the Commission are sufficient; that the issuance of a writ of review is a matter of discretion and not of right, and that the denial of a writ in this case was not an abuse of discretion.

[2-4] That the Civil Service Commission in the proceedings before it sat as an inferior tribunal or board exercising judicial functions whose proceedings were special, and limited by the charter of the city of Vallejo to the determination of the correctness of the order of dismissal of petitioner, and that its proceedings, if without or in excess of jurisdiction, are subject to review by writ of certiorari, is well established. *Garvin v. Chambers*, 195 Cal. 212, 232 P. 696; *Petersen v. Civil Service Board*, 67 Cal.App. 70, 227 P. 238; *Nider v. Homan*, 32 Cal.App.2d 11, 89 P.2d 136; *Nider v. City Commission*, 36 Cal.App.2d 14, 97 P.2d 293; *Walker v. City of San Gabriel*, 20 Cal.2d 879, 881, 883, 129 P.2d 349, 142 A.L.R. 1383. And if, as alleged by petitioner, there was no evidence adduced before that Commission to support the charges against him, the Commission lacked jurisdiction. *Garvin v. Chambers*, supra, 195 Cal. 212, at page 221, 232 P. 696; *Walker v. City of San Gabriel*, supra, 20 Cal.2d 879, at page 882, 129 P.2d 349, 142 A.L.R. 1383; *Naughton v. Retirement Board of S. F.*, 43 Cal.App.2d 254, 263, 110 P.2d 714. Furthermore, the burden was on respondents to show that the Commission did have jurisdiction (*Garvin v. Chambers*, supra, 195 Cal. 212 at page 223, 232 P. 696; *Petersen v. Civil Service Board*, supra, 67 Cal.App. 70, at page 79, 227 P. 238), and no presumptions can be indulged in favor of the orders of the Commission as an inferior tribunal. *Garvin v. Chambers*, supra; *Petersen v. Civil Service Board*, supra, 67 Cal.App. 70, at page 78, 227 P. 238; *Livingstone v. MacGillivray*, 1 Cal.2d 546, 549, 36 P.2d 622; 2 *MacQuillan on Municipal Corporations*, 2d Ed.Revised, p. 485, sec. 590.

[5,6] Regarding the contention of respondents that the allegation of the petition that no evidence was presented before the Commission is insufficient because made upon information and belief, section 446 of the Code of Civil Procedure authorizes

the making of allegations in such manner. While a plaintiff may not so allege facts known to him or ascertainable from public records, he may so allege matters which are peculiarly within the knowledge of the other party or which he can learn only from statements made to him by others. 21 Cal.Jur. 49. Such is the case here.

[7] Regarding respondents' argument that the issuance of a writ of review is in the discretion of the court, and that the writ having been denied by the trial court we should affirm its order refusing the issuance of the writ, while it is true as a general proposition that the writ may be denied where the granting of it would work injustice, where the applicant has been guilty of laches, or his inexcusable neglect has made it impossible for the parties to be placed in statu quo, or where there is no miscarriage of justice by reason of the proceeding complained of (4 Cal.Jur. 1061 et seq.), nevertheless the discretion exercised by the trial court must be a sound judicial discretion, controlled by principles of law; and the writ should not be denied if the allegations of the petition are sufficient in law, and none of the above-mentioned grounds for its denial are made to appear. Here the writ was apparently denied, not because its allegations were deemed insufficient or because its issuance would work injustice or petitioner was guilty of laches or because no miscarriage of justice will result to petitioner if the allegations of his petition are true, but because, in the opinion of the trial court, the law presumes that the Civil Service Commission acted legally and upon sufficient evidence and, therefore, appellant may not have the record before the Commission review in order to prove the contrary.

[8] In view of the authorities hereinbefore cited we are of the opinion that in denying the petition of appellant the trial court did not exercise a sound judicial discretion and that its order denying such petition should be reversed with directions to issue the writ and, upon a review of the record of the proceedings before the Commission, determine, from the face thereof, whether there was before such Commission evidence to support the charges against appellant and show that he should be discharged for any of the reasons set forth in the charter of the city of Vallejo as constituting cause for removal; and it is so ordered.

PEEK and THOMPSON, JJ., concur.

STRONG v. MACK et al.

Civ. 3088.

District Court of Appeal, Fourth District,
California.

June 7, 1944.

Rehearing Denied June 30, 1944.

Hearing Denied Aug. 3, 1944.

1. Taxation ☞441

The general rule that, where an illegal tax is inseparably connected with a legal tax, the entire tax is void, does not apply where part of a tax is too high as a result of overvaluation or overassessment which can be corrected on proper application to board of equalization.

2. Taxation ☞301(7), 788(9)

Failure to consider anticipated revenue from collection of delinquent taxes and taxation of solvent credits and securities in preparing budget and fixing tax levy did not render tax levy void in its entirety or overcome prima facie effect of tax deed conveying land sold to state for nonpayment of taxes under such levy, where taxpayer did not avail himself of opportunity to object to budget before final adoption or pay tax under protest and sue for refund of excess and revenue reasonably to be anticipated from omitted sources was less than 10 per cent of total amount of budget and levy. Pol.Code, §§ 3627a, 3714, 3804, 3804.1 to 3804.3, 3819, 3897.

3. Taxation ☞442

Invalidity of practically entire county assessment roll should not be adjudged without clear showing of fraud or equivalent thereof.

4. Constitutional law ☞284(2)

Statutory requirement of notice that copies of preliminary budget are available to taxpayers and for a hearing on date specified in notice at which taxpayer may appear and be heard for or against any part of budget satisfies requirements of "due process of law" and meets all jurisdictional requirements. Pol.Code, § 3714.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

5. Taxation ☞301(7)

Objections to form and substance of budget as presented in preliminary copies thereof available to taxpayers, insofar as they affect general validity of tax levy, are

deemed waived if not raised at hearing before final adoption of budget, particularly as respects matters affecting amount necessary to be raised by taxation and determination of rate of levy. Pol.Code, § 3714.

6. Taxation ☞542, 543(1)

Where anticipated revenue from collection of delinquent taxes and taxation of solvent credits and securities was not considered in preparing budget and fixing tax levy, taxpayer could pay tax under protest and bring an action to recover excess payment. Pol.Code, §§ 3714, 3804, 3804.1 to 3804.3, 3819.

7. Taxation ☞667

That former owner of land sold to state for delinquent 1933-34 taxes paid one-tenth of delinquent taxes for 1933 to 1936, inclusive, and interest thereon under "10-year plan", did not establish that subsequent sale of land by state was for more than the amount of taxes due. Pol.Code, §§ 3817c6, 3897.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by F. D. Strong against Joseph Mack and others to quiet title to realty, wherein C. J. Novotny, sued as John Doe Twenty, filed a cross-complaint. Judgment for plaintiff, and cross-complainant appeals.

Judgment affirmed.

See also 58 Cal.App.2d 805, 137 P.2d 748.

Clarence J. Novotny, of San Diego, for appellant.

W. E. Starke, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action to quiet title to two lots in the city of San Diego. The plaintiff claims under a tax deed dated July 9, 1940, which was issued after a sale pursuant to the provisions of section 3897 of the Political Code. The property had been sold to the state because of the nonpayment of the second installment of taxes for the year 1933-1934. The defendant Novotny, the former owner of the property, attacked these sales on the ground that the levy or assessment upon which they were based was void.

At the trial the plaintiff introduced his tax deed and rested. The defendant No-

votny introduced evidence showing that in the preparation of the budget for the fiscal year 1933-1934, the auditor gave no consideration to, and made no allowance for, anticipated revenue from the payment of delinquent taxes or for revenue from stocks and bonds and solvent credits, and that the final budget submitted to the board of supervisors contained no reference to these matters. An ordinance of the board of supervisors adopting this final budget and a resolution passed by that board setting the tax rate and levying the tax for that year were then introduced in evidence. It was further shown that under the provisions of section 3627a of the Political Code solvent credits and stocks and bonds were assessed for that year at figures which under the statutory rate would produce \$6341.11 from solvent credits and \$36,024.56 from stocks and bonds, or a total of \$42,365.67 from these sources. It was also shown that during that fiscal year \$232,081.96 in delinquent taxes was actually collected and apportioned for county purposes.

The court found in favor of the plaintiff and entered a judgment quieting his title, from which the defendant Novotny, sued as John Doe Twenty, has appealed.

The appellant contends that it appears from the evidence that the provisions of section 3714 of the Political Code relative to the preparation and adoption of a budget were not complied with for the year in question in that no consideration was given therein to solvent credits or to stocks and bonds which were taxable at the statutory rate, and none to anticipated collections from delinquent taxes; that the tax rate adopted was, therefore, larger than it needed to have been or would have been had these matters been included in the budget; that the prima facie effect of the respondent's deed was thus contradicted and overcome by other evidence; and that it follows that the taxes purportedly assessed against this property for that year were illegal and void in their entirety.

[1] The appellant relies on *Otis v. Los Angeles County*, 9 Cal.2d 366, 70 P.2d 633, in support of his contention that the taxes levied against his property for the year in question were absolutely void. That case also involved taxes for the fiscal year 1933-1934. In that case, as here, the board of supervisors, in fixing the levy on real property, gave no consideration to and did not anticipate revenue from the levy on solvent credits and securities. However, that case

was one brought to secure a return of a claimed excess in the amount of taxes paid, the excess having been paid under protest. At that time, provision for the return to the taxpayer of certain excess taxes paid was made by other sections of the Political Code. In upholding the right of the taxpayer to a return of the excess amount thus paid the court held that the failure to consider and allow for anticipated revenue from the tax on solvent credits and securities had resulted in an increase in the tax rate and that the tax levy there involved was invalid to the amount of such excess and to that extent was void. It was not held, however, that the entire assessment or levy for that year was void and we are cited to no case in this state in which such a holding has ever been made. In *Redman v. Warden*, 92 Cal.App. 636, 268 P. 686, a tax deed was held invalid because the entire assessment was illegal and invalid due to the omission of certain lands which should have been included in the assessment and levy of taxes. This was in accord with the general rule that where an illegal tax is inseparably connected with a legal tax the entire tax is void. However, it was very early held in this state that this rule does not apply to a case where a part of a tax is too high as a result of a mere over-valuation or over-assessment which can be corrected on proper application to a board of equalization. *People v. Arguello*, 37 Cal. 524.

[2,3] In our opinion, similar principles should here be applied. No failure to tax any property appears and any excess tax which may have resulted from the omissions in question was not only comparatively small but it came from what is in practical effect an overassessment or mistake in fixing the rate, rather than from a source which is recognized as one so contrary to law that it will result in invalidating the entire assessment. A further consideration is that the appellant then had at least two remedies provided by statute for the very purpose of enabling him to obtain relief from any injustice that might otherwise appear. *Rittersbacher v. Board of Sup'rs*, 220 Cal. 535, 32 P.2d 135, 138. In that case, the court also observed:

"If the plaintiffs were to prevail in this consolidated proceeding, the result would be to invalidate practically the entire assessment roll of Los Angeles county for the year 1933. Such a result may not lightly be contemplated and should not be

adjudged except upon a clear showing of 'fraud or something equivalent of fraud' on the part of the assessing authorities * * *."

budget under consideration and thus subjected to inspection and correction.

[6] The appellant had a further remedy in that he could have paid the tax in question under protest and then brought an action to recover the amount of the excess payment under the provisions of section 3804 or section 3819 of the Political Code, as then in effect. The right thus given and the remedy thus afforded was somewhat modified by new sections added in 1939. Sections 3804.1 to 3804.3, Stats. 1939, Ch. 159, p. 1384. See, *Southern Service Co., Ltd. v. Los Angeles County*, 15 Cal.2d 1, 97 P.2d 963.

A possible further consideration is that this entire tax levy should not be held void on the ground that it was for an amount greater than was needed since the revenue to be anticipated in connection with solvent credits and securities was much less than 10% of the total amount of the budget and levy. See, *Bray v. Jones*, 20 Cal.2d 858, 129 P.2d 357. Not only would this be equally true if the amount collected on delinquent taxes in that year is also considered, but on this phase of the matter it should be remembered that the year 1933-1934 was in the deepest part of the depression and the amount of delinquent taxes actually collected may not in any degree reflect the amount of such collections which could reasonably have been anticipated at the time the budget was prepared and when the rate of the levy was fixed. For all of the reasons given, we conclude that the tax levy in question was not void in its entirety and that the evidence offered by the appellant did not have the effect of contradicting and overcoming the prima facie evidence of the respondent's deed.

[7] The only other point calling for any consideration is the appellant's suggestion that on August 20, 1938, under the "ten-year plan" he paid \$11.37 as one-tenth of the delinquent taxes on this property for the years 1933 to 1936, inclusive, together with \$17.06 interest thereon, that a part of this payment should have been applied to the delinquency for 1933-1934, and that it follows that the property was sold for more than the amount of taxes due. It does not appear that any further payments were made on this plan and the only evidence we find in the record is a receipt for this amount showing that it was a conditional payment on account of delinquent taxes and that it was issued under the pro-

[4,5] The variation from the procedure required by section 3714 of the Political Code, of which the appellant now complains, is one which appears in the printed preliminary budget, a copy of which was introduced in evidence, and the record indicates that the same omission was carried into the final budget which was adopted by the board of supervisors. The omission was one of which the appellant had notice and to which he had an opportunity to object before the final budget was adopted and the rate of the tax levy fixed. While section 3714 requires the preparation of a budget that shall include consideration of all income and revenue from all known material sources, it also provides for notice to the taxpayers that copies of the preliminary budget are available to them and for a hearing on the date specified in such notice "at which time and place any taxpayer may appear and be heard for or against any part of such budget." It is not contended that these provisions were not complied with in this instance, and it may fairly be inferred from the evidence appearing in the record that the appellant failed to avail himself of this opportunity to have the omission of which he now complains corrected. The notice and hearing thus provided for were sufficient to constitute due process of law and to meet all jurisdictional requirements. Not only did the appellant have an opportunity to be heard but these provisions of the statute, for a notice and hearing, seem to have been clearly intended to give a certain finality to this consideration of the budget with respect to all matters included in or omitted therefrom which could have been questioned at the hearing, and except as otherwise provided by statute. With such a hearing provided for it would reasonably seem to follow that objections to the form and substance of the budget as thus presented are to be deemed waived, if not raised at the hearing, at least insofar as they affect the general validity of the tax levy which is to be based upon this budget. This should especially be true with respect to matters which merely affect the amount necessary to be raised by taxation and the determination of the rate of the levy which is to follow and which is to be largely, if not entirely, governed by the items of the

visions of the Political Code as a receipt which "may be applied on redemption" of the property in question, which was sold to the state on June 28, 1934. It is not claimed that the property was ever redeemed, and there is nothing to show that the amount in question was to be applied or was applied to the delinquent tax for 1933-1934. Section 3817c6 of the Political Code, added in 1938 (Stats.Ex.Sess.1938, Chap. 17, p. 97), then provided that no such partial payment should constitute a redemption or affect the right, title or interest of the State, and that any such payment is merely "compensation for the use of the real estate." See, *Higbie v. County of Los Angeles*, 47 Cal.App.2d 281, 117 P.2d 933. There is nothing in the record from which it can be determined or held that when this property was sold by the state in 1940 it was sold for an excessive amount.

Under the views herein expressed, it is unnecessary to consider respondent's further contention that any defects claimed and relied upon by the appellant have been cured by various curative statutes.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.



64 Cal.App.2d 681

SWANSON v. HEMPSTEAD et al.

Civ. No. 14207.

District Court of Appeal, Second District,
Division 3, California.

June 2, 1944.

1. Attorney and client ☞147

Where client had various claims against a defaulting and impecunious debtor which she might or might not be able to establish, attorneys were not guilty of fraud or of taking undue advantage in inducing client to enter into contract calling for contingent fee of 50 per cent. of any recovery.

2. Attorney and client ☞147

Where client sought legal assistance in enforcing claims against a defaulting

and impecunious debtor, contingent fee contract calling for fee of 50 per cent. of any recovery was not "unconscionable", notwithstanding that it subsequently appeared that attorneys would receive substantial remuneration for a relatively small amount of work.

See Words and Phrases, Permanent Edition, for all other definitions of "Unconscionable Contract".

3. Contracts ☞94(1)

An "unconscionable contract" is one such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other.

4. Attorney and client ☞147

Whether a contingent fee contract is unconscionable must be determined upon the situation as it fairly appeared to the parties at the time it is entered into, and not as subsequent events reveal it to be.

5. Judgment ☞251(1)

Where client made no claim in pleading or at the trial that attorneys had burden of establishing validity of contingent fee contract, judgment apparently based on failure of attorneys to establish validity of contingent fee contract was improper because it was inconsistent with theory of the pleadings. Civ.Code § 2235.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Suit by Carolyn Swanson against Walter E. Hempstead, Jr., and others to obtain a decree that a promissory note payable to plaintiff did not fall within purview of plaintiff's retainer contract with the defendants, and that the note and moneys collected by the defendants be delivered to the plaintiffs. From a judgment for the plaintiffs and from an order denying a new trial, the defendants appeal.

Judgment reversed, and the appeal from the order denying a new trial dismissed.

Harry Sutton, of Hollywood, for appellants.

Frank L. Simons, of Los Angeles, for respondent.

DESMOND, Presiding Judge.

We find the judgment in this case to be based on findings which are inconsistent with the theory of the pleadings. We

recognize that in the administration of justice pleadings are a means to an end, not an end in themselves, and that an issue which has been tried and determined should not be removed from the foundation of the resulting judgment just because it was not an issue within the framework of the pleadings. Where, however, the judgment rests upon the determination of issues which were neither foreshadowed by the pleadings nor understood by the parties to be in dispute at the trial, and which determination is the result of one party's failure to produce evidence of whose need he has had no warning, we have a case where the departure from the pleadings may not be merely technical, but substantial, resulting in a miscarriage of justice. We find that to be the situation in this case.

The case went to trial upon the issues created by the complaint and the joint answer of the three defendants. By the silence of their answer the defendants admitted the allegations of the complaint that they were attorneys at law, that the plaintiff employed them to perform certain legal services, and entered into the following contract of employment with them: "The Undersigned, hereinafter called the client, hereby retain Walter E. Hempstead, Jr., Attorney at Law, hereinafter called the attorney to: Institute suit against Vivian Gardner Williams, Frank Williams, Hazel Campbell, Harry Lindley for the purpose of recovering money and property owed by said persons to undersigned, or held in trust by said persons for undersigned, and agrees that the attorney is empowered to perform the said services for and on behalf of the client, and in his name, and to do all things necessary, appropriate or advisable, or which the attorney may deem necessary, appropriate or advisable, thereto whether by instituting and maintaining to completion an action or actions or other legal proceedings, or otherwise, either before or after judgment, or judgments.

"As compensation for the services of the attorney, the client will pay the sum of 50 per cent of any money or property paid, received or collected, by action, compromise or otherwise, upon or in satisfaction of any claim, or recovery made, incident to, or as a result of, the said services.

"The client will advance all necessary fees, costs and expenses incident to the performance of said services.

"This retainer shall be irrevocable, in so far as it may be made such, and the dis-

charge, or attempted discharge of the attorney, or the sale, assignment, transfer, or encumbrance of claim or right of recovery, or the proceeds thereof, or any judgment thereon, whether resulting from his services or otherwise, shall not affect or destroy his right and interest in the said claim, right of recovery, the proceeds thereof, or judgment thereon.

"This retainer shall operate as an assignment pro tanto to said attorney, of any claim or right of recovery, in so far as such assignment may be lawful, arising out of, or incident to, the matter or matters in which the attorney is retained to perform said services, and of anything received or collected thereon or of judgments obtained thereon.

"Both the attorney and client will use their best efforts in furthering the purpose of this retainer and in obtaining the necessary evidence and attendance of witnesses.

"This retainer is executed in duplicate and the client acknowledges receipt of a copy thereof. Should it be necessary to institute legal proceedings for the collection of any part of the aforesaid sums, the client agrees to pay costs of Court and a reasonable attorney fee therefor. Client hereby gives and grants to said attorney a lien upon the aforesaid claim and cause of action as security for the payment of compensation herein agreed upon to be paid said attorney."

After entering into this contract, the complaint continues, the defendants performed certain legal services for the plaintiff between December 12, 1941, the date of the contract, and the 20th day of the following January, "for which the said defendants were paid in full." Two events are then alleged to have taken place, on the two following days, as though they had no relation to what had gone before. On January 21, it is alleged, one Vivian Williams made a promissory note for \$2,825, payable to plaintiff, in lieu of and in cancellation of a promissory note for \$2,900, dated May 7, 1941, and in consideration of the cancellation of the former note and of other obligations owing from Vivian Williams to the plaintiff, and of the dismissal with prejudice of an action brought by the plaintiff upon the \$2,900 note. Then, on January 22, plaintiff complained, the defendants "caused" her to execute to them, without any consideration, an assignment of an undivided one-half interest in the new note, which had been delivered to

them and of which they have ever since held exclusive possession, collecting and retaining for themselves 50% of the \$50 monthly installments paid upon it. The plaintiff has demanded that the defendants cancel the assignment, deliver the new note and the payments they have received and retained, under it to the plaintiff, but that the defendants have refused to comply with these demands, claiming an interest in the note because of the retainer contract. The complaint then concludes its averments with the statement: "that an actual controversy exists between the plaintiff and the said defendants respecting the said contract, Exhibit 'A', and as to what the said Exhibit 'A' covered, or covers, and of the interest, if any, which the said defendants have, or should have, in and to said promissory note, plaintiff's Exhibit 'B', and that the said plaintiff herein requests a determination by this Honorable Court of the construction of the said contract, plaintiff's Exhibit 'A', and of the validity of the assignment of the interest in the promissory note, plaintiff's Exhibit 'B'." The prayer is for a decree that the promissory note does not fall within the purview of the retainer contract and that it and all moneys the defendants have collected under it be delivered to the plaintiff.

The trial court found that each allegation of the complaint was true, a finding broader than the evidence justified, but made no finding on new matter set up in the answer, in which facts were alleged that were established by the evidence beyond dispute. That is, contrary to the allegations of the complaint, and its implications, the services rendered by the defendants were not limited to the period between December 12 and January 20, nor were they paid for in full. As alleged by the answer and proved beyond question, the defendants brought an attachment action on plaintiff's behalf against Vivian Williams on a \$2,900 note and upon plaintiff's claim that almost \$1,250 more was due her, and a levy netted some \$57. A compromise was then effected whereby Vivian Williams transferred to plaintiff "certain personal property" (an automobile) and executed a new note for \$2,825 in her favor. This compromise was not reached until January 21, and some of the details, including the execution of the assignment of the one-half interest in the note, were not completed until the next day. The new note, for some time prior to the trial, had been in the possession of a bank, which was making the collections at the de-

fendants' expense, and forwarding one-half of the monthly payments received to the plaintiff, one-half to the defendants.

We have reviewed the pleadings somewhat extensively to show that the issues which they presented were simple. The ultimate issue was whether or not the defendants had a half interest in the new note. That issue depended upon the interpretation to be given to the retainer agreement and upon the endeavor of the plaintiff to have it appear that the assignment she executed was a transaction separate from all others, and was without consideration. There was no suggestion anywhere of a contention on plaintiff's part that the retainer agreement had been signed by her as a result of overreaching; that her confidence had been abused; or that, for any other reason, the contract was not valid.

The judgment which was entered in this case cannot be successfully defended upon the finding that the complaint's allegations are true, even if it were not the fact that, in part, this finding has no support in the evidence. Beyond decreeing that the assignment of the half interest in the new note was without effect, and was cancelled, and that the note should be delivered to the plaintiff, the judgment declared that the retainer contract was likewise invalid, and cancelled it, and gave plaintiff judgment against each defendant for \$279, the amount already received by the defendants over \$250, which was found to be the reasonable value of their services. The portion of the decree which cancelled the retainer contract was based on findings that the retainer contract was an unconscionable contract; that at the time it was entered into the plaintiff was the client of the defendants, and that in getting her to enter into the contract they took undue advantage of her and practiced fraud upon her. Oddly enough, the support in the evidence for the finding that at the time the retainer contract was entered into the plaintiff was defendants' client, is found in the testimony of the defendants, and then only goes to show that one of the defendants had been employed by, or had even met, her. The plaintiff as a witness most positively denied that she had employed any of the defendants as her counsel prior to December 12. The trial court, of course, could disbelieve her positive statements and yet decide in her favor, on the defendants' testimony, but the circumstance is further

proof that the theory upon which the judgment depends was not at all the theory on which the plaintiff came into court or presented her case. She must have been happily surprised at the outcome.

The defendants, also, were surprised, and prejudicially so. The trial court's findings, that the retainer contract was unconscionable, that the defendants took an undue advantage of the plaintiff, and practiced fraud upon her, must find support, if they have any, either in the evidence introduced or by a presumption which cast a burden upon the defendants that they did not sustain. The evidence produced does not support any one of the three findings. Picking here and there in the testimony to obtain the bits which best support the findings, we learn that the first contact that the plaintiff had with any of the defendants was on or about December 9, 1941, when she was introduced to defendant Hempstead in a corner drug store. The plaintiff, it developed, had had some dealings with the Vivian Williams mentioned in the retainer contract, with the result that Mrs. Williams had the plaintiff's stove and ice box in operation in Mrs. Williams home, and had some other of plaintiff's household effects in her garage. Hempstead assisted the plaintiff in obtaining possession of this property. According to her testimony he was not employed and did nothing to help her until after the retainer agreement was signed, but, as we have already noted, the trial court must have accepted the defendant Hempstead's testimony, at least in part, that he had agreed with the plaintiff, sometime before December 12, to attempt to recover the stove and other articles, his fee to be fifty percent of what was recovered. His services under this agreement, it would appear, began prior to, but were not concluded until sometime after, the execution of the retainer agreement.

Plaintiff's difficulties were more extensive than the loss of possession of these household goods, and for relief with respect to her further wrongs Hempstead introduced her to defendant Widoff, with whom he shared an office suite and had been associated in some cases. Widoff was told that the plaintiff had advanced to or on behalf of Mrs. Williams various sums amounting to over \$4,100, and that Mrs. Williams had an automobile belonging to the plaintiff. The automobile was registered in the name of Mrs. Williams, and

there was no writing indicating that the plaintiff had any interest in it, but the plaintiff claimed to own it by virtue of the fact that she had paid \$395 for it, having purchased it some time earlier for some business she and Mrs. Williams were running. The only written evidence known to exist in support of plaintiff's claim that Mrs. Williams owed her \$4,100 was a promissory note for \$2,900 (on which \$75 had been paid)—and she did not have that. An attorney had had possession of it, but its present whereabouts was not known. (It later developed that this note represented, in effect, an account stated between the plaintiff and Mrs. Williams.) Mrs. Williams had no revealed assets other than her proprietary interest in a beer parlor known as the Cave Man's Cafe and an action pending for the death of one who, she claimed, but could not prove, was her husband, an action which was soon thereafter settled for \$250. She had no money with which to pay attorney fees and none immediately available for court costs.

[1] We cannot state with certainty just how many of these facts were told Widoff and how many the plaintiff failed to disclose to him, at their first meeting. At best, the situation presented to him was one where the only fees that could be expected would come from proving a claim that might be defeated by a denial as persuasive as the claim, and then making a collection from a defaulting, impecunious debtor. It may be that on a retrial additional facts will appear, revealing this to be an invalid contract. But declining to take such a case as was outlined to the defendant except on the terms set forth in the retainer contract, cannot be fairly said to be the practice of fraud upon, or taking undue advantage of, the one seeking legal services. Attorneys are often called upon and frequently do render service without expectation of reward, but there is no legal duty requiring them to do so in such a situation as that presented here.

[2-4] Nor is there any justification in the evidence produced for characterizing the contract as "unconscionable." An "unconscionable contract", the authorities are agreed (65 C.J. 1201; 43 Words and Phrases, Perm.Ed., pp. 78, 79), is one "such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other." *Carter v. Boone County Trust Co.*, 1935, 338 Mo. 629, 92 S.W.2d

647, 657. Whether or not a contingent fee contract is unconscionable, even were that term to be given a less drastic meaning than the authorities ascribe to it, must be determined upon the situation as it fairly appears to the parties at the time it is entered into, not as subsequent events reveal it to be. Implicit in the nature of the contract is speculation on the outcome. A fee of fifty percent of a recovery sure to be made, or which, had a reasonable effort been made to ascertain the facts, would appear to be sure, might well be held unconscionable. But that cannot be and is not plaintiff's position under the evidence produced in this case. The present contract is unconscionable, she argues, because the defendants have received \$529.52 for no more work than bringing an attachment action, levying an attachment by which some \$57 was netted, bringing about a settlement whereby "plaintiff's" car was recovered and sold, a new note with better terms obtained in lieu of the lost one, and, as a consequence of a number of letters written by the defendants, monthly payments of \$50 each, amounting to \$750, have been collected on the note; and for every dollar still to be received on the note—if any more will be received—the defendants will obtain 50¢. This argument, based on hindsight, is not a valid argument upon the question which the pleadings did not present but the trial court raised: Was the retainer contract unconscionable?

[5] There remains the possibility, probability indeed, that the trial court made the findings it did, not because of the evidence produced, but rather because of that not produced. This would be on the principle that, it having been found that the relation of client and attorney existed between the plaintiff and the defendants at the time the retainer contract was entered into, a burden was cast upon the defendants to prove that the contract was valid. The extent of that burden has been prescribed by statute in these words of section 2235, Civil Code (Luiz v. Queen of Angels Hospital, 1942, 53 Cal.App.2d 310, 312, 127 P.2d 966): "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence." By case law the burden is

somewhat greater (*Hawkins v. Faries*, 1942, 49 Cal.App.2d 186, 189, 121 P.2d 20, 21): "Actually, the transactions here involved having been between attorneys and their clients, the question is whether the respondent attorneys overcame by clear and satisfactory evidence the presumption of invalidity which arises from such transactions. 'All dealings between an attorney and his client for the benefit of the former are not only closely scrutinized, but are presumptively invalid on the ground of constructive fraud, and such presumption can be overcome only by the clearest and most satisfactory evidence. Not only must the attorney offer clear and satisfactory evidence that the transaction between himself and his client was fair and equitable, and no advantage was taken by him, but he must also offer proof that the client was fully informed of all matters relative to the transaction, and was so placed as to be able to act understandingly and to deal with the attorney at arm's length.' *Estate of Witt*, 198 Cal. 407, 419, 245 P. 197, 202. To the same effect see *Kisling v. Shaw*, 33 Cal. 425, 91 Am.Dec. 644; *Cooley v. Miller & Lux*, 156 Cal. 510, 105 P. 981; *Clark v. Millsap*, 197 Cal. 765, 242 P. 918." It can be argued, therefore, that the trier of fact, believing neither the plaintiff when she testified that she was not the client of any of the defendants before the retainer contract was entered into, nor the defendants' version of what the facts were, other than that the plaintiff had for three days been the client of the defendant Hempstead, could have concluded that the defendants failed to overcome the presumption that they had taken advantage of their client in securing her signature to the retainer contract. We shall not pause to weigh this argument, nor to assay the evidence in its light. To find support for the judgment in the failure of the defendants, if they did fail, to prove fully facts of whose need they were not made aware by a hint in the pleadings or by any claim of the plaintiff at the trial, would be a miscarriage of justice. Those permitted to practice law in this state have standards set for their conduct. Those standards are set high and must be kept so. Before they can be penalized for a failure to live up to those standards attorneys should, however, be given their day in court. In an action which they do not bring, but in which they appear as defendants, they should not have judgment go against them because of their failure

satisfactorily to prove a fact not in question.

For the reasons given, the judgment is reversed. The appeal from the order denying a new trial is dismissed.

SHINN, J., and BISHOP, Justice pro tem., concur.

that during last 100 feet of approach to intersection cyclist failed to yield right of way to motorist and was guilty of negligence contributing to collision, and that cyclist's injuries resulted proximately from his own negligence, were supported by the law and the evidence. Vehicle Code, § 82.5, St.1937, p. 413; § 552, St.1935, p. 187.



64 Cal.App.2d 718

GLYNN v. VACCARI.

Civ. 14376.

District Court of Appeal, Second District,
Division 1, California.

June 6, 1944.

Rehearing Denied June 27, 1944.

Hearing Denied Aug. 3, 1944.

1. Automobiles ⇨244(13)

Substantial evidence supported trial court's finding that, when motorist entered intersection, motorcycle approaching from his right on through highway at a distance of 300 to 400 feet was not an immediate hazard and established that motorist exercised ordinary care in the circumstances. Vehicle Code, § 82.5, St.1937, p. 413; § 552, St.1935, p. 187.

2. Automobiles ⇨226(2)

Where motorist, after stopping and waiting for traffic to pass on through highway, entered intersection at speed of 15 miles per hour, and when near center line looked to his right without seeing approaching motorcycle, while cyclist knowing of motorist's presence within intersection traveled 300 or 400 feet on through highway at speed of 40 to 45 miles per hour and skidded 99 feet before striking extreme right rear end of automobile, the proximate cause of collision was cyclist's failure to yield right of way to motorist who was lawfully crossing intersection. Vehicle Code, § 82.5, St.1937, p. 413; § 552, St.1935, p. 187.

3. Automobiles ⇨244(58)

In action by motorcyclist for injuries sustained in collision with automobile crossing through highway on which motorcyclist was traveling, trial court's findings

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by John Clifton Glynn against Robert A. Vaccari for personal injuries sustained by plaintiff in a collision between his motorcycle and defendant's automobile. From a judgment in favor of defendant, plaintiff appeals.

Judgment affirmed.

W. W. Comstock, of Los Angeles, for appellant.

Elbert E. Hensley and John H. Klenke, both of Los Angeles, for respondent.

YORK, Presiding Justice.

Plaintiff appeals from a judgment in favor of defendant rendered by the trial court sitting without a jury in an action for damages on account of personal injuries sustained by said plaintiff in a collision between his motorcycle and the automobile of defendant.

The collision occurred about three o'clock in the afternoon of July 18, 1942, a bright, sunny day, at the intersection of Olympic Boulevard and Gerhart Street in the County of Los Angeles. Appellant was proceeding easterly on Olympic Boulevard, a through highway, seventy feet in width, and he testified that as he approached the intersection in question, he was traveling 20 feet from the south curb of Olympic at a speed of 35 to 40 miles per hour, and when he was 300 or 400 feet west of the intersection, he observed that respondent, who was traveling south on Gerhart Street, had stopped at a point near the stop sign on that street, which was approximately 30 feet north of the north curb line of Olympic Boulevard; that respondent "started out from the stop sign very easily; that he shifted into second gear, about 20 feet from the north side of the highway he shifted into second gear, I believe, and picked up speed"; and started across Olympic at about 15 miles per hour. "He proceeded straight south after he entered the highway and after he had crossed the

middle of the street, approximately 15 feet, he heard me coming and so he stopped"; whereupon appellant's motorcycle struck the right rear fender of respondent's automobile, which was then "seven feet south of the middle" of Olympic Boulevard. Appellant also testified that he intended to pass in front of respondent's automobile, but that respondent speeded up when he reached the center of the boulevard, and the collision occurred when appellant attempted to go around back of respondent's automobile. Appellant sustained a "compound fracture of the tibia and fibula of the right leg about three inches above the ankle."

Two witnesses testified that they were present in the Justice's Court of Montebello Township when respondent Vaccari testified "that he stopped, looked to the left and to the right and saw a truck and followed the truck up the street and looked to the left again and proceeded across the street without looking to the right again."

A third witness, who was traveling east on Olympic Boulevard at the time of the accident, testified that respondent Vaccari stated in said Justice Court that "he made the stop; then noticed a truck coming on his left and watched the truck some 75 yards down the road on his right; then looked ahead and continued across the street." It was also shown that the motorcycle left skid marks on the pavement for a distance of 99 feet and that the automobile left none. "The skid mark started in a straight line; then it broke to the south and eventually again turned to the north just before the start of the impact." After the impact respondent's car was parked at the west curb of Gerhart Street south of Olympic Boulevard. State Traffic Officer Thomas, who investigated the accident, testifying as an expert gave as his opinion that appellant was traveling at a speed of approximately 45 miles per hour at the time of the collision.

Respondent Vaccari testified that he approached the intersection in question and came to a complete stop at the north curb line of Olympic Boulevard where he waited "until three or four cars went west and some east"; that as he started into the intersection a truck went by; "I let that get a distance of 75 yards approximately; then I looked to my left and there was two cars about a block and a half down, coming from the east, that is going west; and I looked to my left, as I proceeded

across, at about the center line, I looked to my right and I kept going across. I never saw him (appellant) coming down Olympic. There are shadows from the trees that cover almost three-fourths of that curb lane, and when I first saw him is when I heard the screech of brakes coming down." Also, that he did not stop his car before the motorcycle struck him and did not shift gears after starting up or while he was in the intersection; that when he saw appellant "coming down on me, I tried to accelerate but it just didn't pick up right away"; and the motorcycle struck "the extreme end of my right fender and bumper."

Appellant urges that the trial court's findings of fact V and VI, to the effect that when respondent *entered* the intersection, appellant's motorcycle, which was then a distance of between 300 and 400 feet west of the intersection, did not constitute an immediate hazard to respondent—are erroneous because (1) they disregard section 82.5 of the Vehicle Code, St. 1937, p. 413, requiring one to stop before *crossing* as well as before *entering* the highway, and that said findings adopt section 552 of the Vehicle Code, St. 1935, p. 187, as the only law applicable to the facts; (2) that they are based on a construction of section 552, *supra*, to the effect that the point of *entrance* to the through highway is the fixed and only place where respondent was required to observe approaching traffic or yield to it; and (3) they are contrary to the truth, i. e.: that appellant's motorcycle was an immediate hazard, else there would have been no collision.

Section 82.5 of the Vehicle Code reads: "A 'through highway' is a highway or portion thereof at the entrance to which vehicular traffic from intersecting highways is required by law to stop before entering or crossing the same, and when stop signs are erected as provided in this code."

Section 552 of the same Code provides: "The driver of any vehicle which has stopped as required by this code at the entrance to a through highway shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard, but said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on the through highway shall yield the right of way to the

vehicle so about to enter or cross the through highway."

64 Cal.App.2d 908

NUTZEL v. KOZDRON et al.

Civ. No. 14456.

District Court of Appeal, Second District,
Division 2, California.

June 15, 1944.

1. Attachment ⇐6

An attachment lies in all cases of an implied contract for payment of money when the defendant is a nonresident of the state. Code Civ.Proc. § 537, subd. 2.

2. Money received ⇐8

If defendant steals money from a plaintiff, an implied contract to repay money arises.

3. Attachment ⇐122(2)

Although original affidavit upon which a writ of attachment has been issued is defective in failing to state that defendant is a nonresident, such defect may be remedied by filing of amended affidavit at or before time of hearing of motion to dissolve attachment.

4. Attachment ⇐6, 122(2)

Where affidavits on file at time of hearing of motion to vacate attachment disclosed that defendants had stolen money from plaintiff, and amended affidavit filed at that time alleged that defendants were nonresidents, plaintiff was entitled to an attachment, and motion to dissolve attachment should have been denied. Code Civ. Proc. § 537, subd. 2.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action for money had and received by George W. Nutzal against Walter Kozdron and Hugh Lynn, also known as Robert L. Riley, Jr., wherein the plaintiff caused a writ of attachment to be levied upon funds which the defendants had deposited in two banks, and wherein the defendants filed a motion to vacate the writ of attachment. From an order granting the defendants' motion, the plaintiff appeals.

Order reversed.

Leola Buck Kellogg, of Sacramento, for defendants and respondents.

Frank O. Weller and Thomas S. Tobin, both of Los Angeles, for plaintiff and appellant.

[1,2] Substantial evidence was produced on behalf of respondent to support the findings of fact complained of, and to establish the exercise by him of ordinary care in the circumstances presented herein: That he stopped and waited for traffic to pass before entering the intersection; that as he started into the intersection a truck passed by and he waited until it had progressed a distance of 75 yards; that he then proceeded to cross the boulevard at a speed of 15 miles per hour, having first looked to his left; that when he was near the center line of Olympic, he looked to his right, did not see appellant approaching, and continued across the boulevard until he was struck. Meanwhile, appellant, with knowledge of respondent's presence within the intersection, traveled 300 or 400 feet at a speed of 40 to 45 miles per hour, and skidded 99 feet before striking the extreme right rear end of respondent's automobile. From this it would appear that appellant's failure to yield the right of way (Sec. 552, Vehicle Code) to respondent, who was lawfully crossing the boulevard, was the proximate cause of the collision. As stated in *Casselman v. Hartford A. & I. Co.*, 36 Cal.App.2d 700, 708, 98 P.2d 539, 544: "This appellant, in common with many users of the highways, seems to have the impression that every motorist who attempts to enter a main highway from a side road, does so at his peril. This misconception of the law is a prolific source of accidents. As we have shown, such motorist has very definite rights granted to him by the provisions of the Vehicle Code, and those users of the main highway who ignore such rights must be prepared to pay the penalty."

[3] In conclusion, findings of fact VII, VIII and IX, to the effect that during appellant's last 100 feet of approach to said intersection he failed to yield the right of way to respondent and was guilty of negligence contributing to the collision; that the defense of contributory negligence was established; and that appellant's injuries resulted proximately from his own negligence—are supported by the law and the evidence and therefore were properly made by the trial court.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

McCOMB, Justice.

From an order granting defendants' motion to vacate an attachment levied on funds deposited by defendants in two Los Angeles banks, plaintiff appeals.

These are the essential facts:

On October 30, 1943, plaintiff filed a complaint against defendants in the form of a common count for money had and received in the sum of \$9,200 and caused a writ of attachment to be levied upon funds which defendants had deposited in two Los Angeles banks. In order to secure the writ of attachment plaintiff's attorney filed an affidavit in which it was alleged that plaintiff's cause of action against defendants arose from the fact that defendants had forcibly robbed plaintiff of the sum of \$9,200 on September 10, 1943.

Defendants made a motion to vacate the writ of attachment theretofore issued; at the time of the hearing of the motion to dissolve the writ of attachment plaintiff's attorney filed an affidavit in opposition to the motion to vacate the attachment in which it was alleged that (a) on September 10, 1943, defendants in the city of Baltimore, Maryland, assaulted and robbed plaintiff of the sum of \$9,200, and (b) defendants were not residents of the State of California and had left this state. The trial court granted defendants' motion to vacate the attachment theretofore issued.

This is the sole question necessary for us to determine:

Did the trial court err in granting defendants' motion to vacate the writ of attachment which had been issued?

This question must be answered in the affirmative, and is governed by the following principles of law:

[1] (1) An attachment lies in all cases of an implied contract for the payment of money when the defendant is a non-resi-

dent of this state. (Section 537, subdivision 2 of the Code of Civil Procedure.)

[2] (2) If a defendant steals money from a plaintiff, an implied contract to repay the money arises. (Los Angeles Drug Co. v. Superior Court, 8 Cal.2d 71, 74, 63 P.2d 1124; Philpott v. Superior Court, 1 Cal.2d 512, 521 et seq., 36 P.2d 635, 95 A.L.R. 990; Armstrong v. Kubo & Co., 88 Cal.App. 331, 335 et seq., 263 P. 365.)

[3] (3) Even though the original affidavit upon which a writ of attachment has been issued is defective in failing to state that defendant is a non-resident of this state, such defect may be remedied by the filing of an amended affidavit at or before the time of the hearing of a motion to dissolve the attachment. (Runkle v. Lane, 40 Cal.App.2d 654, 656, 105 P.2d 373; Rosenberg v. Bullard, 127 Cal.App. 315, 320, 15 P.2d 870; Hamburger v. Halperm, 28 Cal.App. 317, 318, 152 P. 61; Nichols v. Davis, 23 Cal.App. 67, 69, 137 P. 41.)*

[4] Applying the foregoing rules to the facts of the instant case, as it appears from the affidavits which were on file at the time of the hearing of the motion to vacate the attachment that defendants had stolen money from plaintiff, thereby giving rise to an implied contract for the repayment of the amount of the stolen money; and since it was alleged in the amended affidavit, filed at the time of the hearing, that defendants were non-residents of the State of California, under section 537, subdivision 2 of the Code of Civil Procedure, plaintiff was entitled to an attachment and the motion to dissolve the same should have been denied.

The order from which the appeal is taken is reversed.

MOORE, P. J., and W. J. WOOD, J., concur.

* Fairbanks, Morse & Co., v. Getchell, 13 Cal.App. 458, 463, 110 P. 331; relied on by defendants is inapplicable to the facts of the instant case because in that case there was not any affidavit filed when the attachment was issued and therefore nothing to amend, while in the present case an affidavit was

filed when the writ of attachment was issued which was defective, but subject to amendment pursuant to the provisions of section 558 of the Code of Civil Procedure. (See Corum v. Superior Court, 114 Cal.App. 741, 744 et seq., 300 P. 837.)

64 Cal.App.2d 745

**EVARD v. BOARD OF EDUCATION OF
CITY OF BAKERSFIELD et al.**

Civ. 3132.

District Court of Appeal, Fourth District,
California.

June 7, 1944.

1. Schools and school districts ⇨141(4)

Where teacher having permanent tenure was employed for a specified time but she left her position before expiration of that time without consent of school board, she was guilty of "unprofessional conduct" within School Code and was subject to statutory penalty provided therefor. School Code, §§ 5.380, 5.390.

See Words and Phrases, Permanent Edition, for all other definitions of "Unprofessional Conduct".

2. Estoppel ⇨62(5)

Where letter to teacher quoted section of School Code and informed her that leaving her position in middle of school year without permission made her guilty of unprofessional conduct and made her liable to suspension of her state credentials for one year, and balance of letter and other correspondence made it clear that school board regarded her offense seriously and could not condone it, the school board was not estopped from claiming that teacher had forfeited her tenure. School Code, §§ 5.380, 5.390, 5.391, 5.396.

3. Schools and school districts ⇨133

Teacher having permanent tenure in city school district forfeited her tenure when she voluntarily ceased her employment with that district before expiration of her contract without consent of school board. School Code, §§ 5.380, 5.390, 5.391, 5.396.

4. Schools and school districts ⇨141(5)

Where teacher having permanent tenure left her position, before expiration of her contract, without consent of school board, and charges were filed against her with county board of education which denied petition to revoke the county certificate of the teacher and left disciplinary action to the school board, determination of county board was not res judicata on question of whether teacher was guilty of unprofessional conduct. School Code, §§ 5.380, 5.390.

5. Mandamus ⇨79

Schools and school districts ⇨133

Where teacher voluntarily ceased her employment with school district where she had permanent tenure, she voluntarily abandoned her tenure and ceased to be a permanent teacher, so that she was not entitled to writ of mandate requiring the district to assign her to a teaching position. School Code, §§ 5.380, 5.390.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Proceeding by Rita Finley Evard against the Board of Education of the City of Bakersfield and B. F. Stinson and others, members of the board, and John L. Compton, executive officer thereof, for writ of mandate to require defendants to assign plaintiff to a teaching position. From a judgment denying the petition for the writ of mandate, the plaintiff appeals.

Affirmed.

Clafin & Chain, of Bakersfield, for appellant.

Alfred Siemon, of Bakersfield, for respondents.

MARKS, Justice.

This is an appeal from a judgment denying plaintiff's petition for a writ of mandate to require defendants to assign plaintiff to a teaching position in the elementary schools of the city of Bakersfield.

Plaintiff had acquired the status of a permanent teacher in the elementary schools of the city of Bakersfield. She was under contract to teach during the school year of 1942-1943. She was married and her husband, a Lieutenant in the United States Army, was stationed at a camp near Mineral Wells, Texas.

Under date of November 23, 1942, she made a request for a leave of absence, effective immediately, to enable her to join her husband in Texas as she believed he was about to be ordered overseas.

On the next day the superintendent of schools wrote plaintiff a letter acknowledging receipt of the request and informing her that it would be placed before the board of education at its next meeting on December 10, 1942. He called her attention to section 28,A, paragraph 8, of the "Rules and Regulations of the Board" providing that: "No

leaves of absence will be granted, except for illness or other equally grave emergencies, unless the Superintendent of Schools shall have ascertained that a competent substitute, satisfactory to the Board of Education, is available." He further informed her that finding such a substitute by December 10th was very doubtful but that one might be available at the commencement of the second semester on January 18, 1943. The letter concluded: "In the event that I am unable to find a satisfactory substitute a recommendation to the Board that you be released at the close of the first semester, January 15th, 1943, is much more probable."

The board of education passed the following resolution:

"On motion by Mr. West, seconded by Mr. Meagher, it was ordered that the Board of Education follow the provision set forth in Section 39 of the Rules and Regulations and Section 28,A,8 of the Rules and Regulations, which state in effect that teachers shall not be released from service until a satisfactory substitute has been found and that the Superintendent be authorized to release Roselyn Baumgardt, Rita Evard, Vinetta Laugh, Johannah Long, Betty Kelly and Virginia Hamel in accordance with said sections of the Rules and Regulations of the Board."

Under date of December 14, 1942, plaintiff was informed of the substance of the resolution by a letter which concluded as follows:

"Therefore, your request for leave of absence will be granted if and when a satisfactory substitute can be found.

"Please be assured that every reasonable effort will be made to secure a satisfactory teacher to take your place.

"You will be notified in the event it is possible to grant your leave of absence."

Plaintiff performed her duties as teacher up to and including December 11, 1942, and did not report for duty or teach on December 14th, or thereafter, but left without obtaining a leave of absence. She wrote the superintendent of schools on December 19, 1942, from Mineral Wells, Texas, stating, among other things, that: "Thirty-nine Lieutenants were moved away this week, so you see how indefinite things are, and I would certainly like to return to Bakersfield."

Under date of April 21, 1943, plaintiff sent the following telegram to the superintendent of schools:

"I shall return for duty next September or when the next school year starts. My summer address is 412 Sixth Street, Antioch, California, and my present address is Crazy Hotel, Mineral Wells, Texas."

The minutes of a meeting of the board of education held on May 3, 1943, contains the following:

"The case of Rita Evard, a permanent teacher in the Bakersfield City Schools, who left her position without the written consent of the Board as required in School Code Section 5.380 was discussed. On motion by Mr. Drury, seconded by Mrs. Voorhees, the Superintendent was instructed to address a letter to Mrs. Evard asking for her resignation."

Under date of May 5, 1943, the following letter was written to plaintiff:

"At a meeting of the Board of Education held on May 3rd, 1943, the statement of your intent to return to service was read to the Board.

"The Board desires to call your attention to Section 5.380 of the California School Code, which reads as follows:

"Should any teacher who is the holder of an educational or life diploma and is employed by a board of school trustees for a specified time, leave the school before the expiration of such time, without the consent of the trustees, in writing, said teacher shall be deemed guilty of unprofessional conduct. The superintendent of schools shall report the delinquency of the teacher to the state board of education, who are thereupon authorized to suspend said diploma for a period of one year."

"Under the existing circumstances the Superintendent has been reluctant to file a letter with the State Board of Education as required in School Code Section 5.380, because such action might result in the suspension of your diploma for a period of one year.

"You will appreciate the fact that it is not possible for the Board of Education to permit teachers to leave and return at will.

"The Board of Education believes that inasmuch as you left your position without its written consent, and in violation of School Code Section 5.380, you will consider it your professional obligation to submit your resignation to the Board by return mail. Further action of the Board is pending your immediate reply."

Plaintiff replied to this letter under date of May 12, 1943. She asked reconsideration of her case, stating:

"I realize teachers are not to go and come from their positions at will, but I feel that my case is different as my husband was on foreign orders. I left feeling a substitute could be found, and I did not intend any unprofessional action."

Under date of May 27, 1943, plaintiff was informed that her letter had been submitted to the board of education; that it adhered to the position stated in the letter of May 5th; that as plaintiff left her position without consent and in violation of law she should consider it her professional obligation to submit her resignation.

Under date of July 23, 1943, the following letter was written to plaintiff:

"I have been directed by the Board of Education of the Bakersfield City Schools to file a statement with the County Board of Education requesting a hearing on your case in accordance with School Code Sections 5.390, 5.391 and 5.396.

"However, as a matter of professional courtesy I have requested the Board's permission to notify you of the Board's action and again suggest to you that your resignation be submitted.

"The request for a hearing will be filed with the County Board of Education in the event that your resignation is not received on or before Wednesday, August 4, 1943."

As no resignation was received from plaintiff, charges were filed against her with the County Board of Education. A hearing was held and under date of September 3, 1943, the action of the County Board was communicated to the executive officer of the Bakersfield City Board of Education in the following letter:

"The following is the action of the Kern County Board of Education at the hearing of the Bakersfield City Schools v. Rita Finley Evard.

"After weighing evidence presented by both parties in the case of the Bakersfield City Schools versus Rita Finley Evard requesting that the County Board revoke the County certificate of Mrs. Evard in accordance with the California School Code, Section 5.396, by a five to nothing vote, the County Board denied the petition."

"The County Board feels that any disciplinary action against Mrs. Evard should be taken by the Bakersfield City School District as provided for by law."

Under date of September 13, 1943, plaintiff was informed that at a meeting of the Board of Education of the Bakersfield City

Schools, held on September 9, 1943, it was decided that as she had broken her tenure by leaving her position contrary to the provisions of section 5.380 of the School Code she was no longer considered an employee of the Bakersfield City School District. Plaintiff presented herself for duty at the commencement of the school term in September, 1943, and demanded that she be assigned a position as teacher. That demand having been refused she brought this action for reinstatement.

[1] It is admitted that plaintiff had tenure in the Bakersfield City Schools; that she was employed in the Bakersfield City Schools for a specified time and left her position before the expiration of that time without the consent of the trustees of the district. It follows that she was guilty of unprofessional conduct and was subject to the punishment of having her diploma suspended "for a period of one year". Sec. 5.380, School Code. She was also subject to punishment by the county board of education which had power to revoke or suspend her certificate granted by it on proof of unprofessional conduct. Sec. 5.390, School Code. Neither section, as in effect at that time, made suspension of the diploma or certificate mandatory.

[2] Plaintiff argues that as she had permanent tenure in the Bakersfield City Schools she could not be refused reemployment at the commencement of the next school year without previous notice of the termination of her tenure by the school board. The same argument is presented in another form. She maintains that defendants are estopped from now claiming that she has forfeited her tenure, because, instead of notifying her that her tenure was forfeited and that she was no longer a permanent teacher in the Bakersfield City Schools, they requested her resignation which was a recognition of her permanent status and that there was an existing contract of her employment.

We do not construe the evidence before us as supporting either argument. The letter to plaintiff of May 5, 1943, quoted section 5.380 of the School Code in full. This clearly informed her that leaving her position in the middle of the school year without permission in itself made her guilty of unprofessional conduct and made her liable to suspension of her State credentials for one year. The balance of the letter, as well as other correspondence, should have made it clear to plaintiff that although

the city board of education had an understanding sympathy with her desire to be with her husband before he went overseas, it regarded her offense seriously and could not condone it; that the request for her resignation was made because defendants did not want the more serious penalty of suspending her State credentials imposed upon her. We find nothing in any of the letters, when reasonably construed which should have led plaintiff to believe that her unauthorized and continued absence would be forgiven or that her tenure would be continued. She left her position after her attention had been called to the rules and regulations of the board which prohibited leaves of absence until the superintendent of schools had ascertained that a competent substitute satisfactory to the board of education was available. In the same letter she was informed of the difficulty of obtaining a satisfactory substitute and that one might be found by January 15, 1943. Disregarding this warning, plaintiff left her position, and by so doing immediately became guilty of unprofessional conduct and subject to the penalties provided therefor. It is difficult to see how any estoppel can be based on any such state of facts.

The important question for decision here is the effect on plaintiff's tenure because of her leaving her position, before the expiration of her contract, without the consent of the board of trustees. The question is answered in the cases of *McKee v. Edgar*, 137 Cal.App. 462, 30 P.2d 999, and *Brightman v. Board of Education*, 4 Cal. App.2d 394, 41 P.2d 346. In both cases it is held that a teacher with a permanent status in one school district terminated her tenure in such district when she voluntarily left her employment there, even though she immediately accepted employment in another district under jurisdiction of the same board of education.

[3] Under the rule announced in these cases we must conclude that plaintiff forfeited her tenure in the Bakersfield City School District when she voluntarily ceased her employment with that district without the consent of the school board. The question of her good or bad faith, and the question of her unprofessional conduct, are not necessarily involved here.

[4] Plaintiff argues that in the trial of the charges before the Kern County Board of Education she was found not guilty of unprofessional conduct which is res judi-

cata and decisive of this case. We do not so construe the order of the county board. It merely denied the petition to revoke the county certificate of plaintiff and left disciplinary action to the city board of education. This is very different from finding her not guilty of unprofessional conduct.

[5] As plaintiff voluntarily ceased her employment with the Bakersfield City School District where she had tenure, she voluntarily abandoned her tenure in that district and ceased to be a permanent teacher. *McKee v. Edgar*, supra; *Brightman v. Board of Education*, supra. As plaintiff was not a permanent employee of the Bakersfield City School District there was no obligation resting on that district to employ her in September, 1943.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



64 Cal.App.2d 592

PEOPLE v. KRUPA,

Cr. 2281.

District Court of Appeal, First District,
Division 1, California.

May 29, 1944.

Hearing Denied June 26, 1944.

1. Criminal law ☞1023(12), 1134(10)

Orders denying defendant's motions in arrest of judgment and to stay pronouncement of judgment on conviction are not appealable, but are reviewable on appeal from judgment.

2. Infants ☞20

Evidence was sufficient to support conviction of employing or using a minor in unlawfully transporting or carrying a narcotic. *St.1939*, p. 772, § 11714.

3. Criminal law ☞200(1)

A judgment on plea of guilty under second count of information, charging violation of Welfare and Institutions Code by inducing a minor to obtain, remove, and transport marijuana cigarettes from a pocket of a coat in defendant's hotel room, thereby causing such minor to become a

law violator, barred prosecution of defendant on first count of information, charging violation of Health and Safety Code by employing and using same minor in unlawfully transporting and carrying same cigarettes so obtained on same occasion, as against contention that second count was based partly on separate unlawful possession of narcotics, not incident to unlawful transportation charged in first count. St. 1937, p. 1033, § 702; St.1939, p. 772, § 11714; p. 3027, § 700.

4. Criminal law ⇨199

A defendant may be convicted of two offenses when they differ in their necessary elements and one of them is not necessarily included in the other but constitutional guaranty against "double jeopardy" applies if one of two different offenses is necessarily included in the other. Pen.Code, § 1023.

See Words and Phrases, Permanent Edition, for all other definitions of "Double Jeopardy".

5. Criminal law ⇨186, 193½

An acquittal or conviction of offense included in greater offense bars subsequent prosecution for greater offense. Pen.Code, § 1023.

6. Criminal law ⇨200(1)

An acquittal of one of two crimes arising from same incident may bar prosecution for other crime, even if the two crimes are distinct and non-inclusive in sense that each requires an element not essential to the other.

7. Criminal law ⇨193½, 200(1)

Where an offense cannot be accomplished without committing another offense or one committing acts denounced by one statute must always violate another statute, such other offense or violation is a necessarily included offense within rule that acquittal or conviction of offense included in greater offense bars prosecution for greater offense.

8. Infants ⇨20

To establish offense under section of Welfare and Institutions Code denouncing misdemeanor of inducing a minor to do an act rendering him a law violator, the minor need not have been actually debauched or corrupted, nor is proof of such fact necessary to establish felony of using a minor to transport a narcotic unlawfully. St.

1937, p. 1033, § 702; St.1939, p. 772, § 11714; p. 3027, § 700.

9. Criminal law ⇨200(1)

One accused of contributing to minor's delinquency by using him to transport narcotics unlawfully may be prosecuted either under statute declaring such offense a felony or statute denouncing misdemeanor of inducing minor to do an act rendering him a law violator, but conviction or acquittal under either statute bars prosecution under the other. St. 1937, p. 1033, § 702; St.1939, p. 772, § 11714; p. 3027, § 700.

10. Criminal law ⇨179, 193½

Where the state first prosecutes one accused of two offenses arising from same incident for offense carrying lighter penalty or accepts plea of guilty of such offense, it cannot thereafter prosecute him for offense carrying heavier penalty.

11. Criminal law ⇨179

A judgment on defendant's plea of guilty under second count of information, charging misdemeanor by inducing minor to obtain, remove, and transport marijuana cigarettes from pocket of defendant's coat in his hotel room, thereby causing such minor to become a law violator, barred prosecution of defendant under first count of information, charging felony of employing, and using such minor to transport and carry such cigarettes. St.1937, p. 1033, § 702; St.1939, p. 772, § 11714; p. 3027, § 700.

12. Criminal law ⇨296

In determining whether conviction of one offense bars prosecution for another offense, regard should be had to type of offense, notions of fairness, and purpose of statute defining crime involved.

13. Criminal law ⇨179, 180

The fact that trial court's dismissal of charge in order to hold defendant for higher offense after jury has been impaneled and sworn bars subsequent prosecution of defendant for higher offense, in which dismissed charge is included, does not preclude court from dismissing charge of lighter offense, after defendant pleads guilty thereof, in order to hold him for higher offense. Pen.Code, §§ 1021, 1385, 1387, 1429.

KNIGHT, J., dissenting.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Gene Krupa was convicted of employing or using a minor in unlawfully transporting or carrying a narcotic, and from the judgment on the verdict and orders denying his motions for new trial, in arrest of judgment, and to stay pronouncement of judgment, he appeals.

Appeals from orders denying motions in arrest of judgment and to stay pronouncement thereof dismissed, and judgment of conviction and order denying motion for new trial reversed.

J. W. Ehrlich, of San Francisco (Roy A. Sharff and Alfred M. Miller, both of San Francisco, of counsel), for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

[1] After a trial by jury, defendant was found guilty of a violation of section 11714 of the Health and Safety Code, St.1939, p. 772. From the judgment of conviction, and from the orders denying his motions for a new trial, in arrest of judgment, and to stay the pronouncement of judgment, he prosecutes this appeal. The orders denying his motions in arrest of judgment and to stay pronouncement of judgment are not appealable, but are reviewable on the appeal from the judgment. For this reason the direct appeals from such orders must be dismissed. *People v. Williams*, 184 Cal. 590, 194 P. 1019; *People v. Fitzgerald*, 14 Cal.App.2d 180, 58 P.2d 718; see cases collected 8 Cal.Jur. p. 492, sec. 508.

The information, as originally framed and as amended, contained two counts. The first count charged a violation of section 11714 of the Health and Safety Code, a felony. That section provides: "Every person who hires, employs, or uses a minor in unlawfully transporting, carrying, selling, preparing for sale, peddling, or using any narcotic is guilty of a felony punishable by imprisonment in the State prison for not less than one year nor more than six years, and for each subsequent offense shall be imprisoned in the State prison for not less than six years." The second count charged a violation of section 702, Welfare and Institutions Code, St.1937, p.

1033, that is, contributing to the delinquency of a minor, a misdemeanor.

When arraigned, defendant pleaded guilty to the misdemeanor charge and not guilty to the felony charge. He also interposed the plea, as to count one, that the judgment about to be entered upon his plea of guilty to count two, would be a conviction of the same offense charged in count one. The court, with full knowledge that defendant intended to rely on the judgment of conviction under count two, pronounced judgment on that count and sentenced appellant to ninety days imprisonment and a fine of \$500. The court then ruled that conviction of count two was not a bar to a prosecution of count one, and the case proceeded to trial on that count.

[2] The evidence produced on the trial amply supports the judgment. It shows that on the night of January 18, 1943, Krupa instructed his valet and property man Pateakos, a minor of the age of twenty years, to go to his, Krupa's hotel room and remove an envelope from his coat pocket; that Pateakos removed the envelope which contained thirty-seven marijuana cigarettes from Krupa's coat pocket; that he was attempting to leave the hotel with that envelope, and another containing two and one-half such cigarettes, removed by Pateakos from the desk in Krupa's room, when he, Pateakos, was arrested by two agents of the Federal Bureau of Narcotics. This evidence obviously supports the implied finding of the jury that appellant employed or used "a minor in unlawfully transporting" or "carrying" a "narcotic" in violation of section 11714 of the Health and Safety Code.

On this appeal, no direct attack is made upon the sufficiency of the evidence. However, in addition to the main contention of double jeopardy, appellant does contend that several other serious, prejudicial, and reversible errors were committed at the trial. In view of the conclusion that we have come to on the question of jeopardy, it is not necessary to discuss these other alleged errors.

[3] Count one of the amended information charged a violation of section 11714 of the Health and Safety Code in the following language: "The said Gene Krupa, on or about the 18th day of January, A. D. nineteen hundred and forty-three, at the City and County of San Francisco, did hire, employ and use one John Pateakos, a

minor of the age of twenty years, in unlawfully transporting and carrying a quantity of cigarettes containing a narcotic, to-wit: marihuana, also known as cannabis indica and also as cannabis americana."

The second count, as set forth in the amended information, is as follows: "Gene Krupa is also accused by the District Attorney of the City and County of San Francisco, State of California, by this information, of the crime of misdemeanor, to-wit: Violation of Section 702 of the Welfare and Institutions Code of the State of California committed as follows: The said Gene Krupa on or about the 18th day of January A. D. nineteen hundred and forty-three at the City and County of San Francisco, State of California, did endeavor to induce and persuade and did induce and persuade one John Pateakos, a male minor of the age of twenty years, to go to the room of him, the said Gene Krupa and obtain and remove and transport therefrom from a pocket of a coat located therein an envelope containing a quantity of narcotic, to-wit: marihuana, also known as cannabis indica, and also known as cannabis americana, and said Gene Krupa did also then and there permit and allow said John Pateakos to handle and have in the possession of said John Pateakos cigarettes containing marihuana, the said John Pateakos being then and there in the employ of said Gene Krupa, all of which wilful and unlawful acts and course of conduct of said Gene Krupa as aforesaid did thereby, then and there, manifestly tend to, and did encourage, cause and contribute to the said John Pateakos becoming and remaining such a person as is described in said Section 700 of said Welfare and Institutions Code, St.1939, p. 3027, to-wit: A person under twenty-one years of age who violates any law of this State or any ordinance of any town, city, or county, of this State defining crime contrary to the form, force and effect of the Statute in such case made and provided, and against the peace and dignity of the People of the State of California."

It will be noted that the second count charges that the appellant violated section 702 of the Welfare and Institutions Code in that he induced the minor to do an act which tended to cause, and caused, the minor to become a law violator. The minor's violation of law, as alleged in the information, was to "obtain" marihuana from the pocket of a coat in appellant's room,

and to "remove and transport" the marihuana thus obtained.

The Attorney General, in his brief as originally filed in support of the judgment, argued that the two offenses were not necessarily identical because, consistently with the information, the marihuana referred to in count one may not have been the same marihuana referred to in count two. In a letter written after this brief was filed, however, he requested that this portion of his brief be stricken and disregarded. The Attorney General now concedes (and the concession is in accord with the facts) that both counts in the amended information relate to the same incident, that is, to the minor obtaining the marihuana from Krupa's coat pocket and carrying it on his person until he was apprehended. Among other things, the letter states: "Count Two as amended in our opinion is not substantially different than Count One. There is additional language used in Count Two as amended relating to possession which it would appear may be implied in the allegations of Count One." Thus it is now admitted that the only possession of marihuana by the minor involved in either count was the possession involved in the coat pocket incident described in detail in count two. This is of considerable importance. It has been held in prosecutions for violations of the liquor laws that where the only possession shown is that incident to transporting the liquor, and it does not appear that there was a prior or subsequent possession, the possession and transportation may not be treated as two separate offenses. *People v. Clementt*, 208 Cal. 142, 280 P. 681; *In re Chaus*, 92 Cal.App. 384, 268 P. 422; *People v. Buchanan*, 106 Cal.App.Supp. 765, 288 P. 50; *Schroeder v. United States*, 2 Cir., 7 F.2d 60. See note 74 A.L.R. 411, citing also cases contra. Since there admittedly was no possession here except that involved in the coat pocket incident, it cannot be held that count two is based in part on a different violation of law by the minor, that is, on a separate unlawful possession not incident to the unlawful transportation which is the basis of count one.

[4] The statements of the law applicable to the doctrine of double jeopardy are by no means clear, and in some respects inconsistent. See, generally, for traditional statements of the rule, 1 *Bishop's Criminal Law*, 9th Ed., p. 776; 1 *Wharton's Criminal Law*, 12th Ed., p. 535, sec.

394; 2 Freeman on Judgments, 5th Ed., p. 1370, sec. 650; 7 Cal.Jur. p. 955, sec. 97; 15 Am.Jur. p. 53, sec. 380. As stated by the Supreme Court of this state, in its more recent decisions, the rule is that a defendant may be convicted of two offenses when they differ in their necessary elements and one is not necessarily included within the other. *People v. Craig*, 17 Cal. 2d 453, 110 P.2d 403; *People v. Warren*, 16 Cal.2d 103, 104 P.2d 1024; *People v. Herbert*, 6 Cal.2d 541, 58 P.2d 909; *People v. Coltrin*, 5 Cal.2d 649, 55 P.2d 1161; *People v. Day*, 199 Cal. 78, 248 P. 250. That is, although offenses are not the same, if one is necessarily included in the other, the guaranty against double jeopardy applies. Under all tests, the doctrine of included offenses is recognized. Section 1023, Penal Code, provides: "When the defendant is convicted or acquitted, or has been once placed in jeopardy upon an indictment or information, the conviction, acquittal, or jeopardy is a bar to another indictment or information for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that indictment or information." Thus it is held that every battery includes an assault, as do mayhem, rape and robbery. *People v. McDaniels*, 137 Cal. 192, 197, 69 P. 1006, 59 L.R.A. 578, 92 Am.St.Rep. 81; *People v. Defoor*, 100 Cal. 150, 34 P. 642. Murder includes manslaughter. *People v. Ny Sam Chung*, 94 Cal. 304, 29 P. 642, 28 Am.St.Rep. 129.

[5] Section 1023 in terms applies where the prosecution for the higher offense is first. But it is thoroughly settled that the same rule applies where the prosecution for the lesser offense comes first. *People v. McDaniels*, supra; *People v. Ny Sam Chung*, supra. Where prosecution for the included offense is first, and there is an acquittal, the defendant may not thereafter be tried for the greater, for if he is not guilty of the lesser included offense he cannot be guilty of the greater. A conviction of the lesser is held to be a bar to prosecution for the greater on the theory that to convict of the greater would be to convict twice of the lesser. These propositions are developed at length in *People v. McDaniels* and *People v. Ny Sam Chung*, supra.

[6] It should also be noted that even where crimes arising from the same incident are distinct and non-inclusive in the

sense that each requires an element not essential to the other, an acquittal in one may bar prosecution for the other. Where offenses possess a common element, as well as distinct elements, an acquittal, where it can be shown to be a decision negating the existence of the required element, will be res judicata in those jurisdictions which recognize that doctrine as obtaining in criminal proceedings. See 2 Freeman on Judgments, 5th Ed., p. 1364, sec. 648; 24 Minn.L.Rev. 558; 19 Minn.L.Rev. 476; 10 Wash.L.Rev. 198.

[7] It is clear that where an offense cannot be accomplished without necessarily committing another offense, the latter is a necessarily included offense. If, in the commission of acts denounced by one statute, the offender must always violate another, the one offense is necessarily included in the other. In the case herein a violation of section 11714, Health and Safety Code, inevitably and necessarily involves a violation of section 702, Welfare and Institutions Code. It is impossible for a person to commit a violation of section 11714 of the Health and Safety Code without committing the misdemeanor denounced by section 702 of the Welfare and Institutions Code. The person who uses a minor to unlawfully transport a narcotic has necessarily induced the minor to do an act which renders the minor a person subject to section 700, Welfare and Institutions Code, that is, a person who has violated a law of the state, section 11160 of the Health and Safety Code, St.1941, p. 2820, and this constitutes an offense under section 702 on the part of the person who has thus induced the minor to violate the law.

[8-10] To repeat, section 11714, Health and Safety Code, cannot be violated without also offending against section 702, Welfare and Institutions Code. Having regard for the incident upon which both counts are admittedly based, as set forth in count two, exactly the same facts were required to prove an offense under count one as to establish a crime under count two. Every element of the felony charge was necessary and indispensable to a conviction of the misdemeanor charge.

While it is true that section 11714 cannot be violated without offending also against section 702, it is apparent, as respondent urges, that the converse is not true. A person may violate section 702, that is, contribute to the delinquency of a minor, otherwise than by causing such mi-

nor to become a law violator, or by causing him to violate a law dealing with another subject than narcotics. If a violation of section 702 always involved a violation of section 11714 (as a violation of section 11714 always involves a violation of section 702) the offenses would be identical in the sense that neither would involve an element not necessary for the other. But, as we have said above, the cases are clear that the principle of double jeopardy applies where one offense is necessarily included in the other, as well as where they are identical. It is of the nature of included offenses that the included offense may be committed without accomplishing the inclusive offense.

In the instant case, the essence of both offenses charged against appellant was the commission of acts which contributed or tended to contribute to the delinquency of a minor. It is not necessary to establish an offense under section 702 that the minor should actually have been debauched or corrupted. *People v. Kinser*, 99 Cal. App. 778, 279 P. 488. Nor is such proof necessary to constitute the crime under section 11714. Under section 702 the offense of contributing to the delinquency of a minor is a misdemeanor. Likewise, some other violations of the code provisions dealing with narcotics are misdemeanors. See sections 11710-11716, Health and Safety Code. But under section 11714, where a minor is used to unlawfully transport, carry, sell, etc., any narcotic, the person thus using the minor is guilty of a felony. Though not expressed, the apparent reason for increasing the grade of crime above that which prevails generally as to narcotic offenses is the tendency of the act denounced by section 11714 to contribute to the delinquency of the minor. Viewed in relation to section 702, where contributing to the delinquency of a minor takes the form of using the minor unlawfully to transport narcotics, the offender is subject to prosecution under section 11714, which creates a felony carrying a heavier penalty than section 702. However, the person accused should not also be subject to the misdemeanor penalty. He is liable to prosecution under either section, but a conviction or acquittal of an offense under one bars prosecution under the other. Where the state instead of prosecuting first for the offense which carries the heavier penalty, prosecutes for the offense which carries the lighter penalty,

or accepts a plea of guilty to that offense, it is without right thereafter to prosecute for the offense which carries the heavier penalty. This follows from the thoroughly settled principle that a conviction or acquittal of an included offense bars prosecution for the greater offense. *People v. McDaniels*, supra.

[11] By way of illustration, robbery is of the first degree where perpetrated by torture or by a person armed with a dangerous or deadly weapon. Sec. 211a, Penal Code. This does not mean that where the robbery is thus committed the defendant may be punished for both robbery of the first degree and for robbery of the second degree, the offense he would have committed had he acted otherwise than he did in fact, that is, if he had accomplished the crime without torture or use of such weapon. So in the present case the defendant may not be convicted of both a felony and a misdemeanor on the basis of the same incident because if he had contributed to the delinquency of the minor otherwise than he did in fact he could have been prosecuted for a misdemeanor only.

The principle of included offenses is recognized in the rule, referred to above, that every battery includes an assault, as do mayhem, rape and robbery. *People v. McDaniels*, supra; *People v. Defoor*, supra. We have heretofore referred to the cases arising under liquor laws in which it has been held that the possession involved in the transportation of liquor may not be prosecuted after conviction or acquittal on charges of transportation. *People v. Clemett*, supra; *In re Chaus*, supra; *People v. Buchanan*, supra; *Schroeder v. United States*, supra. In *People v. Lopez*, 46 Cal. App.2d 857, 117 P.2d 10, section 1159, Penal Code, was involved. It provides: "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense." The defendant was charged with aiding and abetting her co-defendant in commission of statutory rape. She was found guilty of contributing to the delinquency of a minor, that is, violation of section 702, Welfare and Institutions Code. She contended that the offense of which she was convicted was not necessarily included in the offense charged. The judgment against her was affirmed.

In the case of some included offenses, an additional element is required to estab-

lish the greater offense, as with assault and battery. In the present case it is not even required that additional facts be proved. The identical facts which are required to convict under count two constitute a violation of section 11714.

As already pointed out, it is the law that a defendant may be convicted of two offenses when they differ in their necessary elements and one is not necessarily included within the other. *People v. Craig*, supra; *People v. Warren*, supra; *People v. Herbert*, supra; *People v. Coltrin*, supra. Thus in *People v. Coltrin*, supra, it was held that two separate non-inclusive offenses are committed where the victim dies of an illegal abortion. Neither offense necessarily involves the commission of the other. Abortion does not necessarily involve the death of the victim, and murder may be committed otherwise than in the perpetration of an illegal abortion. Moreover, where death results from an abortion the wrongdoer has accomplished two wrongs. He has put an end to the embryo, as well as to the victim of the illegal operation. But a violation of section 11714 necessarily constitutes a violation of section 702.

Statutory rape and incest arising out of the same act have been held to constitute separate non-inclusive crimes. *People v. McCollum*, 116 Cal.App. 55, 2 P.2d 432. Each requires proof of an element not essential to the other, incest, the prohibited relationship, rape, want of consent, actual or constructive. Either may be committed without the other. Where the offender commits both offenses by means of a single act his conduct is doubly wrong. He should be punished for both crimes, although they arise from a single act. But a violation of section 11714 cannot be accomplished without violating section 702.

Death resulting from reckless driving affords another illustration of separate non-inclusive offenses. *People v. Herbert*, 6 Cal.2d 541, 58 P.2d 909. Where death ensues from reckless driving the offense of manslaughter is complete. But manslaughter may arise otherwise than through automobile injury and death. Conversely the offense of reckless driving is complete although there is no injury to person or property.

In *People v. Day*, 199 Cal. 78, 248 P. 250, the question decided was that assault by means or force likely to produce great bodily injury (sec. 245, Penal Code) and

the crime denounced by section 244, Penal Code, were separate, non-inclusive offenses. Section 244 provides: "Every person who willfully and maliciously places or throws, or causes to be placed or thrown, upon the person of another, any vitriol, corrosive acid, or caustic chemical of any nature, with the intent to injure the flesh or disfigure the body of such person, is punishable by imprisonment in the state prison not less than one nor more than fourteen years." It is apparent that an assault by means or force likely to produce great bodily injury could occur by other force or means than vitriol, corrosive acid, or caustic chemical. But to establish the separate, non-inclusive character of the two offenses the opinion found it necessary to demonstrate that there could be a violation of section 244 without inevitably committing an assault by means or force likely to produce great bodily injury. This the court did by holding that the crime under section 244 would be accomplished although the vitriol, corrosive acid, or caustic chemical thrown was so small in quantity or weak in strength as to be incapable of producing great bodily injury. Illustrations could be multiplied indefinitely.

The decisions in *People v. Stangler*, 18 Cal.2d 688, 117 P.2d 321, and *People v. Bevans*, 19 Cal.App.2d 288, 65 P.2d 92, are not inconsistent with these conclusions. In the *Stangler* case the defendant was charged in separate counts with statutory rape and violation of section 288, Penal Code (lewd and lascivious acts upon the body of a child under 14), based upon the same incident. He was acquitted of violating section 288, but convicted of rape. He contended that the verdicts were inconsistent and that the acquittal of violation of section 288 was, therefore, an acquittal of rape. Statutory rape does not inevitably involve a violation of section 288, for the offense under that section must be committed upon the body of a child under the age of fourteen, whereas statutory rape is perpetrated where the female is under eighteen. Although there is some confusing language in this case, it is clear that the court did not purport to overthrow the law as set forth in extenso in such cases as *People v. Coltrin*, supra; *People v. Herbert*, supra, and *People v. Day*, supra. As to effect of inconsistent verdicts generally, see 43 Harv.L.Rev. 657; 28 Mich.L.Rev. 339; 14 Cal.L.Rev. 336; 10 So.Cal.L.Rev. 208. It should also be point-

ed out that it appears from an examination of the record in *People v. Stangler* that insofar as the information charged violation of section 288, it was not based on the rape proper, but on acts preceding it, which, it has been held, may constitute a separate offense. *People v. Jameson*, 136 Cal.App. 10, 27 P.2d 935; *People v. McAfee*, 82 Cal.App. 389, 405, 255 P. 839.

In the *Bevans* case, *supra*, the defendant was convicted on two counts, one charging contributing to the delinquency of a minor, the other violation of section 288. The court pointed out that one act was proved which would not come under the provisions of section 288, Penal Code, as it was not "upon or with the body, or any part or member thereof" of the child, but which was clearly denounced by the juvenile court law.

[12] It has been said that no rule of thumb is adequate to all cases; that any single test may reach absurd or unjust results in particular cases. 24 Minn.L.Rev. 556, 562; 22 C.J.S., Criminal Law, § 278, p. 414. Regard should be had to the type of offense, notions of fairness, and the purpose of the statute defining the crime involved, etc. 18 Cal.L.Rev. 171. In the case herein it is obvious that fairness requires that the defendant should not be punished twice for what he did.

It is true that the effect of this holding is that defendant escapes punishment for the more serious offense, violation of section 11714, Health and Safety Code, a felony, and suffers only the lighter punishment prescribed for an offense under section 702, Welfare and Institutions Code, a misdemeanor. This result does not, necessarily, show a weakness in the law. The doctrine that no man shall be put in jeopardy twice for the same offense is based upon sound and fundamental principles, which are recognized by both the federal and state constitutions. The fault in the present case, if any there be, lies in the procedure adopted. It was within the discretion of the law enforcement authorities to prosecute defendant for either the felony or the misdemeanor. They elected to frame an information charging the two identical offenses. This made it possible for the defendant to adopt the procedure he did.

[13] It should also be pointed out that the record shows that the plea to both counts was made at the same time. Judgment

was not pronounced on the plea of guilty to the second count until after defendant had made his plea of not guilty and double jeopardy to the first count. The court, therefore, pronounced judgment on count two knowing that defendant intended to rely on that judgment in bar of the felony charge. An examination of the pertinent code sections indicates that the trial court, instead of accepting the plea of guilty to count two, and pronouncing judgment thereon, had it desired to hold defendant for the higher offense, could very likely have dismissed the second count, even after plea, and have refused to enter judgment therein. Section 1021 of the Penal Code provides: "If the defendant was formerly acquitted on the grounds of variance between the indictment or information and the proof, or the indictment or information was *dismissed* upon an objection to its form or substance, or *in order to hold the defendant for a higher offense, without a judgment of acquittal, it is not an acquittal of the same offense.*" (Italics added.)

The above section recognizes a right in the court to dismiss a charge in order to hold the defendant for a higher offense. It is not provided that the dismissal must be made before plea. It has been held that a dismissal made to hold for a higher offense after a jury has been impaneled and sworn, that is, after jeopardy has attached, will bar a subsequent prosecution for a higher offense in which the dismissed charge is included. *People v. Ny Sam Chung*, 94 Cal. 304, 29 P. 642, 28 Am.St. Rep. 129; *People v. Hunckeler*, 48 Cal. 331; 7 Cal.Jur. 944, 949, 953; see also *People v. Horowitz*, 131 Cal.App.Supp. 791, 19 P.2d 874. But it does not follow that where the defendant has not submitted himself to trial, but has offered a plea of guilty to the count charging the lighter offense, that the court is without right to dismiss that count in order to hold the defendant for the higher offense.

There are also sections 1385 and 1387, Penal Code. Section 1385 provides: "The court may, either of its own motion or upon the application of the district attorney, and *in furtherance of justice*, order an action or indictment to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes." By section 1387 it is provided that the order for dismissal is not a bar if the offense is a felony. *People v. Smith*, 143 Cal. 597, 77

P. 449; *People v. Brown*, 42 Cal.App. 462, 183 P. 829; *People v. Saenz*, 50 Cal.App. 382, 195 P. 442.

As to justices' courts there is a specific section, section 1429, Penal Code, which permits the judge to reject a plea to the lesser offense in order to hold the defendant for the greater. It provides in part as follows: "* * * If the defendant pleads guilty, the court may, before entering such plea or pronouncing judgment, examine witnesses to ascertain the gravity of the offense committed; and if it appear to the court that a higher offense has been committed than the offense charged in the complaint, the court may order the defendant to be committed or admitted to bail, to answer any indictment which may be found against him by the grand jury, or any information which may be filed by the district attorney."

If sections 1021, 1385 and 1387 of the Penal Code, referred to above, are not broad enough to enable the superior court to reject the plea of guilty to the lesser offense in order to hold the defendant for the greater, then the matter calls for legislative rectification.

The appeals from the orders denying the motions for arrest of judgment and to stay pronouncement of the judgment are dismissed. The judgment and order denying the motion for a new trial are reversed.

WARD, J., concurs.

KNIGHT, Justice (dissenting).

I dissent upon the following grounds: First, the reversal of the conviction in my opinion is based not only on a misconstruction of material portions of the record, but also on legal theories which are out of line with the established law of this state as declared in numerous decisions dealing with the question of double jeopardy. Secondly, it will be noted that factually the reversal rests entirely upon the assumption that both counts of the amended information involved but one identical act and that this assumption is based upon the single sentence of a letter written by the attorney general and submitted to this court after the briefs were filed, which the majority opinion interprets to be a concession on the part of the people that both counts of the information involve only one identical act. But when this letter, consisting as it does of two pages, is read as a whole, in the light of the purpose for

which it was written, it becomes apparent that the majority opinion has misinterpreted the purport of this single sentence. In any event, the record itself must control in the determination of the appeal, and as will hereinafter be demonstrated, the factual assumption upon which the majority opinion is founded is not only clearly negated by the allegations of the second count of the amended information, but it is directly contrary to position taken by the prosecution throughout the trial of the case and in opposing appellant's motions for new trial and arrest of judgment; also contrary to the conclusion reached by the trial court in denying these motions. Moreover, it is directly contrary to the position taken by the appellant himself while testifying at the trial as a witness in his own behalf. Thirdly, section 1041 of the Penal Code declares that a plea of once in jeopardy raises an issue of fact. It becomes an issue of law only when the facts are undisputed. *People v. Wilkison*, 30 Cal.App. 473, 158 P. 1067; *People v. Conson*, 72 Cal.App. 509, 237 P. 799. Here at the trial appellant himself treated the issue as a disputed issue of fact, and it was submitted to the determination of the jury as such pursuant to instructions proposed by appellant; the jury found against appellant on that contested issue, and as will hereinafter be shown, the testimony of the defendant himself supports the jury's conclusion. However, the majority opinion fails to give any consideration to this aspect of the case.

Turning to the record itself, the facts and circumstances leading up to the arrest of appellant as they are shown by the evidence of the prosecution, which in view of the verdict must be taken as true, are as follows: At the time of trial the appellant, Gene Krupa, was 34 years old, a musician, and the proprietor and leader of a band which played in night clubs and theatres. Appellant played the drums. Marijuana is a narcotic plant, the growing, possession, transporting, selling or giving away of which constitutes separate criminal offenses. See Articles 1 and 4, Division 10, Chapter 7, Health & Safety Code. The plant is dried and smoked in the form of cigarettes, and when inhaled deeply, causes unpredictable results, one of its effects being to distort time. If used by a musician it will cause him to "play faster without feeling the effects of doing it." At the time of appellant's arrest, his band was

filling an engagement at a theatre in San Francisco, and he was staying at one of the leading hotels. The adjoining room to his was occupied by his manager, there being a connecting door between the two rooms. Prior to the opening of his engagement in San Francisco he filled one in Los Angeles, and while doing so hired a boy named John Pateakos as valet and property man, whose chief duty was to take care of appellant's clothing, particularly the suits he wore; and he brought the boy to San Francisco with him. On the night of January 18, 1943, three agents from the federal bureau of narcotics, named Guibbini, Grady and Polcuch, having been informed that appellant was in the possession of marijuana cigarettes, called at appellant's dressing room in the theatre in which he was playing, to interview him regarding the information they had received. Pateakos was present at the beginning of the interview, but the agents requested him to leave the room, which he did. After identifying themselves as federal narcotic agents, they asked appellant if he had any marijuana on his person or in his room, and he denied having any. They told him they had been informed that he did have a quantity of marijuana in his possession, and he replied that there was nothing to the information. They then asked him if they might search his dressing room, and he told them to "go ahead." While they were doing so Guibbini asked appellant if he had ever used marijuana, and appellant stated that he had at one time, about 10 years ago, but that lately he had had nothing to do with it. While the search was going on, appellant asked permission to leave the room to go out and wash. He was allowed to do so, but as soon as he left Guibbini followed him and he observed appellant about halfway up the stairs leading to the second floor engaged in earnest conversation with Pateakos. Guibbini separated them, and brought appellant back to his dressing room, where he was further questioned. Guibbini thereupon went to a phone and instructed the room clerk at the hotel where appellant was staying to allow no one except appellant to enter the latter's room. Guibbini then proceeded to the hotel, leaving Polcuch with appellant. As Guibbini got out of the elevator at the hall leading to appellant's room, he saw Pateakos waiting to enter the elevator. He brought Pateakos back to the room adjoin-

ing appellant's occupied by the manager of the band, who was there present, and upon searching Pateakos found in his pocket two envelopes, one containing 37 marijuana cigarettes and the other containing two whole ones, and one-half of one partially smoked. Shortly thereafter, Polcuch and Grady arrived with appellant, and Polcuch and Guibbini took him to his room, where the officers found some fragments of marijuana in a drawer of a writing desk. Appellant denied having anything to do with the marijuana cigarettes or the fragments found. He was then taken back to the adjoining room, and Pateakos was taken to appellant's room. Pateakos refused then to make a statement in explanation of his possession of the marijuana cigarettes. He admitted having them in his pocket, but he denied knowing anything about marijuana. He was then returned to the room where appellant was, and appellant stated if the boy had the marijuana cigarettes on him, it was his worry and not his (appellant's); that he did not have anything to do with it. The agents then took Pateakos to their office, where he made a statement, and appellant was placed under arrest the following day.

Pateakos appeared as a witness against appellant at the preliminary examination, but shortly afterwards disappeared, and was unavailable at the trial. The substance of the testimony given by him at the preliminary examination was as follows: He was 20 years of age, and his home was in New Bedford, Massachusetts. He had been employed at the Paladium at Hollywood, where appellant employed him as his valet and property man. Part of his duties were to "carry" all of appellant's "clothes along," and "assist him at his room." After leaving appellant's dressing room at the theatre at the time of the visit of the federal agents, appellant came out and overtook him about half way up the stairs; and appellant told him to go to his room and get an envelope in his coat pocket. In obedience to this request he ran to the hotel and went to the clerk's office to get the key to appellant's room, but was told they were not supposed to give out the key. He then went to a "bell hop" he knew, who let him into appellant's room, where he got the envelope from a pocket of appellant's coat. It was in the closet. The envelope was open, and contained marijuana cigarettes. After leaving the room he recalled that one day while in the room

the drawer to the writing desk was open and he had noticed two and a half marijuana cigarettes in the drawer, so he told the bell boy he had forgotten something and returned to the room, where he took these two and a half cigarettes and placed them in an envelope and took them with him. At the elevator he met Guibbini, who took him to the band manager's room, searched him, and found the two envelopes containing the marijuana cigarettes from the clothing he wore.

The bellboy corroborated Pateakos' testimony. He testified that he let Pateakos into the room at the time indicated and saw him remove the envelope from the clothes in the closet and put it in his pocket; that he let him into the room the second time when Pateakos stated in the hall he had forgotten something; that he saw Pateakos take another envelope from the writing desk; that when he let Pateakos in the room he was unaware of the instructions to the clerk to permit no one but appellant to enter his room.

Section 11712 of the Health and Safety Code deals with the possession of narcotics. It provides that any person convicted of having possession of any narcotic is punishable by imprisonment in the county jail or the state prison. Section 11713 of the same code deals with the act of transportation of narcotics. It provides that any person convicted of transporting, selling, or giving away any narcotics is punishable by imprisonment in the county jail or the state prison. The element of transportation is not included in the former section, nor is the element of possession included in the latter. They constitute separate offenses under the different sections. Section 11714 of said code declares that every person who hires, employs or uses a minor in unlawfully transporting or carrying any narcotic is punishable by imprisonment in the state prison. This section makes no mention of possession.

The juvenile law has been made a part of the Welfare and Institutions Code, and section 702 thereof provides among other things that any person who commits an act which causes or tends to cause or encourage a minor to come within the provisions of the juvenile law as specified in section 700 thereof is guilty of a misdemeanor, and among the acts specified in section 700 is the violation of any law of this state.

Under the authority of the provisions of the two statutes above mentioned and in view of the facts developed at the preliminary examination, the district attorney on February 2, 1943, filed an information against the appellant charging him in separate counts with having violated both the Health and Safety Code and the juvenile law. The first count charged appellant with having violated section 11714 of the Health and Safety Code, to-wit, with having employed and used Pateakos "in unlawfully transporting and carrying a quantity of cigarettes containing a narcotic." By the second count he was charged with having committed two acts in violation of the juvenile law: (1) By inducing Pateakos "to keep" a quantity of narcotics in his, Pateakos', room; and (2) by permitting and allowing Pateakos to "handle and have in the possession of said John Pateakos" cigarettes containing marijuana, all of which it was alleged did cause and contribute to the said Pateakos "becoming and remaining such a person as is described" in section 700 of the juvenile law, to-wit, a person who violates any law of this state." Appellant moved to dismiss the information and filed a demurrer thereto, but on April 19, 1943, before any ruling was made on his motion or demurrer, he entered a plea of guilty to the second count and asked for probation. The cause was then continued from time to time until May 17, 1943, on which date the district attorney filed an amended information. Count 1 as originally filed was not changed, but count 2 was. The charge made in the original count 2 that appellant induced Pateakos "to keep" narcotics in his room was omitted, and it was charged in the amended count 2(1) that appellant induced and persuaded Pateakos to "obtain and remove and transport" from the pocket of appellant's coat an envelope containing a quantity of narcotics; and (2) that he permitted and allowed Pateakos "to handle and have in the possession" of Pateakos cigarettes containing marijuana, all of which did encourage and cause and contribute to Pateakos becoming a person such as is described in section 700 of the juvenile law, to-wit, a minor who violates any law of this state. In other words, in count 2 as amended appellant was charged with having induced Pateakos to violate two separate sections of the Health and Safety Code, to-wit, (1) possession of nar-

cotics, Sec. 11712; and (2) transporting narcotics, Sec. 11713. On the day following the filing of the information appellant was again arraigned and the minutes of the court as originally entered recited the following: "Thereupon, the defendant, Gene Krupa, pleads that he is not guilty as charged in count one of the amended information, and not guilty by reason of a former holding; and guilty to count two of the amended information"; whereupon appellant interposed a motion for probation. (It should be here stated, however, that after the clerk's transcript was filed herein the trial court made a nunc pro tunc order correcting the minutes so that as corrected the plea of once in jeopardy was legally sufficient to meet the requirements of subdivision 4 of section 1017 of the Penal Code.) On the same day that appellant asked for probation his motion was denied, and he was sentenced to imprisonment in the county jail for ninety days and fined \$500; thereafter and on June 29, 1943, he was brought to trial before a jury on the second count.

On account of the disappearance of Pateakos the testimony given by him at the preliminary examination was read to the jury. Appellant became a witness in his own behalf, and in contradiction of the denials he had made to the federal agents on the night of January 18th he admitted that all of the marijuana cigarettes which had been taken from his clothes belonged to him. In this connection he testified that he brought them to San Francisco from Los Angeles in the clothing which Pateakos was required to take care of, and that he had smoked part of one of the cigarettes after coming to San Francisco. He further admitted that while in San Francisco the cigarettes were kept in the clothes Pateakos was required to take care of, and that Pateakos "handled the clothes every day in the week." He denied, however, that he had asked Pateakos on the night in question to remove them from the pockets of his clothes. He was asked why he pleaded guilty to count 2 wherein he had been charged with having done so, and in reply he went on to say that he was advised by his attorney that it was against the "rule" in California to have a minor around where there was marijuana cigarettes, and that Pateakos had taken care of his, appellant's room, his laundry, and clothes. In other words, the purport of his testimony was that he had pleaded guilty

to that portion of the charge that he had allowed Pateakos to "handle" and have possession of the cigarettes, but that he was not guilty of the other act charged therein, to-wit, that he had induced the boy to transport and carry the cigarettes. In that state of the record the issue of double jeopardy was submitted to the determination of the jury pursuant to two instructions, one of which was proposed by appellant, and was as follows: "It appears from the evidence in this case that Gene Krupa pleaded guilty on the 19th day of May, 1943, in this Superior Court to the charge of contributing to the delinquency of John Pateakos, a minor, committed by allowing said John Pateakos to have and handle the marijuana cigarettes involved in the prosecution now before you and by persuading said John Pateakos to obtain and remove and transport said cigarettes from the pocket of a coat, and therefore, if you find the present information charges the same offense the defendant is twice in jeopardy and entitled to an acquittal." Upon the evidence before it the jury returned a verdict finding appellant guilty, which necessarily carried with it the implied finding that the act of allowing Pateakos to handle and have possession of the marijuana cigarettes was not the same act involved in the charge of inducing Pateakos to transport and carry the cigarettes, on which charge appellant was then on trial; and as stated, the testimony of appellant himself is legally sufficient to support the conclusion reached by the jury.

Even assuming, however, that this court, in the exercise of its reviewing powers, has the right to disregard the conclusion reached by the jury and the evidence supporting it, and may, contrary thereto and as a matter of law, hold that the handling, transportation, possession and carrying constituted one transaction, the judgment in my opinion should nevertheless be affirmed, for regardless of whatever may be the rule in other jurisdictions, it is the well settled law of this state "that a plea of once in jeopardy * * * is not good unless the second prosecution is for the same offense, both in law and in fact, as that for which the first prosecution was instituted." 7 Cal.Jur. 955. In other words, the established rule is that a defendant may be convicted on two or more separate offenses arising out of the same transaction where each is stated in a sepa-

rate count and when the offenses differ in their elements and one is not included in the other. The real test is the identity of the offenses, as distinguished from the identity of the transaction from which they arise. *People v. Hoyt*, 20 Cal.2d 306, 125 P.2d 29; *People v. Venable*, 25 Cal. App.2d 73, 76 P.2d 523; *People v. Bevans*, 19 Cal.App.2d 288, 65 P.2d 92; *People v. Coltrin*, 5 Cal.2d 649, 55 P.2d 1161; *People v. Warren*, 16 Cal.2d 103, 104 P.2d 1024; *People v. Zimmer*, 23 Cal.App.2d 581, 73 P.2d 923. The same doctrine is stated in 15 Am.Jur. at page 63 as follows: "A single act may constitute two or more distinct and separate offenses, and a person charged therewith may be convicted and punished for both. Prosecutions of a person for separate offenses based upon the same transaction do not involve double jeopardy where there are distinct elements in one offense which are not included in the other. If a single transaction constitutes two or more offenses wherein the lesser offense is not necessarily involved in the greater and the facts necessary to convict on the second prosecution would not necessarily have convicted on the first, then the first prosecution is not a bar to the second." Later on, in the same volume at page 65, it is said: "A putting in jeopardy for one act is no bar to a prosecution for a separate and distinct act merely because they are so closely connected in point of time that it is impossible to separate the evidence relating to them on the trial for the one of them first had. Consequently, a plea of former jeopardy will not be sustained where it appears that in one transaction two distinct crimes were committed." And again on page 67 it is stated: "A single act may be an offense against two statutes; and if one statute necessitates proof of a different circumstance or element from that which the other requires, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. * * * Undoubtedly, it is within the power of the legislature to create two or more offenses which may be committed by a single act, each of which is punishable by itself. A conviction or acquittal in such case under either statute would be no bar to a conviction under the other, for the accused would not be twice in jeopardy for one offense, but only once in jeopardy for each offense."

In applying the foregoing rules in this state it has been held that an acquittal on a charge of rape does not exclude a conviction for incest, since they were not identical offenses. *People v. McCollum*, 116 Cal.App. 55, 2 P.2d 432. It has also been held that the conviction of misdemeanors consisting in the unlawful possession and manufacture of intoxicating liquor do not constitute former jeopardy in a prosecution for possession of a still, notwithstanding the fact that all of the offenses were committed at the same time and place. *People v. Painetti*, 210 Cal. 476, 292 P. 965. In *People v. Bevans*, supra, the appellant was charged in separate counts with a violation of section 288 of the Penal Code and with violation of the juvenile court law, and he was convicted on both counts. He contended that the offenses were identical, but the court held otherwise, saying in part [19 Cal.App. 2d 288, 65 P.2d 93]: "* * * the offenses charged while identical in time were not the same either in law or in fact. The conviction of the one would not be a bar to the conviction of the other." In *People v. Moon*, 7 Cal.App.2d 96, 45 P.2d 384, it was held that in a prosecution for robbery and grand theft where the two offenses consisting of different elements but arising from the same acts were charged in two separate counts of the information, the dismissal of the count charging robbery did not bar a conviction upon the second count for grand theft. And in *People v. Sheasbey*, 82 Cal.App. 459, 255 P. 836, it was held that robbery and kidnapping do not possess the same elements and both may be punished although relating to the same transaction.

In the present case the elements of the two offenses denounced by the separate statutes which form the basis of the two counts were essentially different. In order to establish guilt under the second count, which was based on the juvenile court law, to which appellant pleaded guilty, all that was necessary to prove was that the minor violated section 11712 of the Health and Safety Code by having possession of narcotics, and that appellant contributed to such act of violation by the minor; whereas in order to establish guilt under the first count, which was based on the Health and Safety Code, and upon which appellant was convicted by a jury, it was essential for the prosecution to prove more than mere possession of nar-

cotics by the minor; it was required to establish the additional element that appellant induced the minor to transport and carry the narcotics.

It is my conclusion, therefore, that under the doctrine of the authorities above cited the conviction under the second count did not bar a conviction under the first, and that accordingly the judgment should be affirmed.

Hearing denied; SHENK, J., dissenting.



64 Cal.App.2d 787

**SHEWBRIDGE v. POLICE COMMISSION
OF CITY AND COUNTY OF SAN
FRANCISCO et al.**

Civ. 12644.

District Court of Appeal, First District,
Division 2, California.

June 9, 1944.

Rehearing Denied July 8, 1944.

Hearing Denied Aug. 7, 1944.

1. Witnesses ⇨1

The fact that witness, who testified against discharged policeman in hearing before police commission, was subsequently adjudged insane, was not pertinent to competency of witness at time he testified, in absence of anything in record indicating that witness was insane at such time.

2. Evidence ⇨63

A person is presumed to be sane until adjudicated insane.

3. Municipal corporations ⇨78

The general law, requiring that police department rules and regulations prescribe a separate and distinct penalty for violation of each of such rules and regulations, has no application to police department of city and county of San Francisco which acts under a charter.

4. Municipal corporations ⇨185(7)

The fact that the word lawful, as used in charge before police commission that policeman refused to obey and strictly execute lawful order of his superior officer, might be a mere conclusion did not

vitate charge, since word was mere surplusage. Civ.Code, § 3537.

5. Municipal corporations ⇨185(5)

Where two charges were lodged with police commission against policeman and policeman's attack was directed at pleading of first charge only, commission had jurisdiction to hear and determine proceedings if second charge was well pleaded.

6. Mandamus ⇨168(4)

Where policeman was discharged by police commission after trial on charges that at a particular time, in violation of regulations, he did not have his gun and handcuffs on his person, passages from reporter's transcript indicating that at such time officer was properly equipped, in light of other passages indicating that he was not so equipped, merely showed a conflict in evidence, not an excess of jurisdiction which would authorize the overruling of board's order in mandamus proceeding. Code Civ.Proc. § 953a.

7. Municipal corporations ⇨185(7)

It was proper to lodge charges against police officer with police commission in the form of an ordinary verified complaint in a justice or police court, as against contention that charges were improperly verified.

8. Mandamus ⇨168(4)

Where record before trial court in mandamus to review action of police commission in ordering dismissal of policeman failed to disclose that board acted arbitrarily or fraudulently or without due regard to rights of policeman, trial court should not have granted peremptory writ.

9. Mandamus ⇨172

In mandamus to review action of police commission, truth as to jurisdictional facts cannot be contested, and court is limited in reviewing order to record made before commission, and, from such record, jurisdiction of commission to act must appear.

Appeal from Superior Court, City & County of San Francisco; Theresa Meikle, Judge.

Mandamus and certiorari by Thomas E. Shewbridge against the Police Commission of the City and County of San Francisco and William P. Wobber and others, as

members of and constituting such Commission, to review petitioner's dismissal from the police force. From a judgment annulling the order of dismissal and granting a peremptory writ of mandate, defendants appeal.

Reversed.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for appellants.

John J. Taaffe, of San Francisco, for respondent.

STURTEVANT, Justice.

Heretofore the plaintiff, Thomas E. Shewbridge, hereinafter called the petitioner, was a member of the police department of the city and county of San Francisco. On the 21st day of July, 1942, charges were filed against him in the office of the police commission. Later he appeared and entered a plea of not guilty. On July 29, 1942, a hearing before the police commission was had. The petitioner was found guilty and was ordered dismissed from the department. On the 16th day of September, 1942, the petitioner appeared in the superior court and filed a petition asking for a writ of mandate and for a writ of certiorari. An alternative writ was thereupon issued. The appellants answered denying many of the allegations set forth in said petition and at the same time filed in the superior court a return consisting of the reporter's transcript of all proceedings had before the police commission. Thereafter the proceeding came on for trial and the appellants offered in evidence the said return and all exhibits that had been before the police commission. No other evidence, oral or documentary, was introduced. On the 1st day of October, 1943, the trial court signed and caused to be entered a formal order: "Judgment and order annulling order of respondents dismissing petitioner and granting peremptory writ of mandate." Thereafter the appellants appealed from said judgment and order and the whole thereof. Said appeal was taken pursuant to section 953a of the Code of Civil Procedure.

[1,2] The transcript was filed December 29, 1943. The appellants' opening brief was filed January 27, 1944. The petitioner's brief was filed April 5, 1944. On April 21, 1944 the petitioner filed in this court, "Application of petitioner and re-

spondent for leave to produce additional evidence." The hearing of that application was continued and submitted with the hearing of the cause. An examination of the papers filed in the application last mentioned discloses that on the hearing before the police commission on July 29, 1942, Albert S. Munn was called as a witness by the appellants. Said papers further show that on September 27, 1943, Albert S. Munn was adjudged an insane person. Be that as it may, the fact is immaterial in the case at bar. When he was called as a witness at the time mentioned above he was presumed to be sane. Nothing appears in the record indicating anything to the contrary. The fact that he was later adjudged insane is in no manner pertinent to his competency at the time he was called as a witness before the police commission.

The charge preferred against the petitioner alleged:

"Now comes Albert S. Munn, Captain of Police, and charges said Police Officer Thomas E. Shewbridge, hereinafter referred to as the 'accused' with violations of Rule 329 and Rule 431 of the Rules and Regulations of the Department, committed as follows to wit:

"That during all the times herein mentioned, said accused was and still is a member of said Police Department, and a member of Company 'K', thereof.

"That at or about 2.00 o'clock p.m., on Tuesday, July 21st, 1942, the said accused was detailed to traffic patrol duty at Powell and Geary Streets and did refuse to obey and strictly execute the lawful order of his superior officer, Captain Albert S. Munn, the complainant herein, to issue a traffic citation for a public offense committed in the presence of the said accused.

"That at or about 2.00 p.m., on Tuesday July 21st, 1942, the said accused while detailed to traffic patrol duty at Powell and Geary Streets and in uniform was not equipped with his revolver and handcuffs.

"That by reason of the foregoing, the said accused violated the Rules and Regulations of the Police Department of the City and County of San Francisco.

"The foregoing charges are based upon two sections of the Rules and Regulations of the Police Department of the City and County of San Francisco. They read in part as follows:

"329. A member shall, while on duty in uniform, carry the following equipment:

* * * (b) Loaded revolver * * *
(e) Handcuffs. * * *

"431. Shall strictly obey and promptly execute the lawful orders of his superior officers. In case of conflict of orders from superior officers he shall respectfully call the attention of the superior officer giving the last order to such conflict; should the latter not change his order, it shall be obeyed and the member shall not be held responsible for disobedience of any former order or any violation of the rules in obeying said last order."

[3] The petitioner asserts: "The order of the police commission dismissing him is void because the rules and regulations of the San Francisco police department violate the state law in that they do not prescribe a separate and distinct penalty for the violation of each of such rules and regulations." We find no merit in the point. Bearing in mind that San Francisco is acting under a charter, the general laws referred to by the petitioner have no application in the case at bar. *West Coast Advertising Co. v. City and San Francisco*, 14 Cal.2d 516, 521, 95 P.2d 138; *Ludolph v. Board of Police Com'rs*, 30 Cal.App.2d 211, 217, 86 P.2d 118; *Christal v. Police Commission*, 33 Cal.App.2d 564, 572, 92 P.2d 416.

[4, 5] The petitioner contends: "The charges are insufficient on their face and the board had no jurisdiction to try the petitioner." He quotes from the first charge "* * * did refuse to obey and strictly execute the lawful order of his superior officer * * *." He points to the use of the word "lawful". He claims it is a conclusion of law. Conceding it was, it was merely surplusage. Superfluity does not vitiate. Civ.Code, sec. 3537. Moreover the attack is directed at the pleading of the first charge only. It does not apply to the second charge. If the latter was well pleaded it follows that the defendant board had jurisdiction to hear and determine the action.

[6] The petitioner quotes certain passages from the reporter's transcript to the effect that he had his gun and handcuffs on his person at the time alleged in the charges. It is a sufficient reply to state that other passages from the reporter's transcript may be quoted as showing that he did not have them and that the testimony given by Captain Munn was true and

correct. Such facts merely showed a conflict in the evidence—not an excess of jurisdiction.

[7] The petitioner contends that the charges were improperly verified. That contention rests on the fact that the charges were in the form of an ordinary complaint in a justice or police court and that the verification thereof was "Albert S. Munn being first duly sworn deposes and says: That he is the complainant preferring the within charges; that he has read said charges and that the same are true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes the same to be true. Albert S. Munn, complainant. Subscribed and sworn to before me this 21st day of July, 1942. A. J. Goldman, Deputy County Clerk." That form was altogether proper. *Christal v. Police Commission*, 33 Cal.App.2d 564, 570, 92 P.2d 416; *Charter* (1932) sec. 155.

The appellants contend that the record before the trial court did not show that the defendant board had acted "arbitrarily, capriciously or fraudulently or without due regard to the rights" of the petitioner, and therefore the judgment of the trial court should not have been against the appellants. In *Ludolph v. Board of Police Com'rs*, 30 Cal.App.2d 211, 216, 86 P.2d 118, 121, the court said:

"The authority thus conferred upon the board is pursuant to the provisions of our state Constitution and is of a judicial character exercised by a quasi-judicial body. California Constitution, art. 11, sec. 8½, subd. 3; *Imperial Water Co. v. [Board of] Sup'rs*, 162 Cal. 14, 17, 18, 120 P. 780; *Crane v. Board of Sup'rs*, 17 Cal. App.2d 360, 364-366, 62 P.2d 189. If, and only if, the board acted in excess of the jurisdiction granted certiorari will lie."

In *Murphy v. Retirement Board*, 49 Cal. App.2d 58, on page 60, 121 P.2d 101, on page 102, this court, speaking through Mr. Presiding Justice Nourse, said:

"When the case is one in mandamus to 'review' the trial and judgment of an administrative or quasi judicial board, the function of the trial court is not that of a court sitting in a trial de novo. We endeavored to make this clear in *Hogan v. Retirement Board*, 13 Cal.App.2d 676, 677, 57 P.2d 520, 521, where we said: 'When the law gives to a fact-finding body the

power to hear and determine a question of fact, the judgment of that body will not be controlled by mandamus in the absence of a showing that it acted arbitrarily, capriciously, or fraudulently, or without due regard for the rights of the applicant. *Mogan v. Board of Police Com'rs*, 100 Cal. App. 270, 279 P. 1080; *Sevina v. Hickok*, 113 Cal.App. 301, 298 P. 116; *McColgan v. Board of Police Com'rs*, 130 Cal.App. 66, 19 P.2d 815.'"

[8, 9] On the other hand, the petitioner throughout his brief contends that he is entitled to show that the record made before the defendant board did not speak the truth. He does not state any specific jurisdictional fact which was not stated in the charges but makes numerous contentions that the facts stated were not true. He thus assumes a position that is wholly untenable. In *Miller & Lux v. Board of Sup'rs*, 189 Cal. 254, at page 269, 208 P. 304, at page 311, the court said:

"In reply the plaintiff properly calls attention to the fact that the function of a writ of review is to bring before the court for consideration the proceedings before the inferior tribunal, including the evidence, and that the proceedings for a writ of review is *not a proper one in which to contest the truth as to the jurisdictional facts*. *Golden Gate [Con. H.] M. Co. v. Superior Court*, 65 Cal. 187, 191, 3 P. 628; *Hoffmann v. Superior Court*, 79 Cal. 475, 21 P. 862; *De Pedorena v. Superior Court*, 80 Cal. 144, 22 P. 71; [*City of*] *Los Angeles v. Young*, 118 Cal. 295, 50 P. 534, 62 Am.St.Rep. 234. This position is undoubtedly well taken.

"*The court is limited in its proceedings to review the order of the board of supervisors to the record there made, and from that record the jurisdiction of the board to act in the premises must appear.*" (Italics ours.)

So in the instant case, the trial court was called upon to determine whether the pleading filed with the defendant board stated facts sufficient to confer jurisdiction on that board to hear those charges. If it did confer jurisdiction, that jurisdiction in the abstract was power to determine incorrectly as well as correctly.

We have read the record of the proceedings before the defendant board and the proceedings before the trial court from the beginning to the end. We find no place where the record shows, or purports

to show, that the defendant board exceeded its jurisdiction.

It follows that the judgment of the trial court must be reversed and it is so ordered.

NOURSE, P. J., and SPENCE, J., concur.



64 Cal.App.2d 622

CALIFORNIA SHIPBUILDING CORPORATION v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 14287.

District Court of Appeal, Second District,
Division 3, California.

May 29, 1944.

Hearing Denied July 27, 1944.

1. Workmen's compensation ☞1753

Where there was conflict in evidence as to condition of staging encircling ship under construction, Industrial Commission was not required to make specific finding as to which of the two conditions existed, where either would be in violation of safety order requiring slip staging to be not less than 36 inches wide. *St.1937*, p. 309, § 6402.

2. Workmen's compensation ☞1939

On petition for writ to review an order of Industrial Commission awarding compensation, court was required to accept inference drawn by commission as to place from which deceased employee fell if it was a reasonable and logical one, even if other inferences could reasonably be drawn from evidence.

3. Workmen's compensation ☞1557

Evidence sustained Industrial Commission's finding that flanger's helper fell to his death at point on staging encircling ship, where staging violated safety order requiring slip staging to be not less than 36 inches wide, in that at such point there was either no plank or only a single plank 12 inches wide, and that such violation was proximate cause of accident. *St.1937*, pp. 281, 309, §§ 4553, 6402.

4. Workmen's compensation ☞940

Stage-rigger foreman who had responsibility of erecting staging encircling ship

under construction, and who received no orders from superiors and required none, were "managing officers" so as to make corporate employer liable for increased compensation for serious and wilful misconduct for death of employee proximately resulting from foremen's failure to see that staging, where men were working 40 feet above ground, was not constructed in accordance with safety order requiring slip staging to be not less than 36 inches wide. St.1937, pp. 281, 309, §§ 4553, 6402.

See Words and Phrases, Permanent Edition, for all other definitions of "Managing Officer".

5. Workmen's compensation ⇨1557

Evidence sustained Industrial Commission's finding that death of flanger's helper, who fell from staging encircling ship under construction, proximately caused by failure of stage-rigger foremen to have staging at that point complying with safety order, was result of "serious and willful misconduct" of "managing officers" of employer, justifying an award of increased compensation. St.1937, pp. 281, 309, §§ 4553, 6402.

See Words and Phrases, Permanent Edition, for all other definitions of "Serious and Willful Misconduct".

6. Workmen's compensation ⇨941

It is "serious and willful misconduct" justifying an award of increased compensation to allow employees to work under conditions made unsafe through employer's violation of safety orders of Industrial Commission. St.1937, p. 231, § 4553.

7. Workmen's compensation ⇨941

An increased award against corporate employer for "serious and willful misconduct" is proper, where unsafe condition which causes injury to employee has been created by another employee who has independent duty of seeing that law is complied with and that working conditions are made safe, or where an employee who is under that duty has knowledge of the unsafe condition and does nothing to correct it. St.1937, p. 281, § 4553.

8. Workmen's compensation ⇨940

An employee whose authority is complete in his own department is a "managing officer" within statute making corporate employer liable for exemplary compensation for injuries proximately caused by violation of a safety order, where the al-

leged dangerous condition is shown to have been brought home to an executive, managing officer, or general superintendent of employer. St.1937, p. 281, § 4553.

9. Workmen's compensation ⇨1800

The Industrial Commission's practice of submitting application for rehearing to a reviewing referee other than referee who conducted hearing and recommended an award is not improper. St.1937, p. 193, § 115.

10. Workmen's compensation ⇨1730, 1800

The Industrial Commission may delegate to its referees the hearing of evidence and may act on the findings and recommendations of referee, and the same rule applies to petition for rehearing. St.1937, pp. 193, 303, §§ 115, 5906.

11. Workmen's compensation ⇨1800

Where contentions relied on in support of petition for rehearing in workman's compensation case were same as those urged on original hearing, commission was authorized to deny petition without a further hearing if contentions had been adequately considered theretofore. St.1937, p. 303, § 5906.

12. Workmen's compensation ⇨1800

The Industrial Commission's order denying a rehearing was valid, where it was based on report and recommendation of reviewing referee to whom application for rehearing was referred by commission after award was made for additional compensation for serious and willful misconduct of employer's managing officer proximately causing death of employee, and where, though referee's report did not include summary of evidence, it did state generally the facts and conditions of alleged violation of safety order, and ultimate fact that employee's death resulted proximately from such violation. St.1937, pp. 193, 281, 303, 309, §§ 115, 4553, 5906, 6402.

Proceeding by California Shipbuilding Corporation for a writ to review and to annul an order of the Industrial Accident Commission awarding \$2,500 to Belle Rebecca Gaddis for the death of her husband, Jonas D. Gaddis, petitioner's employee, who was found to have met his death by reason of the willful and serious misconduct of his employer, the petitioner.

Award affirmed.

Thelen, Marrin, Johnson & Bridges and Gardiner Johnson, all of San Francisco, for petitioner.

Everett A. Corten, Atty., Industrial Accident Commission, and Fred G. Goldsworthy, Asst. Atty., both of San Francisco, for respondents.

SHINN, Justice.

By this proceeding California Shipbuilding Corporation seeks annulment of an award made against it by Industrial Accident Commission in the amount of \$2500 in favor of Belle Rebecca Gaddis, widow of Jonas D. Gaddis, petitioner's employee, who was found to have met his death by reason of the willful and serious misconduct of his employer, petitioner herein. The proceeding does not bring in question a separate award against the insurer of the employer of the death benefit of \$6,000. The findings include the following:

"3. This Commission now finds that the said injury and death of Jonas Dulpha Gaddis was directly and proximately caused by the serious and willful misconduct of the employer herein and in support thereof specifies the following particulars:

"(a) Did knowingly and wilfully permit said employee to be in a place of employment which was patently unsafe and dangerous to life and limb in violation of Safety Order No. 6402 as the same is set forth in the Ship and Boat Building Safety Orders in full force and effect at the time of the injury and death of the deceased herein. [Corrected to read section 6402 of the Labor Code.]

"(b) Did knowingly and wilfully violate Safety Order No. 1806 of the said same Safety Orders in that in the space between the stairway, which was provided as a means of ingress and egress, and the point where the employee was required to perform his duties, there was a failure to provide sufficient planks as is and was required by said Safety Order. * * *

Safety Order 1806 specifies: "Slip staging shall be not less than thirty-six (36) inches wide. Planks not less than twenty-four (24) feet long shall be used whenever possible." Section 6402 of the Labor Code, St.1937, p. 309, reads: "No employer shall require, or permit any employee to go or be in any employment or place of employment which is not safe."

Petitioner's contention is that the Commission acted in excess of its jurisdiction,

in that there was no evidence that the employee's death was directly and proximately caused by a violation of said safety order and no evidence that knowledge or notice of the alleged dangerous condition was shown to have been brought home to an "executive, managing officer, or general superintendent" of the employer (sec. 4553, Labor Code, St.1937, p. 281) so as to charge the corporation with penal liability.

[1-3] Gaddis was employed as a flanger's helper in the construction of a ship in the employer's yard at Terminal Island. He went to work at 4:30 p.m. on the day of his accident and at about 7 p.m. fell from the staging to the ground, receiving fatal injuries. The staging encircled the ship and consisted of six levels or working platforms. Completed sections of platform had three planks two inches by twelve inches by twenty-four feet, which overlapped at the ends. Gaddis and a fellow workman, Morkal, had reached the sixth level, which was approximately forty feet high, by means of a ladderway which led to a twenty-four inch wide cat walk above the sixth level, from which they had climbed down to the platform where they were working. At this point there were but two twelve-inch planks; to their right as they faced the ship there was a section that had only one plank. There is a conflict in the evidence as to the condition of the staging in the twenty-foot section next to the ladderway. Counsel for the Commission rely upon testimony that there was an open space of some twenty feet next to the ladderway, where there was no platform. Counsel for petitioner contend that the section next to the ladderway had one twelve-inch plank and there was testimony to this effect. There is nothing in the record to indicate whether the Commission found there was one plank or none at all at this point, but a specific finding was not necessary, as either condition would have been in violation of the safety order. At about 7 p. m. Gaddis announced to Morkal that he was going to get a drink of water. He started toward the ladderway, ostensibly to go to the ground where the fountain was located. A few minutes later Morkal saw him "on the end of the scaffold where there was no scaffolding any further"; when he looked again Gaddis had disappeared. He had fallen to the ground level into a bin of stanchions at a point 10 or 15 feet from the ladderway and directly beneath the unfinished section of the platform. No one

saw the start of his fall and there was no direct evidence as to the cause of it. The contention of petitioner is that the finding that it was caused by the unsafe condition of the platform is based upon mere speculation and is unsupported by any logical deduction from the established facts, or, in other words, that it is based, not upon an inference drawn from proven facts, but upon a succession of inferences of questionable weight. As we view it the Commission was required to determine first whether Gaddis fell either in attempting to cross over to the ladderway on his way to the ground or while attempting to return to his work. All of the circumstantial evidence, and such direct evidence as there was, points to the conclusion that he fell from some point within 20 feet of the ladderway. In crossing that section he would have had to walk on a single plank, or if none was there, climb down five or six feet to the fifth level. It is doubtful how he was attempting to negotiate the crossing but there is no doubt that whichever course he took was made necessary by the unfinished condition of the platform. It is possible that Gaddis may have fallen from the ladderway or from the fifth level after he had reached it in safety, but the probabilities strongly support the implied finding of the Commission that he fell from a place where the platform was unfinished, and not from some place that was not unsafe or dangerous. But even if other inferences could reasonably be drawn as to the place from which he fell, we are bound to accept the inference which the Commission drew if it is a reasonable and logical one. We regard it as more reasonable than any of the other possible inferences suggested by petitioner or by the proven facts.

If it is accepted as a fact, satisfactorily established by the evidence, that Gaddis fell while attempting to cross where the sixth level platform was unfinished, it is entirely logical to conclude that the immediate cause of his fall was the absence of a completed platform. This is only to say again that it is more reasonable to believe that he fell while attempting something difficult and dangerous than to believe that he fell after he had safely reached the ladderway or the completed platform on the fifth level. We find no reason to question the soundness of the finding that the direct and proximate cause of the accident was the violation of the safety order by the employer.

[4,5] The second ground of attack is that there was no evidence of serious and willful misconduct upon the part of an "executive, managing officer, or general superintendent" of petitioner, which is required by section 4553 of the Labor Code before an exemplary award can be made against a corporate employer. There was evidence that two of petitioner's stage-rigger foremen had actual knowledge of the unfinished condition of the platform and of the fact that men were working on it. It was the duty of the foremen to take care of the general staging and to see that it was put in properly, and they determined what was required. They ordered staging material, including planking, as the staging was carried higher around the ship. They had been told that working platforms should be 36 inches wide. Unsafe conditions were reported to them by the safety inspectors and engineers when they were discovered, and it was the duty of the foremen to have the conditions corrected. There was no evidence that the actual condition of the staging where the accident occurred was known to anyone who was the superior of the foremen, nor was there evidence that anyone above the foremen superintended or directed staging construction. It was the duty of safety inspectors and engineers to inspect staging but there was no evidence that any of them was aware of the condition on the sixth level at the time and place of the accident. If the foremen were among those named in section 4553 of the Labor Code, petitioner is responsible in the amount of the penal award for their failure to observe the safety rule; otherwise it is not.

In *E. Clemens Horst Co. v. Ind. Acc. Comm.*, 1920, 184 Cal. 180, 190, 193 P. 105, 109, 16 A.L.R. 611, it was held that the manager of a vegetable drying plant who was entirely entrusted with its operation was a "managing officer" as that term was used in the Workmen's Compensation Act. It was said that the word "officer" was not used in a technical legal sense, but meant "a person in the corporation's employ, either elected or appointed, who is invested with the general conduct and control at a particular place of business of a corporation."

In *Gordon v. Ind. Acc. Comm.*, 1926, 199 Cal. 420, 249 P. 849, 58 A.L.R. 1374, a foreman of a gravel pit who had full charge of excavating gravel from the pit was held to be the "managing representative" of

a partnership. It was said that the use of the words "general superintendent" with "managing officer" with relation to corporations, and with "managing representative" with respect to partnerships, distinguished between those with general and those with special or limited authority and that one might be a managing officer or managing representative even though he had not the authority of a general superintendent.

In *Church, etc., v. Indus. Acc. Comm.*, 1927, 86 Cal.App. 182, 260 P. 578, one Nowell, as architect and contractor, had contracted to build a church building. One Taylor who was subject to advice and direction of Nowell, had charge and control of the men engaged in the work. It was said that he "occupied a position in relation to the work of such description that, at least, he was foreman in charge of the work in which Barnes (the injured employee) was occupied at the time of the accident" and it was held that he was a "general superintendent" within the meaning of the Workmen's Compensation Act.

In *First Nat. Pictures, Inc. v. Indus. Acc. Comm.*, 1927, 87 Cal.App. 537, 262 P. 38, a foreman of the carpenter department of his employer, the petitioner, was held to be a "managing officer" of the corporation.

In *General P. Corp. v. Industrial Acc. Comm.* 1928, 90 Cal.App. 101, 265 P. 508, without discussion of the status of the employee, a corporation was held liable for the serious and willful misconduct of a foreman who was in charge of making a change in a gasoline line.

A safety engineer of petitioner testified as follows:

"Q. But who determines when staging should be erected? A. That more or less follows a routine procedure as far as fabrication is concerned. They are called upon to erect staging for any craft that requires it.

"Q. Who determines when it requires it? A. The stage rigger foremen, or the foremen of the other craft.

"Q. That is part of the stage-rigger foreman's job? A. That is part of his job."

[6-8] The stage-rigger foremen were undoubtedly "managing officers" within the meaning of section 4553 of the Labor Code. They had the responsibility of erecting staging to keep up with the progress of the construction work and to see that it followed a routine procedure or pattern.

They received no orders from superiors and required none. If they were not "managing officers" of their own department of the work, that department, so far as the record discloses, had no immediate managing officer. They had actual knowledge that the staging where the men were working was not constructed in accordance with the safety order and they had the primary responsibility of correcting that condition. Their acts and omissions under the circumstances were those of the corporation. It is serious and willful misconduct to allow employees to work under conditions made unsafe through the employer's violation of safety orders of the Commission. *Hoffman v. Dept. of Indus. Relations*, 1930, 209 Cal. 383, 287 P. 974, 68 A.L.R. 294; *Pacific Emp. Ins. Co. v. Indus. Acc. Comm.*, 1930, 209 Cal. 412, 288 P. 66. An award against a corporation for serious and willful misconduct is proper where the unsafe condition which is the cause of injury has been created by an employee who has the independent duty of seeing that the law is complied with and that working conditions are made safe, or where an employee who is under that duty has knowledge of the unsafe condition and does nothing to correct it. Such an employee is a managing officer if his authority is complete in his own department of the work. The stage-rigger foremen had that authority.

[9-12] The award for serious and willful misconduct was signed by three members of the Commission. The return to the writ in its original form failed to disclose that the commissioners who signed the award had reviewed the record or were otherwise sufficiently informed as to the proof adduced at the hearings to enable them to decide the issue of serious and willful misconduct. Petitioner challenged the competency of the commissioners to decide that issue, since they had not heard the evidence and were not shown to have had knowledge of it. In response to an order for augmentation of the record, the Commission has filed a certified copy of the report and recommendation of a referee who reviewed the record of the hearings on the charge of serious and willful misconduct. It is the practice of the Commission to submit an application for rehearing to a referee other than the one who conducted the hearing and recommended an award, and the practice was followed in this case. The reviewing referee made a memorandum recommending denial of the petition

for rehearing. It appears from this memorandum that a transcript of the evidence had been provided for his use and that points and authorities had been filed. It was stated that the evidence disclosed without serious question that there had been a violation of safety order No. 1806 and section 6402 of the Labor Code, in that the platform planking was unfinished and the platform was of insufficient width, and that there was substantial proof of notice of the existence of violations to the employer or its managing representatives. It was further stated that it was reasonable to believe that the employee fell through one of the gaps in the planking of the scaffold over which he had to pass and that it appeared that the condition of the planking was the proximate cause of death. The commissioners' order denying a rehearing was based upon this report and recommendation. While the report did not include a summary of the evidence, it did state generally the facts as to the condition of the staging and the circumstances of the accident, which were established by the evidence, and it stated as an ultimate fact that the employee's fall resulted proximately from the defective staging. The practice of submitting petitions for rehearing to a reviewing referee is not unauthorized or improper. It tends rather to lessen the chances of error in the final determination. Such work must of necessity be done by referees. It would be impossible for the commissioners themselves to review the records on petitions for rehearing and the law does not impose that duty upon them. The Commission may delegate to its referees the hearing of evidence and may act upon the findings and recommendations of the referees. Taylor v. Industrial Acc. Comm., 1940, 38 Cal.App.2d 75, 82, 100 P.2d 511. There is equal authority for such procedure in passing upon petitions for rehearing. Under section 115 of the Labor Code, St.1937, p. 193, any investigation, inquiry or hearing which the Commission may undertake or hold may be undertaken or held by a referee appointed for that purpose, and every finding, order, decision or award made by such referee pursuant to such investigation, inquiry or hearing, when approved and confirmed by the Commission and ordered filed, is the finding, order, decision or award of the Commission. The contentions relied upon in support of the petition for rehearing in the present case were the same as those urged upon the hearings. If they had been ade-

quately considered theretofore, the Commission was authorized to deny the petition without a further hearing. Sec. 5906, Labor Code, St.1937, p. 303. The record shows that they had been so considered. The order denying a rehearing, based upon the report and recommendation of the reviewing referee was in accordance with authorized procedure and was valid.

The award is affirmed.

DESMOND, P. J., and PARKER
WOOD, J., concur.



CROUCH v. CROUCH. *

Civ. 14357.

District Court of Appeal, Second District,
Division 1, California.

June 6, 1944.

Hearing Granted Aug. 3, 1944.

1. Appeal and error ☞907(3)

Where appeal is upon judgment roll alone, evidence is presumed to support findings made.

2. Divorce ☞327

In wife's divorce action, where there was a finding, presumably supported by evidence, that husband was not a bona fide resident of Nevada at time he obtained a Nevada divorce, Nevada decree was not entitled to "full faith and credit" in California.

See Words and Phrases, Permanent Edition, for all other definitions of "Full Faith and Credit".

3. Divorce ☞327

A foreign divorce decree may be impeached collaterally by showing lack of jurisdiction over res for want of bona fide domicile by party obtaining such decree.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Suit by Edith M. Crouch against Ben E. Crouch for divorce. From a judgment for defendant, plaintiff appeals.

Reversed and remanded for a new trial.

* Subsequent opinion 169 P.2d 897.

Charles C. Montgomery, Jr., of Los Angeles, for appellant.

Peters & Peters, of Chico, for respondent.

DORAN, Justice.

Appellant brought a suit for divorce against respondent in the Superior Court of the County of Los Angeles. Respondent in his answer pleaded a final decree of divorce granted to him in an action against appellant in the First Judicial Court of the State of Nevada, in and for the County of Ormsby, said decree being made and entered on the 4th day of May, 1942. The court below found that appellant's separate causes of action for divorce were each barred by the final decree of divorce obtained by respondent in the State of Nevada and gave judgment for respondent accordingly.

In the findings made below the trial court set forth in full the findings of fact, conclusions of law and decree of the Nevada court, whereby respondent was there awarded an absolute divorce from appellant. The court below then found, "That at the time of the filing of said complaint for divorce in said Nevada Court, and at the time of the rendition of the said judgment therein, the defendant herein was not a bona fide resident of the State of Nevada, nor of the County of Washoe in the State of Nevada, nor of the County of Ormsby in the State of Nevada, but was in truth and in fact a resident of the County of Butte, State of California, by reason of the facts, which the court now finds, to-wit: that said defendant herein left the State of California and entered the State of Nevada on or about the 28th day of February, 1942, solely for the purpose of obtaining a divorce from the plaintiff herein; that in so doing defendant herein abandoned plaintiff herein without cause; that defendant remained in Nevada for a period just long enough to obtain an apparent residence in Nevada and thereupon filed said action for divorce, obtained said decree, and shortly thereafter returned to Butte County, California; that service upon plaintiff herein in said Nevada divorce action was constructive service, and plaintiff herein was at all times domiciled in and a bona fide resident of Los Angeles County, State of California; that plaintiff herein never appeared in said Nevada divorce action; and that at no time while defendant was in the State of Nevada did he have any intention of becoming a resi-

dent thereof save and except for the sole purpose of obtaining a divorce from this plaintiff." Upon the findings made the trial court concluded that the defendants were entitled to judgment against plaintiff in each of the causes of action in the complaint. For the purposes of this appeal, it is not necessary to consider the position of any defendants other than respondent.

[1,2] In support of his contention, that the trial court's conclusions upon the findings and the judgment in respondent's favor were proper, respondent relies upon *Williams v. North Carolina*, 317 U.S. 287-324, 63 S.Ct. 207, 87 L.Ed. 279, 143 A.L.R. 1273. But the basis for the decision in that case readily distinguishes it from the present case and renders the rule of the *Williams* case inapplicable here. In the case on appeal herein, the evidence upon which the findings of the trial court were based is not before this court. The appeal is upon the judgment roll alone, and the evidence must be presumed to support the findings made, which included a finding that respondent was not a bona fide resident of the State of Nevada at the time he procured his divorce there from appellant. In the *Williams* case, *supra*, the decision was based upon an assumption that the petitioners there had a bona fide domicile in Nevada. In the present case the decision must be based upon an opposite assumption. In the *Williams* case, 317 U.S. 287, 63 S.Ct. 215, 87 L.Ed. 288, 143 A.L.R. 1273, the Supreme Court of the United States said: "We thus have no question on the present record whether a divorce decree granted by the courts of one state to a resident as distinguished from a domiciliary is entitled to full faith and credit in another state. Nor do we reach here the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no bona fide domicile was acquired in Nevada." Obviously, in the present case the situation is one wherein, contrary to the findings of the Nevada court, a California court has found that no bona fide domicile was acquired in Nevada. In deciding the *Williams* case, *supra*, the United States Supreme Court expressly pointed out that the issue there was not the same as that presented in *Bell v. Bell*, 181 U.S. 175, 21 S.Ct. 551, 45 L.Ed. 804,—a case in which the Supreme Court of the United States held that a decree of divorce was not entitled to full faith and credit

C. I. T. CORPORATION v. COMMERCIAL
BANK OF PATTERSON et al.

Civ. 12542.

District Court of Appeal, First District,
Division 1, California.

June 7, 1944.

when it had been granted on constructive service by the courts of a state in which neither spouse was domiciled. *Bell v. Bell*, supra, sets forth the rule to be followed here upon the record presented. Respondent points out that appellant was personally served with summons and complaint in the Nevada divorce action, at her residence in Glendale, California. However, this fact does not alter the application of the rule in *Bell v. Bell*, supra. In *Streitwolf v. Streitwolf*, 181 U.S. 179, 21 S.Ct. 553, 45 L.Ed. 807, the wife was personally served in New Jersey, the state of her residence, with a copy of the summons and complaint in an action for divorce filed by her husband in the State of North Dakota. The United States Supreme Court in that case followed *Bell v. Bell*, supra, 181 U.S. 175, 21 S.Ct. 555, 45 L.Ed. 810, stating: "The facts in evidence warranted, and indeed required, the finding that the husband had no bona fide domicile in the state of North Dakota, when he obtained a divorce there; and it is not pretended that the wife had an independent domicile in North Dakota, or was ever in that state. The court of that state therefore had no jurisdiction." In the case here upon appeal the trial court found facts from which it must be concluded that the Nevada court had no jurisdiction over respondent's action for divorce. Upon the facts found, the Nevada decree of divorce here in question was therefore not entitled to full faith and credit in the State of California; and the facts as found by the trial court here do not support a judgment in favor of respondent.

[3] The principle upon which a decree of divorce rendered in another state may be impeached collaterally is recognized as well settled. *Bruguiere v. Bruguiere*, 172 Cal. 199, 202, 155 P. 988, Ann.Cas.1917E, 122; 13 P.2d 719, 86 A.L.R. 1321; *Delanoy v. Delanoy*, 216 Cal. 27, 34, Commonwealth v. *Esenwein*, 348 Pa. 455, 35 A.2d 335. That principle has not been disturbed or modified by the decision of the United States Supreme Court in *Williams v. North Carolina*, supra. *Commonwealth v. Esenwein*, supra. A bona fide domicile is still a requisite to the jurisdiction of an action for divorce.

The judgment is reversed and the cause remanded for a new trial in accordance with the views herein expressed.

YORK, P. J., and WHITE, J., concur.

1. Chattel mortgages ⇨173(3)

In claim and delivery proceeding, the plaintiff under the general issue was entitled to produce evidence of his ownership as entruster under trust receipt without any allegation of special ownership.

2. Chattel mortgages ⇨173(4)

In claim and delivery proceeding by finance company claiming automobiles under trust receipts, bank which claimed automobiles under bill of sale executed to secure loan was required to show that its transactions were within scope of Uniform Trust Receipts Law and the transactions of finance company were not, or if both parties were within purview of the law that bank's title attached before that of the finance company. Civ.Code, § 3012 et seq.

3. Chattel mortgages ⇨3

The Uniform Trust Receipts Law having been legislatively approved by codification should be strictly construed. Civ. Code, § 3012 et seq.

4. Chattel mortgages ⇨9

Where arrangements between finance company and retail automobile dealer for financing dealer's purchase of automobiles called for transfer of title to finance company, to which dealer executed trust receipts naming finance company as entruster and dealer as trustee, and giving finance company right to repossess automobiles at its pleasure, the documents were not to be construed as unrecorded chattel mortgages, but were within purview of Uniform Trust Receipts Law. Civ.Code, § 3013, subd. 12; § 3014, subds. (1) (a), (b) (i, ii), (2).

5. Chattel mortgages ⇨67

Where finance company had agreed in writing to finance retail automobile dealer's purchase of automobiles by means of trust receipts, and separate trust receipt was required upon delivery of each automobile to dealer, a trust receipt transac-

tion arose upon delivery of automobile to dealer without necessity for acceptance of that particular transaction by finance company. Civ.Code, § 3013, subd. 12; § 3014, subd. (1) (a), (b) (i, ii), (2).

6. Chattel mortgages ⇨143

Where retail automobile dealer had possession, but not title, to automobiles purchased by it for which trust receipts were executed to finance company, which had title and right to repossess automobiles at its pleasure, finance company's claim to automobiles was superior to that of bank from which dealer borrowed money secured by bill of sale covering the same automobiles, since dealer's possession was insufficient to give rise to valid trust receipt transaction between dealer and bank. Civ.Code, § 3013, subd. 12; § 3014, subd. (1) (a), (b) (i, ii), (2).

7. Estoppel ⇨76

Where bank which loaned money to retail automobile dealer secured by bill of sale covering automobiles purchased by dealer under trust receipts' transaction made no investigation of title and did not rely upon any act or failure to act on part of finance company holding title under trust receipts, and such company's statement of trust receipt financing was on file with secretary of state, bank could not defeat finance company's claim to automobiles on ground of "equitable estoppel". Civ.Code, § 3013, subd. 12; § 3014, subd. (1) (a), (b) (i, ii), (2).

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Estoppel".

8. Chattel mortgages ⇨260

The failure, if any, of finance company repossessing automobiles under trust receipts to give retail dealer notice of intention to sell did not affect company's right to automobiles as against bank loaning money to dealer on security thereof, where notice was for protection of dealer and no objection was made by it as to sufficiency thereof. Civ.Code, § 3016.2.

9. Chattel mortgages ⇨265

The surplus available after satisfaction of claim of finance company which repossessed and sold automobiles covered by trust receipts was properly used for employees' attendance and expenses in locating purchasers and for attorneys' fees. Civ.Code, § 3016.2(3).

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Claim and delivery proceeding by the C. I. T. Corporation against the Commercial Bank of Patterson and others. Judgment for the plaintiff, and the defendants appeal.

Judgment affirmed.

Nathan B. McVay, of Modesto, and Whitehurst & Logan, of Patterson, for appellants.

Cleary & Zeff, of Modesto, for respondent.

WARD, Justice.

This is an appeal from a judgment in favor of plaintiff for possession of three motor vehicles delivered to it by the sheriff in a claim and delivery proceeding.

Clifford H. Knutson, a retail automobile dealer, on December 12, 1935, entered into an agreement with plaintiff C. I. T. Corporation, hereinafter referred to as C. I. T., for the financing and delivery to him under trust receipts, of automobiles for exhibition and sale. By the terms of the contract Knutson agreed that: "On receiving such merchandise or the documents therefor we will execute to you our Trust Receipts therefor, * * * and our note or acceptance for the amount of the same." The three cars involved in this action were purchased by C. I. T. from their owner, R. B. MacBride, a wholesale distributor, who immediately upon his delivery of them to Knutson, mailed to C. I. T. a time draft upon Knutson executed by him or by MacBride with his (Knutson's) authorization and consent, payable to the corporation; a bill of sale and invoice from MacBride to the corporation, showing the vehicle to have been sold to C. I. T. for the account of Knutson; and a trust receipt executed by him to the corporation. Each trust receipt particularly named C. I. T. as the owner and entruster of the vehicle and Knutson as the trustee, and gave the corporation the right to repossess the property at its pleasure.

Statements of the trust receipt financing and renewals thereof, covering the periods of the financing of the above three motor vehicles, were executed by Knutson and C. I. T., and duly filed with the Secretary of State in compliance with Civil Code, section 3016.9.

In connection with his automobile business, Knutson borrowed money from his

local bank, defendant herein, from time to time, to secure which he gave the bank a bill of sale dated October 16, 1937, wherein was left a blank space for the insertion of the numbers of motor vehicles to be thereafter acquired by him. The bill of sale authorized the bank to insert such numbers of new vehicles as they were received, and the dates of loans made Knutson thereon, and as the motor vehicles were sold and the loans repaid the bank, to cancel the numbers and the dates. A notation of the engine numbers was also placed on the promissory notes as they were executed. A statement of this trust receipt financing executed by the bank and Knutson was also filed with the Secretary of State.

By reason of appellant bank's contention that under the Trust Receipts Law its security interest was prior to that of C. I. T., we here set forth the details of Knutson's financing of the three pieces of motor equipment: (1) On December 9, 1937, he procured a loan from the bank, giving his demand note therefor as of that date, and the bank added the identifying motor number of a Dodge truck to the previously executed bill of sale. The truck was not delivered to Knutson until December 10, 1937, when, under a trust receipt as of that date naming C. I. T. as owner and entruster, he received the same from MacBride. (2) On December 27, 1938, a Plymouth car sold by MacBride to C. I. T. was delivered to Knutson against his delivery to MacBride of a trust receipt naming C. I. T. as the owner and entruster and himself as the trustee. On the same day the bank made a loan to Knutson taking his note therefor and adding the identifying motor number of the Chrysler car to the bill of sale. (3) A third motor vehicle—another Dodge truck—was sold to C. I. T. by MacBride, who delivered it to Knutson the same day, February 23, 1939, against a trust receipt naming Knutson as trustee and the corporation as owner and entruster. On the same day, the bank made a further loan to Knutson, for which it took his note, and inserted the descriptive number of the third motor vehicle in the bill of sale.

The court found that the three motor vehicles in question "were purchased by the C. I. T. Corporation from R. B. MacBride as the distributor, and who had acquired said vehicles direct from the Chrysler Corporation; that said vehicles

were delivered by said R. B. MacBride to Clifford Knutson, a retail dealer, after the execution, or the authorization from Knutson to MacBride to execute, a time draft drawn upon said Knutson payable to the plaintiff corporation, together with a bill of sale from the said R. B. MacBride, the true and lawful owner, to the C. I. T. Corporation, together with a trust receipt executed by said dealer, Knutson, to the C. I. T. Corporation, together with an invoice containing an itemization as to each of said vehicles showing said vehicles to have been sold to the C. I. T. Corporation for the account of said Knutson; that by the terms of said trust receipt the dealer, Knutson, acknowledged the title of said property to be in the C. I. T. Corporation; that the goods were being held in trust for the C. I. T. Corporation subject to the right of said Knutson to exhibit and sell the same for the account of the C. I. T. Corporation in the usual and ordinary course, to keep the funds derived from such sale separate from his own, to immediately remit the same and acknowledging the right of the C. I. T. Corporation to retake said property at its pleasure." The court further found "that said vehicles were never inspected or observed before said defendant advanced any moneys to Knutson."

The evidence indicates that the bank made the loans to Knutson without any independent investigation as to his possession or ownership of the cars, but that from time to time it did ascertain that the cars were in his salesroom.

On the 28th of August, 1939, the bank having discovered that Knutson had disposed of a car, not involved in this litigation but enumerated on its bill of sale, without its knowledge or consent, took possession of the three motor vehicles herein described, which were later seized by the sheriff under a writ of replevin. After obtaining possession of the cars, C. I. T. disposed of all three at private sale, obtaining prices in excess of amounts owed thereon by Knutson. This surplus was retained by it to apply on other indebtedness of Knutson.

[1] On the trial the bank objected to the admission of any evidence of C. I. T.'s ownership as entruster, on the ground that special ownership must be alleged, and cannot be proved under the general issue of replevin. *Commercial Credit Co. v. Peak*, 195 Cal. 27, 231 P. 340, must guide us in

the determination of this question. It was there held that it is sufficient to plead the ultimate fact of ownership. See *Nudd v. Thompson*, 34 Cal. 39.

[2] Irrespective of the burden of proof on the trial, in order to prevail on appeal it is necessary that the bank show that its transactions are within the scope of the trust receipts law and that the transactions of C. I. T. are not. The Uniform Trust Receipts Law, Stats. 1935, p. 1930; Civil Code, Div. 3, Pt. IV, Tit. 14, Ch. III-A. If it appears that both parties are within the purview of such law, then it must be proved that in each of the transactions the bank's title attached before that of C. I. T.

A two-party trust receipts transaction, as appears in the dealings between the bank and Knutson, is provided for in the definition of "trust receipts." Civil Code, sec. 3014, subd. 1(b), (i) and (ii) and subd. 2. The bill of sale from Knutson to the bank evidenced an acknowledgment of a consideration, and an agreement to sell and convey to the bank all new automobiles and trucks "as per numbers hereafter" listed. The use of the word "hereafter" has reference to the cancellation of the numbers of the vehicles as they were sold and the addition of the numbers of new cars purchased and placed on display. The bill of sale recites that a security interest remains or will remain in the entruster. "* * * the relation of entruster and trustee may be created by the execution of a trust receipt." *Bank of America N. L. & S. A. v. National F. Corp.*, 45 Cal.App.2d 320, 333, 114 P.2d 49, 56.

[3] In a supplemental brief filed by appellant bank subsequent to the oral argument, the contention is made that the trust receipt law has been legislatively approved by codification; that it is a creature of statute and should therefore be strictly construed. As a general principle we agree with this contention. The bank concludes therefrom that if there is an omission to recite in an instrument "a security interest" the document is to be construed as an unrecorded chattel mortgage and not as an instrument that may be considered under the Uniform Trust Receipts Law. If the construction sought by the bank be correct, then Knutson's bill of sale to the bank is not such a trust receipt as chapter 111-A contemplates. If both sets of instruments should be construed as trust

receipts, pledges, conditional sale contracts or chattel mortgages, then it would still be necessary to determine their priority. If one should be placed in one class and the other in another, it would still be necessary to determine priority.

Unless the property was already encumbered, it may be assumed from what has been said before that the bank transaction comes under the Uniform Trust Receipts Law, which brings us to the question of what was the transaction between Knutson and C. I. T.

"Security interest" is defined in Civil Code, sec. 3013, subd. 12, as "a property interest in goods, documents or instruments, limited in extent to securing performance of some obligation of the trustee or of some third person to the entruster, and includes the interest of a pledgee, and title, whether or not expressed to be absolute, whenever such title is in substance taken or retained for security only." In *Chichester v. Commercial Credit Co.*, 37 Cal.App.2d 439, 443, 99 P.2d 1083, 1085, the court said: "While the security interest afforded by a trust receipt prior to the enactment of the uniform law was somewhat similar to many other forms of chattel security, it may be distinguished from such transactions as a mortgage, pledge or conditional sale. In the case of a mortgage, a lien is given by the mortgagor to the mortgagee in order to secure the latter for the performance of an obligation by the mortgagor who retains possession of the property. The trust receipt does not conform to a pledge, since in the case of a pledge the security depends upon possession of the goods by the person secured; whereas in the case of a trust receipt, the entruster does not have possession of the goods. In the case of a conditional sale, possession may not ordinarily be retaken until there is a default in the contract; whereas under a trust receipt transaction, possession may be retaken at any time. Other distinguishing features of these various types of security interest under the former law are clearly indicated in the case of *In re James, Inc.*, 2 Cir., 30 F.2d 555."

In *Commercial Discount Co. v. Los Angeles County*, 16 Cal.2d 158, 159, at page 163, 105 P.2d 115, at page 117, the differentiations set forth in the *Chichester* case are approved, but the court said: "Other differences might be noted. In the case of a chattel mortgage title is found in the mortgagee prior to the mortgage.

But the chapter on trust receipts, and particularly section 3014 of the Civil Code, found therein, provides: "The security interest of the entruster may be derived from the trustee or from any other persons, and by pledge or by transfer of title or otherwise."

[4] The facts as to the C. I. T. transaction, as revealed by the record, do not disclose that the documents may, as the bank contends, be construed as unrecorded chattel mortgages. The business relations of Knutson and C. I. T. started in December 1935 upon the presentation by Knutson to C. I. T. of an application for a dealer's floor plan accommodation. Therein Knutson admitted C. I. T. ownership of the merchandise as represented by invoices and bills of lading. Each document provided: "In the event that the said merchandise or the documents therefor shall be entrusted to us for the purpose of sale or otherwise, we hereby consent that your right to repossess yourselves of the same or proceeds thereof and to terminate our privilege of receiving further merchandise shall be exercised at any time in your discretion and that any private sale of merchandise to the manufacturer thereof or to a distributor or dealer or any other purchaser for value therein shall conclusively be deemed a proper sale and price. On receiving such merchandise or the documents therefor we will execute to you our Trust Receipt." "In order to expedite your delivery of merchandise to us under Trust Receipts or otherwise, instead of mailing to you the percentage of amount of invoice from time to time required by you we will, if this is approved by you, deliver such percentage to the distributor or manufacturer for your account at the time of the delivery of the merchandise to us." The application was approved by C. I. T.

Section 3014 of the Civil Code sets forth alternative methods of obtaining or deriving security interest from the trustee. It may be by delivery under subd. (a) of paragraph 1 or by the giving of new value under subd. (b). In either event it must "Be against the signing and delivery by the trustee of a writing designating the goods, documents or instruments concerned, and reciting that a security interest therein remains in or will remain in, or has passed to or will pass to, the entruster, or (ii) Be pursuant to a prior or concurrent written and signed agreement of the

trustee to give such a writing." Knutson had agreed to the purchase price of the cars pursuant to the written and signed contract with C. I. T. to execute a trust receipt. MacBride sold the merchandise in controversy to C. I. T. and made delivery to Knutson against his trust receipt in favor of C. I. T. The concurrent and subsequent transactions between C. I. T., MacBride and Knutson were within the purview of chapter 111-A.

On the question of priority between C. I. T. and the bank it should be noted that neither party obtained interest in the merchandise until MacBride relinquished his right of ownership, etc. Those rights were conveyed to C. I. T. So far as Knutson was concerned, he had been given possession of the automobiles, but that possession was unaccompanied by any further right if for any reason his transaction with C. I. T. was not in accordance with their agreement and with the provisions of the statute. If the possession was without legal basis, the bank could not deal with Knutson, as the right of possession rested either in MacBride or C. I. T. If the possession by Knutson was valid it could be so only through the transaction involving MacBride, C. I. T. and Knutson, which was to terminate "at C. I. T.'s election." Knutson's right of possession was for a limited purpose.

The bank contends that the language in the C. I. T. instrument is similar to that construed in *C. I. T. Corporation v. Seanev*, 53 Ariz. 72, 85 P.2d 713. A uniform trust receipts law did not exist in Arizona. That case, as others cited by the bank is not controlling. The Arizona case did not decide whether the trust receipts were chattel mortgages or conditional sales contracts. In either case the instruments were subject to Arizona recording statutes. Trust receipt transactions involving motor vehicles are common. "This method enables the retail dealer to obtain advances from a financing company to pay the purchase price to the distributor and at the same time receive possession of the automobile for the purpose of placing it on the salesroom floor for exhibition and sale to a prospective customer. Title is transferred directly from the distributor to the finance company which retains such title under the trust receipt until the amount advanced as the purchase price is repaid. The validity of such trust receipts as title

retention documents has been established by the courts. Subsequent to the events hereinbefore related and in 1935, Stats. 1935, p. 1930, the legislature recognized the common practice and adopted the Uniform Trust Receipts Law, which comprises sections 3012 to 3016.16 of the Civil Code." *Commercial C. Co. v. Barney M. Co.*, 10 Cal.2d 718, 720, 76 P.2d 1181, 1182.

[5] The bank also contends that the trust receipts sent C. I. T. by MacBride after each transaction were offers which were not valid contracts until accepted and that the first evidence of acceptance is the date of setting up the transaction on the books of C. I. T. The evidence shows that C. I. T. agreed in writing to finance Knutson's purchase by means of trust receipts, requiring a separate trust receipt for each transaction. Under this method a trust receipt transaction arose upon delivery of a car by MacBride, the distributor, to Knutson, the dealer. The separate trust receipt was merely the method of identifying a particular vehicle.

We hold herein that the instruments, C. I. T. and the bank sufficiently complied with the Uniform Trust Receipts Law to be controlled by chapter III-A of the Civil Code. It is not necessary therefore to comment further upon the chattel mortgage and conditional sale contract cases cited.

[6] All of the equitable rights in this case, based upon the evidence and as appear in the instruments, establish the claim of C. I. T. over that of the bank. The bank's claim is primarily based upon Knutson's possession of the vehicles. Possession alone is insufficient to give rise to a valid trust receipts transaction. *Metropolitan Finance Corp. v. Morf*, 42 Cal.App. 2d 756, 109 P.2d 969.

[7] The facts of this case seem to rule out the doctrine of equitable estoppel. C. I. T.'s statement of trust receipts financing was on file with the Secretary of State, putting the bank on notice. The bank did not rely upon any act or failure to act on the part of C. I. T. at the time of the transactions with Knutson relative to the three cars. The bank made no investi-

gation of Knutson's title. *Metropolitan Finance Corp. v. Morf*, supra.

[8] After default an entruster is entitled to possession. An entruster in possession may give a five day notice, sent by ordinary mail, of intention to sell. Civil Code, sec. 3016.2. Five subdivisions appear in sec. 3016.2. Reading the whole it is plain that "notice" was intended primarily as a means of protection to the trustee and not for purchasers from a defaulting trustee. The trustee in the present case, Knutson, makes no claim nor for that matter appearance, in the present proceeding. No objection has been made by him or in his behalf as to the sufficiency of the notice. The defendant bank admits that it had notice of the sale, and it was not prejudiced if there was a failure to notify Knutson, a matter which from the record seems to be in dispute.

Neither C. I. T. nor the bank had knowledge or actual notice of the activities of Knutson in obtaining money on the particular vehicles. One party must suffer—the trial court determined it should be the bank. The evidence and the law uphold the trial court's conclusion.

After judgment the bank moved for a new trial in the claim and delivery action, and the case was reopened for further testimony as to the disposition of funds received by C. I. T. from the sale of the cars. The trial court found that such sum, including the surplus, was properly used.

[9] The trustee shall receive any surplus and shall be liable to the entruster for any deficiency. The proceeds of a sale shall be applied "(i) to the payment of the expenses thereof, (ii) to the payment of the expenses of retaking, keeping and storing * * * [and] to the satisfaction of the trustees' indebtedness." Civil Code, sec. 3016.2(3) (b). At the hearing it developed that the employees' attendance and expenses in locating purchasers, together with attorneys' fees, etc., used up the surplus.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.

ARMSTRONG v. KLINE.

Civ. 14220.

District Court of Appeal, Second District,
Division 3, California.

June 5, 1944.

Rehearing Denied June 30, 1944.

Hearing Denied Aug. 3, 1944.

1. Executors and administrators ⇨221(7)

In action to recover reasonable value of services rendered to deceased, evidence sustained finding that deceased orally agreed to give, devise, and bequeath to plaintiff certain property in consideration of plaintiff's moving her residence, acting as deceased's housekeeper and assisting deceased in operation of his business, that plaintiff fulfilled terms of agreement, and that deceased failed to perform his part of agreement.

2. Witnesses ⇨270(2)

In action to recover reasonable value of services rendered to deceased under oral agreement of deceased allegedly made in July, 1936, to devise and bequeath property to plaintiff, question put to one of plaintiff's witnesses as to whether witness knew that in July of 1936 plaintiff was receiving relief from one of the relief agencies was not proper cross-examination and objection to question was properly sustained.

3. Appeal and error ⇨205

In action to recover reasonable value of services rendered to deceased under alleged oral agreement of deceased to devise and bequeath property to plaintiff, sustaining objection to cross-examination question put to plaintiff's witness as to whether plaintiff had told witness at any time whether plaintiff was receiving relief from one of the relief agencies was not prejudicial error where there was no offer of proof.

4. Appeal and error ⇨205

Evidence ⇨474(14)

Where witness had testified that she had seen plaintiff sign her signature, sustaining objection to questions as to whether witness was able to identify plaintiff's handwriting and as to whether witness could say signature on back of check was the signature of plaintiff was error, but the ruling was not prejudicially erroneous where no offer of proof was made. Code Civ.Proc. § 1943.

5. Executors and administrators ⇨221(3)

In action to recover reasonable value of services rendered to deceased, where it was shown that checks drawn by deceased were received by plaintiff's creditor, and that plaintiff was given credit on her indebtedness for amount of the checks, the checks were admissible as part of documentary evidence showing that plaintiff obtained a monetary benefit by reason of the issuance of the checks.

6. Evidence ⇨197

In action to recover reasonable value of services rendered to deceased, where checks drawn by deceased were received by plaintiff's creditor and plaintiff was given credit on her indebtedness for amount of checks, even though plaintiff's signature on back of checks was not shown to be genuine, the checks were admissible in view of fact that her signature on her claim was in evidence, since jury could have used claim for purpose of comparison.

7. Appeal and error ⇨1058(1)

In action for reasonable value of services rendered to deceased, where checks drawn by deceased were received by plaintiff's creditor, failure to receive the checks in evidence was not prejudicial error in view of uncontradicted evidence that payments as shown by the checks were credited to plaintiff's account.

8. Trial ⇨234(9)

In action for reasonable value of services rendered to deceased where checks drawn by deceased and received by creditor of plaintiff were erroneously excluded, but uncontradicted evidence showed that the payments made by checks were credited to plaintiff's account, instruction that jury should not consider any evidence offered and rejected or which had been stricken out was not objectionable as precluding jury from considering the uncontradicted evidence.

9. Trial ⇨114

A statement of counsel during a trial is not to be considered as evidence unless such statement is made as an admission or stipulation conceding the existence of a fact.

10. Trial ⇨133(2)

In action for reasonable value of services rendered to deceased, where check drawn by deceased and received by creditor of plaintiff who had been given credit for amount of checks had not been re-

ceived in evidence, but defendant's counsel stated that check showed on its face that it was a check of deceased, admonition of court that jury should disregard statement of defendant's counsel was proper.

11. Trial $\Rightarrow$ 89

In action against administratrix of deceased's estate for reasonable value of services rendered by plaintiff to deceased, administratrix' testimony that plaintiff asked administratrix what she thought about settling was properly stricken out, where counsel for administratrix failed to inform court concerning what he intended to prove.

12. Evidence $\Rightarrow$ 213(5)

It is not permissible to show that a party to litigation has offered to compromise the case, and such rule not only excludes offer to compromise but also all negotiations with relation thereto.

13. Executors and administrators $\Rightarrow$ 210

Frauds, statute of $\Rightarrow$ 138(4)

Where deceased and plaintiff made an agreement that if plaintiff would perform certain services for deceased he would devise and bequeath property to plaintiff but deceased failed to fulfill his part of agreement, the law implied an agreement, on his death, to pay plaintiff the reasonable value of services she had rendered, and statute of frauds was not applicable. St. 1937, pp. 197, 198, 199, 200, §§ 200, 204, 205, 210, 215, 219; Civ.Code, § 1624, subd. 6.

14. Executors and administrators $\Rightarrow$ 210

Where services have been performed under an agreement that compensation would be provided for in a will, the reasonable value of such services may be recovered if no provision is made in the will for compensation for the services.

15. Limitation of actions $\Rightarrow$ 49(2)

Where services were rendered under an agreement that compensation would be made therefor in will, cause of action for reasonable value of services did not arise until death of promisor.

16. Costs $\Rightarrow$ 260(4)

In action against administratrix of deceased's estate to recover reasonable value of services rendered to deceased and to recover possession of automobile and two automobile ownership certificates, where administratrix appealed from judgments for plaintiff on both claims but did

not contend on appeal that judgment that plaintiff should recover automobile and automobile certificates should be reversed, penalty for taking frivolous appeal would not be assessed in view of fact that decision that there was prejudicial error in ruling regarding admissibility of evidence would have applied to both judgments.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Gladys R. Armstrong, now known as Gladys R. Wilcox, against Alma Kline, as administratrix of the estate of Andrew W. Flick, deceased, to recover reasonable value of services rendered and to recover possession of an automobile and two automobile ownership certificates. Judgment for plaintiff, and defendant appeals.

Affirmed.

Carson B. Hubbard, of Huntington Park, and James V. Brewer, of Los Angeles, for appellant.

Paul Vallee and S. Bernard Wager, both of Los Angeles, for respondent.

PARKER WOOD, Justice.

This is an action to recover the reasonable value of services rendered, and to recover possession of an automobile and two automobile-ownership certificates. In a jury trial, plaintiff obtained a judgment for \$7500 for services rendered and a judgment that she have and recover the automobile and the certificates. Defendant appealed from both judgments.

Although an appeal was taken from the judgment that plaintiff have and recover the automobile and the certificates, no contention is made in appellant's briefs or in her oral argument that said judgment should be reversed.

Appellant asserts on appeal that the trial court erred prejudicially in refusing to receive certain evidence offered by appellant, and that "the verdict and judgment are contrary to the law." Since no contention is made that the evidence is not sufficient to support the judgment as to services rendered (or the other judgment), it will not be necessary to state the evidence in detail.

Andrew W. Flick was the owner of a lot, store building and liquor store at

8508 South Compton Avenue in Los Angeles, and he lived in the rear of the store. He died on March 31, 1941. Plaintiff duly served and filed, in the probate proceedings in the matter of his estate, her claim as a creditor of said deceased, which claim was in substance as follows: That said deceased "about July 3, 1936, orally agreed to give, devise and bequeath to Gladys R. Armstrong [plaintiff] * * * in his Last Will, his lot, building and liquor store business * * * located at 8508 South Compton Avenue, Los Angeles, California, as stated by deceased of the value of the sum of \$9500.00 * * * amply provide for claimant [plaintiff] in said Last Will of deceased, and assist claimant in opening, conducting and operating her dress shop business to be located at 8510 S. Compton Avenue, Los Angeles, * * * in consideration of claimant moving her residence to and opening, conducting and operating her said dress shop business at said location of dress shop business, of assisting deceased in operating his said premises and liquor business, acting as his housekeeper and occasionally going out with deceased to his friends' homes. That on about April 15, 1937, deceased opened his real estate office and business at 8506 S. Compton Avenue, Los Angeles * * * and at the request of deceased and as additional consideration for and as part of said agreement, claimant assisted deceased in the conducting and operating of said real estate business to about July 15, 1939. On about May 8, 1939, at the request of and with the consent of deceased, claimant opened and continued to operate her cleaning shop business * * * to March 31, 1941. In consideration of said agreement claimant on about July 3, 1936, moved her said residence to said premises and on about July 15, 1936, opened and continued to operate her said dress shop business at said location * * * assisted deceased in operating said premises and liquor business and acted as housekeeper for deceased in said premises and liquor business daily from about 6 o'clock a.m. to about 10 o'clock p.m., and occasionally went out with deceased to deceased's friends' homes, from said about July 3, 1936, to March 31, 1941, and continues to operate said dress shop business and cleaning shop business. That the reasonable value of all of said hereinabove items is the sum of \$9500.00."

Said creditor's claim stated further: "That deceased failed to give, devise and bequeath to claimant in his Last Will, said premises and liquor business and amply provide for claimant thereon and failed and refused to carry out and perform the provisions of said agreement on his part to be performed; that claimant has performed all the provisions of said agreement on her part to be performed." The claim also included statements that said administratrix (defendant) was withholding from, and refusing to deliver to, plaintiff two certificates of title to two certain described automobiles, which automobiles were purchased by claimant from her personal funds and were owned by claimant; that one of the automobiles was in the possession of claimant at the time of making the claim; and that the reasonable value of the certificates and automobiles was \$150.

The first amended complaint, upon which the action was tried, included allegations which were in substance the same as the statements in said creditor's claim.

The answer of defendant admitted that Flick did not make a will and that he did not give, devise, or bequeath anything to plaintiff.

[1] The evidence was sufficient to support findings that the statements in said creditor's claim as to the making of the agreement, the fulfillment of the terms thereof by plaintiff, and the failure of Flick to perform his part of the agreement, were true.

The real estate office, the liquor store, the dress shop, and the cleaning shop were located at 8506, 8508, 8510, and 8512 South Compton Avenue, respectively. The dress shop adjoined the south side of the liquor store, and the cleaning shop adjoined the south side of the dress shop. Doorways were cut through the dividing walls of those places. The real estate office was immediately north of the liquor store, but did not adjoin it. The four places were connected by a buzzer system so that when the front door of any of those places was opened a buzzer would sound in the other places. The living quarters at the rear of the liquor store consisted of a living room, bedroom, breakfast room, kitchen, and furniture. At the rear of the living quarters Flick had a garage, a garden, and places where he, at times, kept rabbits and chickens.

Upon objection having been made by defendant (under the provisions of section 1880, subdivision 3, of the Code of Civil Procedure) to the giving of testimony by plaintiff, plaintiff did not testify concerning her claim for the reasonable value of services rendered. Plaintiff called 13 witnesses concerning the issue of services rendered and the agreement to make a will. Nine of those witnesses testified that they frequently saw plaintiff working in the liquor store and doing housework in the living quarters of Flick in the rear of the liquor store. Several of those witnesses testified that such work included cooking, scrubbing floors and walls in the store and kitchen, washing windows, and waiting on customers in the liquor store from early morning to midnight. Five witnesses testified that they heard Flick say in substance that he would leave the liquor store and liquor store property to plaintiff if anything should happen to him. Two witnesses testified that Flick said he had not paid any wages to plaintiff. Four witnesses testified that they saw plaintiff take care of Flick when he was sick. He was sick on 7 or 8 occasions, each of which occasions extended over a few weeks. One witness testified that she frequently saw plaintiff iron Flick's laundry.

The testimony of plaintiff concerning the automobile and the two certificates of ownership was in substance that plaintiff purchased the two automobiles referred to in the certificates with her own money; that the certificates were issued in her name as owner; that she endorsed them and placed them in decedent's safe deposit box for safe keeping; that defendant locked the garage at the rear of the liquor store where one of the automobiles was kept and refused to permit plaintiff to have possession of that automobile; and that the other automobile was in the garage at the rear of plaintiff's dress shop and plaintiff had possession of that automobile.

[2,3] Defendant asked one of plaintiff's witnesses on cross-examination: "Did you know that in 1936, in July of 1936, Gladys [plaintiff] was receiving relief from one of the relief agencies?" Plaintiff's objection thereto upon the grounds that it called for a conclusion of the witness and was not proper cross-examination was sustained. Defendant thereupon asked the witness: "Did Gladys tell you at anytime whether she was receiving relief from one of the relief

agencies?" Plaintiff's objection thereto upon the ground that it was not impeachment and not proper cross-examination was sustained. Defendant's argument, in support of her contention that said questions were proper, is that she was entitled to show that plaintiff "possessed little or nothing in the way of worldly goods" when she became associated with Flick, and then was entitled to show that she owned a dress shop and a cleaning shop at the time of Flick's death, in order that a comparison of plaintiff's status at the beginning and close of the association might be made when considering whether plaintiff accumulated sufficient property during her association with Flick to compensate her fully for her alleged services. As to the first question, it was immaterial whether the witness had knowledge of the fact implied therein that plaintiff was receiving relief, and the question was not proper cross-examination. That ruling was not erroneous.

As to the second question, an answer thereto in the affirmative would have been evidence of an admission by plaintiff that she had received relief from a relief agency, and such an admission would have been material evidence for the purpose stated in defendant's argument above mentioned. There was no offer of proof, however, that the answer would be in the affirmative and there was no offer to prove that plaintiff did receive relief in July, 1936, or at all. It was not prejudicial error to sustain the objection to that question.

Defendant contends further that the court erred in refusing to receive in evidence 13 checks, totaling \$111.58, which were drawn by Andrew W. Flick, and were payable to G. R. Armstrong. A witness called by defendant testified that 6 of said checks, totaling \$38.50, were received by him, a manufacturer of laundry equipment, in payment of amounts due to him as monthly installments under a written contract whereby plaintiff agreed to purchase from him certain electric equipment which had been installed in her cleaning shop. There was no testimony that plaintiff endorsed any of those checks. Defendant offered the 6 checks in evidence. Plaintiff objected to said offer upon the ground that there was no showing that plaintiff endorsed the checks or had anything to do with them. The trial judge said: "Will you connect it up further

later, Mr. Hubbard [counsel for defendant]?" Counsel for defendant replied: "Yes, I think I can connect it up." The trial judge then said: "All right. * * * You may offer them later. The objection is sustained at this time." The only effort "to connect it up" later is referred to hereinafter. Said 6 checks were not offered in evidence later.

A witness called by defendant testified that 7 of said checks (other than the 6 checks just mentioned), totaling \$73.08, were received by him, the credit manager of a laundry machine company, in payment of amounts due the company as monthly installments under a written contract whereby plaintiff agreed to purchase from the company a pressing machine and boiler. There was no testimony that plaintiff endorsed any of those checks. Defendant offered the 7 checks in evidence. Plaintiff objected to said offer upon the ground that there was no foundation for proof of the signature of plaintiff on any of those checks. The trial judge said: "I think you better lay a further foundation. They are already marked." Then counsel for the defendant asked said witness the following questions and the witness gave the following answers:

"Q. Do you know the signature of G. R. Armstrong? A. No, I do not.

"Q. You can't say whether or not that name G. R. Armstrong on the back of the checks was signed by her or by somebody else? A. I couldn't tell."

Thereupon counsel for defendant said: "We will leave them for identification and I will try to identify them further."

The trial judge then said: "All right. They are already marked for identification and you may try to identify them further."

[4] The only effort "to connect it [endorsements] up further later" or "to identify them [endorsements] further" was the calling of another witness by defendant and addressing questions to her concerning her qualifications to testify as to plaintiff's signature. That effort is shown by the following excerpt from the transcript:

"Q. By Mr. Hubbard: Have you seen Gladys Armstrong sign her name? A. Yes.

"Q. Have you seen that on many occasions? * * * A. No. I have seen her sign it.

"Q. How many times have you seen her sign her signature? A. There was two different occasions on which she signed three papers.

"Q. And from observing these signatures could you say you are able to identify her handwriting?

"Mr. Vallee: * * * I object to that on the ground it is calling for a conclusion and opinion of the witness. Whether she can say or not is a matter for your Honor to say, whether she can or cannot.

"The Court: The objection is sustained.

"Q. By Mr. Hubbard: I will now ask you whether or not you can say the signatures on the back of these checks are the signatures of Gladys Armstrong?

"Mr. Vallee: Exactly the same question, and it is objected to.

"The Court: Yes. The objection is sustained."

On appeal the defendant (appellant) does not assign said ruling as error. The ruling, however, was erroneous, the witness having said that she had seen plaintiff write. Section 1943, Code of Civil Procedure. Defendant made no offer of proof that the witness would testify that any of the signatures was the signature of plaintiff, and the ruling was not prejudicially erroneous.

[5-7] The second group of checks, relating to the pressing machine and boiler, were offered in evidence later, and at that time counsel for defendant said: "While it is true I have not been able to prove the signature of Gladys Armstrong, the facts in the case show—" and "This group of checks it has been testified were given in payment of the boiler and the press that were located in this place, and charged to this shop, and I think that is sufficient identification to permit them to be introduced here in evidence. I don't think it is necessary to show how the endorsement was placed on there or by whom. The check on its face shows it is a check of Andrew W. Flick." It was not shown that plaintiff endorsed any of the checks; however, it was shown that the checks drawn by Flick were received by persons to whom plaintiff was indebted for equipment in her cleaning shop and that plaintiff was given credit upon her indebtedness for the amounts of the checks. The testimony was that the amounts credited to plaintiff's accounts were the amounts

shown on the checks drawn by Flick, and that said amounts were so credited by reason of the receipt of said checks issued by Flick. Plaintiff obtained a benefit to the extent of the total amount of the checks, irrespective of whether or not she endorsed the checks. The account sheet showing the payments, by reason of the checks, as to the pressing machine and boiler were offered in evidence and no objection was made to that offer; however, no ruling was made as to the offer. The checks should have been received in evidence as part of the documentary evidence showing that plaintiff obtained a monetary benefit by reason of the issuance of said checks. Furthermore, the checks should have been received in evidence for the reason an exemplar of plaintiff's signature was in evidence at the time the court sustained the objection (her signature on her creditor's claim) which the jury could have used for purposes of comparison with the endorsements on the checks in considering whether plaintiff endorsed the checks. *Castor v. Bernstein*, 1906, 2 Cal. App. 703, 706, 84 P. 244. It is to be noted, however, that counsel for defendant did not state to the court that he offered the checks in order that such comparison might be made. The fact that said payments were made by Flick in behalf of plaintiff was material not only on the issue as to the amount due to plaintiff for services rendered, if any, but also on the issue as to whether there was an oral agreement to devise the liquor store to plaintiff, and also on the issue as to whether plaintiff used her own money or Flick's money in purchasing the automobiles. Among other things, such payments by Flick might have been gifts from him to plaintiff, or in payment or part payment for services rendered, or in compliance with a mutual-assistance-agreement between Flick and plaintiff (as defendant asserts in her brief) whereby they were to assist each other in the operation of their places of business. Defendant made no offer of proof that the checks were drawn by Flick in payment of services rendered, or that they were drawn in compliance with such a mutual-assistance-agreement; however, such offer was not necessary. The failure to receive the checks in evidence was not prejudicial error for the reason there was uncontradicted testimony by witnesses called by defendant, and uncontradicted documentary evidence as shown by the account sheet offered in evi-

dence by defendant (to which no objection was made by plaintiff), that payments as shown by said 7 checks were credited to plaintiff's accounts by reason of the issuance of said checks by Flick. The matter of crediting the account of plaintiff by reason of the issuance of the checks by Flick was before the jury for its consideration.

[8] Appellant asserts, however, that the court instructed the jury "that they could not regard any of the testimony given relative to the checks and they must treat such testimony as if they had never heard the same." The instruction given by the court, so referred to by appellant as an instruction embodying said assertion, was in part as follows: "You must not consider for any purpose any evidence offered and rejected, or which has been stricken out by the court; such evidence is to be treated as though you never had heard it." The evidence that was offered and rejected was the checks. The evidence that plaintiff's accounts for equipment in her shop were credited, by reason of the checks drawn by Flick, was not rejected. The instruction given by the court, so referred to by defendant, does not bear the interpretation which defendant placed upon it that the jury "could not regard any of the testimony given relative to the checks."

[9, 10] Defendant also asserts that "we find the counsel for the respondent causing the Court to admonish the jury to disregard the very evidence that respondent now claims was and is before the jury [referring to the evidence that the checks were credited to plaintiff's accounts]." Said assertion is based upon the following: "Mr. Hubbard: This group of checks it has been testified were given in payment of the boiler and the press * * * and I think that is sufficient identification to permit them to be introduced here in evidence. I don't think it is necessary to show how the endorsement was placed on there or by whom. The check on its face shows it is a check of Andrew W. Flick. Mr. Vallee: Just a minute. I charge counsel again with probably inadvertently, though he is, doing something he shouldn't do, telling what the evidence may be 'if it is introduced, to this jury. The Court: I will instruct the jury to disregard any statements made by counsel." (After further discussion, all of which does not appear in the transcript, the court said,

"I will sustain the objection.") A statement of counsel made during a trial is not to be considered as evidence unless such statement is made as an admission or stipulation conceding the existence of a fact. The admonition of the court that the jury should disregard said statement of counsel for defendant was proper.

[11,12] Defendant also contends that the court erred in refusing to receive evidence of an admission against interest made by plaintiff. The defendant was called as a witness by her counsel and was asked by her counsel whether the plaintiff had a conversation with her (defendant) relative to the filing of a claim by plaintiff against the estate of Flick. Defendant replied in the affirmative, and after other questions and answers concerning the time and place of, and the persons present at, the conversation, the following occurred:

"Q. And what was said, if anything, at that time [September, 1941] by Mrs. Armstrong [plaintiff] in your presence?

"Mr. Vallee: Just a moment. I object to that on the ground there is no evidence of any compromise—

"The Court: I don't know what it is.

"Mr. Vallee:—which is admissible in evidence.

"Mr. Hubbard: This is not any evidence of a compromise, as I understand.

"The Court: The objection is overruled, subject to a motion to strike, if not proper. You may answer.

"Q. By Mr. Hubbard: What was the conversation? A. Well, she called me out of the liquor store over into her cleaning shop and she asked me what I thought about settling, and I told her that—

"Mr. Vallee: Now,—

"The Court: That is stricken out; the jury will disregard that."

In *Boyes v. Evans*, 1936, 14 Cal.App.2d 472, at page 479, 58 P.2d 922, at page 926, it was said: "It is a well-established rule of law that it is not permissible to show that a party to litigation has offered to compromise the cause. The rule not only excludes the offer to compromise, but also all negotiations with relation thereto." In *H. D. Taylor Co. v. J. H. Jonas & Sons*, 1931, 118 Cal.App. 208, at page 211, 4 P.2d 797, at page 799, it was said: "Counsel's own question about 'trying to settle' clearly warranted the court's conclusion that he was inquiring into an offer to compromise and such evidence was in-

admissible." The purported conversation was in September, 1941. The testimony of counsel for defendant (given after said testimony by defendant) showed that he had received a letter from plaintiff about May 7, 1941, wherein plaintiff claimed \$912 for two years' services rendered to Flick as clerk and housekeeper. His testimony also showed that prior to receiving the letter he had told plaintiff she could not recover for services which were rendered more than two years preceding Flick's death unless she had a contract with Flick. It appears therefore that at the time of the purported conversation wherein the witness said, "she asked what I thought about settling," that a claim had been filed by plaintiff with the administratrix (the said witness). There was therefore, at the time of the purported conversation, an issue between the plaintiff and the witness which could have been the subject of a compromise. If, as appellant asserts, the statement of the witness was not to be evidence of an attempted compromise, it was the duty of counsel for defendant to have informed the court concerning what he intended to prove, but he failed to so inform the court. It was not error to exclude the answer relative to "settling."

The last contention of defendant is that "a contract in favor of the plaintiff could not be implied or enforced because prohibited by law." Her argument in support of that contention is that "the case was tried upon the theory of a long line of decisions holding that where services have been performed and accepted the law will imply a contract to pay the reasonable value of such services at the conclusion thereof," and that "in cases where the services have continued until the time of death, payment of such services was not due until the date of death"; and that "All of the aforesaid decisions are in direct conflict with the labor laws of the State of California." She cites several sections of the Labor Code (enacted in 1937, St.1937, p. 185) which, insofar as material here, provide in substance as follows: Section 200, that "'Wages' includes all amounts for labor performed by employees," and that "'Labor' includes labor, work, or service whether rendered * * * under contract * * * or other agreement if the labor * * * is performed personally by the person demanding payment"; section 204, that certain wages are "payable twice during each calendar month"; section 205, that "in

household domestic service, when the employees * * * are boarded and lodged by the employer, the wages * * * shall become due and payable once in each calendar month"; section 210, that "every person who fails to pay the wages * * * as provided in sections 204 and 205, shall forfeit to the State the sum of ten dollars for each failure"; section 215, that "Any person * * * who violates any provision of sections 204, 205 * * * is guilty of a misdemeanor"; and section 219, that "no provision of this article can in anyway be contravened or set aside by a private agreement, whether written, oral, or implied." Appellant asserts that said sections of the Labor Code "are prohibitory and being for the public welfare and therefore any contract either express or implied in contravention of them is void and unenforceable." She states further that by reason of said provisions of the Labor Code that "an implied contract to pay for services rendered cannot be the basis for a suit to recover the reasonable value thereof."

[13-15] These points were not presented during the trial, but were first presented upon the motion for a new trial. Apparently it is defendant's contention that if plaintiff was entitled to wages for her alleged services and if she failed to collect the wages each month, as provided in section 204 or section 205 of the Labor Code, she forfeited the wages. It is not necessary to consider further the contention of defendant based upon said sections of the Labor Code for the reason this action is not predicated upon an agreement to pay wages. The implied finding of the jury was that there was an agreement between Flick and plaintiff that if plaintiff would perform certain services for Flick that he would devise and bequeath certain property to her. Under such an agreement, if Flick failed to fulfill his part of the agreement the law implied an agreement, upon his death, to pay plaintiff the reasonable value of the services she had rendered. This is not an action upon an express contract to pay wages or

upon an express contract to pay for services rendered. The provisions of section 1624, subdivision 6, of the Civil Code (the statute of frauds) are not applicable herein. This is an action for the reasonable value of services rendered. If services have been performed under an agreement that compensation for the services would be provided for in a will, the reasonable value of such services may be recovered if no provision was made in the will for compensation for the services. *Winder v. Winder*, 1941, 18 Cal.2d 123, 127, 114 P.2d 347, 144 A.L.R. 935; *Reeves v. Vallow*, 1940, 16 Cal.2d 95, 97, 104 P.2d 1017; *Long v. Rumsey*, 1938, 12 Cal.2d 334, 342, 84 P.2d 146. Under such an agreement, as shown by the implied findings of the jury that plaintiff was to be compensated by will for services rendered, a cause of action for the reasonable value of services did not arise until the death of Flick and the statute of limitations did not bar any part of the period of continuous services. *Lloyd v. Kleefisch*, 1941, 48 Cal.App.2d 408, 412, 120 P.2d 97.

[16] Plaintiff asserts that since defendant appealed from the judgment that plaintiff have and recover the automobile and the two certificates and has not contended on appeal that said judgment should be reversed, a penalty for taking a frivolous appeal as to said judgment should be assessed. Although defendant did not contend that said judgment should be reversed, the points presented by defendant as to the judgment for the reasonable value of services rendered applied also to the judgment concerning the automobile and the certificates. A decision on appeal that there was prejudicial error in the rulings of the court as to the admissibility of evidence concerning the judgment for the reasonable value of services would have applied also to the other judgment. A penalty should not be assessed by reason of said appeal.

The judgments are affirmed.

DESMOND, P. J., and BISHOP, Justice pro tem., concur.

64 Cal.App.2d 805

HYMAN v. TARPLEE et al. (WOODWARD, Intervener).

Civ. 12633.

District Court of Appeal, First District,
Division 1, California.

June 10, 1944.

1. Gifts ⇨49(5)

Evidence sustained finding that bank account in name of decedent's first wife as trustee for decedent represented money given to first wife by decedent after his divorce from her, and that no part of such funds belonged to decedent or his estate.

2. Gifts ⇨4

The essentials of a valid "gift" are competency of donor to contract; a voluntary intent of donor to make a gift; delivery, actual or symbolical, amounting to a transfer of title; acceptance, actual or imputed; a complete divestment of all control by donor; and a lack of consideration in return for gift.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift".

3. Gifts ⇨32(1)

A gift of donor's own note or check is not enforceable by donee against donor or his estate in absence of an estoppel, since note or check amounts to a promise to make a gift in future.

4. Gifts ⇨32(1)

Where alleged donor is payee of note or check, rule that a gift of donor's own note or check is not enforceable has no application, since title passes to note or check of which donor is payee upon physical delivery to donee even without endorsement.

5. Gifts ⇨49(5)

Evidence that donee placed money given to her by donor in bank account in her name as trustee for donor, and that donee was disturbed over possibility that donor might need hospital and medical care, authorized finding that donee unequivocally accepted gift.

6. Gifts ⇨5(3)

Trusts ⇨34(1)

Donee's deposit of money given to her by donor in name of donee as trustee for

donor does not necessarily create a trust in which donor has a present interest and is not necessarily inconsistent with a completed gift.

7. Trusts ⇨34(1), 59(1)

A deposit in name of depositor as trustee for third party, where depositor retains right to withdraw all money deposited and third party is entitled to balance only upon death of depositor if no other disposition has been made of fund by depositor, is a "tentative trust" revocable at will, and, in absence of agreement to contrary, third party has no right to withdraw money prior to death of depositor.

See Words and Phrases, Permanent Edition, for all other definitions of "Tentative Trust".

8. Pleading ⇨236(1)

Where defendant's new attorneys, who were engaged after original attorney died, discovered that original answer incorrectly set forth facts, trial court did not abuse its discretion in permitting filing of an amended answer several weeks prior to trial.

9. Appeal and error ⇨959(1)

Pleading ⇨236(1)

The granting or refusing of leave to amend an answer is within sound discretion of trial court, which discretion will seldom be disturbed where exercised for purpose of allowing true facts to be alleged.

10. Pleading ⇨255

The rule that court should be liberal in allowing amendments when they do not seriously impair rights of opposite party is particularly applicable to answers.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Joseph G. DeForest, as executor of the last will of George H. Woodward, also known as George Holmes Woodward, deceased, against Elizabeth K. Tarplee and Irene Woodward Troy to recover a sum deposited in a bank account in name of first-named defendant as trustee for decedent, wherein Mary G. Woodward, guardian of the persons and estates of Milo Woodward and Beverly Woodward, minors, intervened. Joseph G. DeForest died and Joseph Leo Hyman was

substituted as plaintiff. From a judgment for defendants, plaintiff and intervenor appeal.

Affirmed.

Fred L. Berry, of San Francisco, for appellant.

Joseph Leo Hyman, of San Francisco, for intervenor appellant.

Fabius T. Finch and Paul F. Fratossa, both of San Francisco, for respondents.

PETERS, Presiding Justice.

Joseph G. DeForest, as executor of the will of George H. Woodward, brought this action against Elizabeth K. Tarplee and her daughter, Irene Woodward Troy, to recover \$4,071.26 deposited in a bank account in the name of Elizabeth K. Tarplee as trustee for George H. Woodward, on the theory that the deposit belonged to the estate of decedent. DeForest has since died and Joseph Leo Hyman substituted as plaintiff. Mary G. Woodward, as guardian of the persons and estates of her two minor daughters, was permitted to intervene. Her legal position is identical with that of the plaintiff. On the theory that Woodward, prior to his death, made a completed gift to Mrs. Tarplee of the money in question, which was accepted by her, the trial court determined that Mrs. Tarplee owned the deposit. The plaintiff and intervenor appeal. Their main contention is that there is no evidence to show a completed gift.

The evidence most favorable to respondents is as follows: The decedent, George H. Woodward, was married three times. Mrs. Tarplee was his first wife, and defendant, Mrs. Troy, is their daughter. Woodward and Mrs. Tarplee were married in 1899 and divorced in 1907. There is some evidence that during their marriage Mrs. Tarplee loaned her husband \$1,000 of her own money to finance a bicycle shop, which sum was never repaid. There was no property settlement at the time of the divorce, nor any provision for alimony. After the divorce the parties remained on friendly terms, and Woodward paid his former wife for the support and education of their daughter. In 1920 the daughter left college and married. Woodward strongly disapproved of the marriage, and, as a result, became estranged from his daughter. Thereafter, for many years, he did not see her. He did remain on friendly terms with Mrs. Tarplee, and, for a period

of about five years, ending about 1923, he had his mother board with her.

Woodward married a second time. This marriage lasted but a few years, terminating in a divorce. In that proceeding he paid his second wife \$30,000 in cash, and gave her a life estate in some valuable property in San Francisco. In 1923 he married a third time, this time to the intervenor Mary G. Woodward. Two children were born of this marriage.

After his divorce from respondent, Woodward's new business, a machine shop, prospered. He purchased a home in Hillsborough in which he and his third wife and their two children lived. He deeded this house to his third wife, together with an adjoining piece of vacant land. By his will he left his business, appraised at \$40,000, to his two children by his third wife, and also left them some insurance. During the period 1920-1937 Woodward remained estranged from his daughter by his first wife, and from 1923 to 1937 he saw Mrs. Tarplee on but one or two occasions.

By 1937 Woodward's third marriage was on the verge of collapse. At that time he was suffering from a heart ailment, and was highly nervous and excitable. He left his Hillsborough home and took a room in San Francisco. Shortly thereafter he called upon Mrs. Tarplee and became reconciled with his daughter, the respondent Irene, and her daughter, his grandchild. Irene, who had divorced her husband, was living with her mother, and was working. As time went on Woodward became very friendly with this family. He called every morning and gave his daughter a ride to work, and called for her nearly every night and rode her home. Nearly every day he returned to the Tarplee house after taking his daughter to work and had breakfast with Mrs. Tarplee, and would then rest. Mrs. Tarplee would put up his lunch and he would then go to his shop. He was too nervous to remain there any length of time, and many times he returned to the Tarplee home in the afternoon for a rest, or he would take Mrs. Tarplee for a ride. Nearly every evening he had dinner at the Tarplee house. Both he and his daughter enjoyed fighting and wrestling matches, and several nights a week he escorted her to such exhibitions. On Sunday he frequently took his granddaughter to the ball game.

During this period he stated, on many occasions, that he wanted to do something

for his first wife, their daughter and granddaughter. He told them that he had a single premium five-year endowment policy for \$5,000 which he had purchased with funds that were not community property of himself and his third wife, and that he wanted Mrs. Tarplee and his daughter to have this money. He was very appreciative of the care and consideration given to him by Mrs. Tarplee and their daughter, and also wanted to repay Mrs. Tarplee for the original \$1,000 she had loaned him. He expressed the thought that if he left the \$5,000 to them by will, that there would be considerable trouble. He expressed these feelings many times before the date of the questioned gift. In June of 1938, before the due date of the policy, he went to the insurance company, and had the policy reduced to \$2,500, and cashed in the other \$2,500. For this he received a check from the insurance company for \$2,066.68. He brought this check to the Tarplee home, there endorsed it, and handed it to Mrs. Tarplee stating, according to her testimony: "I want you to have it, if I would leave it, there would be too much trouble. * * * Well, I have got this money and I want you to have it, that is all I can do for you," and he says, "you know," he says, "I owe you a thousand dollars, and," he says "I am going to give you a power of attorney on a thousand dollars that I have in the bank, and," he says, "if I need anything you take it out of that." After endorsing the check, he handed it to her and stated: "Here, this is yours." Mrs. Tarplee further testified that when he handed the check to her she stated: "George, you really hadn't ought to give me this, suppose you might need this yourself." He replied: "I won't need it, it is for you; that is all I can do for you and I want you to have it * * * you know, I owe you that thousand and I will try to make up for what I didn't give you and Irene." Mrs. Tarplee testified that she then suggested that the money be deposited in the bank in her name with Woodward as beneficiary; that she had such an account with her daughter and understood that if anything happened to her, the daughter would get that account; that if anything happened to her and her daughter she thought Woodward should get the money here involved.

On cross examination she testified that she took the first check "with the under-

standing that it was for me * * * " that when he handed her the check he stated: "That is for you. That is yours and I don't want any part of it. I will be taken care of, I have the shop. * * * This check is yours. Here, take it."

The respondent Mrs. Troy corroborated the story told by her mother in all important particulars.

After the check had thus been handed to Mrs. Tarplee, she put it in her purse and kept it for several days until she had an opportunity to go to the bank with Woodward. The check was deposited in a new account in the name of "Elizabeth K. Tarplee, trustee for George H. Woodward." Mrs. Tarplee kept possession of the bank book.

A few days after the account was opened, Woodward cashed in the balance of the insurance policy and received a check for \$2,004.58. Either he or Mrs. Tarplee deposited this check in the account. Mrs. Tarplee first testified that this check was also endorsed and handed to her and that she deposited it, but later she testified that Woodward may have deposited the second check. The evidence is clear, however, that Woodward intended this second check to be part of the same transaction with the first check. After the deposit of the second check the account had a balance of \$4,071.26. Mrs. Tarplee withdrew \$71.26, and apparently divided it with Woodward in order that the account should have a balance of an even \$4,000. Mrs. Tarplee kept the bank book, and no further money was withdrawn from the account until after Woodward's death, which occurred several weeks later. After Woodward's death she withdrew the money and opened another trust account in her name as trustee for her daughter.

As was indicated above, about the time of these transactions Woodward also gave Mrs. Tarplee a power of attorney to draw on an account of his in which there was \$1,000 on deposit. This was done, according to her testimony, in order that, if he became ill, she could secure money to pay his expenses. No money was withdrawn from this account prior to Woodward's death. After his death Mrs. Woodward attempted to withdraw this money to pay his funeral expenses, but the bank, having heard of Woodward's death, properly refused payment. This money, of course, belongs to the estate.

[1,2] This is a fair summary of the evidence produced by the respondents. It seems too clear to require extended comment that such evidence supports the conclusion of the trial court that there was a completed gift of this money to Mrs. Tarplee. The essentials of a valid gift are thus summarized in 13 Cal.Jur. p. 32, § 1: "The essentials of a valid gift are (1) competency of the donor to contract, (2) a voluntary intent on the part of the donor to make a gift, (3) delivery either actual or symbolical, amounting to a transfer of title, (4) acceptance, actual or imputed, (5) a complete divestment of all control by donor, and (6), a lack of consideration in return for the gift."

[3,4] Appellants urge that the evidence fails to show a delivery by Woodward or an unequivocal acceptance by Mrs. Tarplee, and fails to show that the money was not in fact held in trust for Woodward. So far as delivery is concerned, appellants place their main reliance on the rule that a gift of the donor's own note or check is not enforceable by the donee against the donor or his estate, in the absence of an estoppel, for the reason that it only amounts to a promise to make a gift in the future, and is no more enforceable than any other promise to make a gift. That is undoubtedly the law. *Coon v. Shry*, 209 Cal. 612, 289 P. 815; *Tracy v. Alvord*, 118 Cal. 654, 50 P. 757; *Wisler v. Tomb*, 169 Cal. 382, 146 P. 876; *Hironymous v. Hiatt*, 52 Cal.App. 727, 199 P. 850. But that rule has no application to the facts of this case. That rule only applies where the alleged donor is the maker of the note or the check. It has no application at all to a case, such as the present one, where the alleged donor is the payee of the note or check. In such event, just as in the case of other choses in action given the requisite intent, title passes to the note or check upon physical delivery to the donee, even without endorsement. *Edwards v. Wagner*, 121 Cal. 376, 53 P. 821; *Druke v. Heiken*, 61 Cal. 346, 44 Am. Rep. 553; *Eckstrom v. Brooks*, 115 Cal. App. 727, 2 P.2d 207; see cases collected 38 C.J.S., Gifts, § 54, p. 840; 24 Am.Jur. § 83, p. 773.

[5] So far as acceptance is concerned, appellants urge that Mrs. Tarplee did not unequivocally accept the proffered gift, but insisted that Woodward retain some interest therein. It is far more reasonable to

interpret the evidence as indicating that Mrs. Tarplee did unequivocally accept the gift, but wanted to assure Woodward that if anything happened to her and their daughter the money would be returned to him. She obviously was disturbed over the possibility that he might need hospital and medical care and might be unable to get ready cash to pay for them. That problem was taken care of by the \$1,000 deposit.

[6,7] So far as the form of the deposit is concerned, a trust in which Woodward had a present interest was not necessarily created thereby. Such deposits are frequently used where the so-called trustee retains the right to withdraw all of the money deposited, and the so-called beneficiary is entitled to the balance only upon the death of the depositor, if no other disposition has been made of the fund by the depositor. In *re Estate of Alberts*, 38 Cal. App.2d 42, 100 P.2d 538. Such trusts are "tentative trusts," revocable at will, and in the absence of agreement to the contrary, the beneficiary has no right to withdraw the money prior to the death of the trustee. In *re Totten*, 179 N.Y. 112, 71 N.E. 748, 70 L.R.A. 711, 1 Ann.Cas. 900. For a full description of such trusts see *Restatement of Law of Trusts*, Vol. 1, § 58, p. 181. Such a form of deposit is not necessarily inconsistent with a completed gift to Mrs. Tarplee.

The only other point urged by appellants is that the trial court abused its discretion in permitting respondents to amend their answer upon motion prior to trial. When the original answer was filed respondents were represented by a lawyer who subsequently died. In this original answer the respondents alleged that the money was deposited for the use and benefit of Woodward during his lifetime and was to become the property of respondents only upon Woodward's death. After the death of the lawyer that had prepared this answer, the present lawyers were retained. They examined the pleadings and consulted with their clients and discovered that the original answer incorrectly set forth the facts. Several weeks prior to trial the new lawyers served and filed a notice of motion to amend the answer. That motion was supported by affidavits and by a draft of the proposed amended answer. The amendment consisted in alleging a completed absolute gift prior to the death of Woodward. The motion was opposed by appellants, and,

after a hearing, permission to file the amended answer was granted by the court.

Appellants urge that in allowing this amendment the court abused its discretion in that the amended answer sets up an entirely different transaction than the one relied upon as a defense in the original answer. One case is cited, Webster-Soule Farm v. Woodmansee's Adm'r, 36 Idaho 520, 211 P. 1090, in which it was held that the court did not abuse its discretion in refusing to permit an amendment which directly contradicted an allegation of fact contained in the original pleading.

[8-10] The granting or refusing of leave to amend an answer is within the sound discretion of the court. Such discretion will seldom be disturbed where exercised for the purpose of allowing the true facts to be alleged. The rule that the court should be liberal in allowing amendments when they do not seriously impair the rights of the opposite party is particularly applicable to answers. See cases collected 21 Cal.Jur. § 140, p. 203. The allowance of this amendment was obviously within the discretion of the lower court.

The judgment appealed from is affirmed.

KNIGHT, J., and DOOLING, Justice pro tem., concur.



64 Cal.App.2d 866

HUDSON v. ZUMWALT et al.
Civ. No. 7038.

District Court of Appeal, Third District,
California.

June 14, 1944.

Rehearing Denied July 14, 1944.

Hearing Denied Aug. 10, 1944.

1. Injunction ☞251

In action on bond, evidence supported finding that plaintiff was entitled to \$1,000 damages for loss sustained in sale of his equipment and loss of profits in his business on account of defendants improperly securing a temporary restraining order in another action to terminate present plaintiff's lease of gas station.

149 P.2d—29½

2. Malicious prosecution ☞56

The burden is on one who seeks to recover damages for malicious prosecution of proving that former suit was commenced maliciously without probable cause, and that it terminated favorably to him.

3. Malicious prosecution ☞27

"Malice", as it relates to malicious prosecution, does not necessarily infer presence of anger or vindictiveness, and it is sufficient if it appears that former suit was commenced in bad faith to vex, annoy or wrong the adverse party. Pen.Code, § 7, subd. 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Malice".

4. Malicious prosecution ☞20

"Probable cause", as it relates to malicious prosecution, may exist when one possesses a suspicion or draws a conclusion which is founded on circumstances sufficiently strong to warrant a reasonable person to assume the truth of the charge.

See Words and Phrases, Permanent Edition, for all other definitions of "Probable Cause".

5. Malicious prosecution ☞16

The mere proof of want of probable cause is not sufficient to justify a judgment for malicious prosecution, but it is necessary also to prove actual malice.

6. Malicious prosecution ☞20

The knowledge of facts which may justify the alleged malicious suit is that which is possessed at time of its commencement and not that which is subsequently acquired.

7. Malicious prosecution ☞35(1)

Although it is necessary to prove that former action was terminated favorably to party claiming injury, it need not be shown that it was finally decided on its merits, and it is sufficient if it was disposed of in such a manner as to require plaintiff to institute another action to try issues presented.

8. Landlord and tenant ☞116(5)

If purchaser of gas station desired to evict one operating the station as a tenant under a lease from month to month for failure to pay rent, purchaser's notice should have been in the alternative to pay the rent or surrender possession. Code Civ.Proc. § 1161, subd. 2; Civ.Code, § 827.

9. Malicious prosecution ⇨64(2)

Evidence was sufficient to establish case of malicious prosecution against purchaser of a gas station who brought suit against one operating the station under a lease for unlawful detention of property, where it appeared that suit was brought to vex and annoy lessee and to force him to sell his trade fixtures without probable cause. Civ.Code, § 1019.

10. Malicious prosecution ⇨21(2)

Defense of reliance upon advice of counsel was not available to defendant in malicious prosecution action, where it appeared that defendant was himself an attorney who had previously enjoyed an active practice of the law, and that defendant did not make full disclosure of all material facts to attorney with whom he consulted.

11. Appeal and error ⇨1004(1)

A verdict in a malicious prosecution action will not be disturbed as excessive unless amount is so large as to be presumptively the result of passion and prejudice.

Appeal from Superior Court, Colusa County; Arthur Coats, Judge.

Action by J. L. Hudson against I. G. Zumwalt, L. J. Lowry and others upon a bond furnished by named defendants upon the issuance of a temporary restraining order in another action to terminate present plaintiff's lease of a gas station for breach of covenant to pay the rent. From a judgment for plaintiff against named defendants, the named defendants alone appeal.

Affirmed.

Seth Millington, of Gridley, and C. D. McComish, of Colusa, for appellants.

E. Vayne Miller, of Sacramento, for respondent.

THOMPSON, Justice.

The defendants, I. G. Zumwalt and L. J. Lowry, have appealed from a judgment which was rendered against them pursuant to the verdict of a jury, in a suit upon a bond furnished by appellants upon the issuance of a temporary restraining order in another action to terminate plaintiff's lease of a gas station for breach of covenant to pay the rent. The judgment from which this appeal is taken also includes further damages for malicious prosecution of the

suit to terminate the lease. A motion for nonsuit and a motion for new trial were denied.

The complaint in this case was couched in two counts. The first cause was for damages sustained in the sale of plaintiff's equipment and loss of profits in his business on account of the restraining order. He claims to have lost an offer of \$2,500 for his business and equipment. He sold the equipment for \$750. The second cause was for damages for malicious prosecution of the suit for possession of the gas station. The \$1,000 bond was executed by I. G. Zumwalt, L. J. Lowry and Leon Spier. Pending the trial, Leon Spier died and the action against him was dismissed. At the close of plaintiff's evidence a nonsuit was granted as to the defendants George R. Zumwalt and Lionel R. Zumwalt. The jury returned a verdict against I. G. Zumwalt and L. J. Lowry on the first count of the complaint in the sum of \$1,000. On the second count the jury returned a verdict against I. G. Zumwalt for \$4,000 compensatory damages and the additional sum of \$1,000 as exemplary damages. Judgment was rendered against I. G. Zumwalt and L. J. Lowry for \$1,000, and against I. G. Zumwalt only for the additional sum of \$4,000.

Cora Elizabeth Wickes Thornton owned a gas station lot at Willows in Glenn County. April 30, 1936, she executed a written lease of the property to J. L. Hudson for one year at \$25 per month, payable in advance on the first day of each month. The lease provided that after the expiration of the year the lessee would be deemed to hold possession of the property "from month to month" on the same terms. The lease also provided that at the expiration of the term the lessee should have ten days within which to remove all of his improvements "including buried tanks but excluding all plumbing and plumbing fixtures and all sewer, water, gas and electric connections and also excluding cement or gravel walks, runways and approaches and all foundations," provided he was not then in default of any of the terms of the lease. May 1, 1936, Mr. Hudson took possession and operated the gas station until August 6, 1937. He constructed and equipped the gas station on that lot including the installation of two 500 gallon tanks, one 10,000 gallon tank, three gas pumps, one service station building, two toilets, two flood lights, water fixtures, air fixtures, one air

compressor, approaches to the roads and he surfaced the yard with gravel, all at a total expense of \$3,050. April 30, 1937, Mr. Hudson became ill and orally agreed with C. R. Wickes, the father of the lessor, to thereafter continue the lease from month to month for the rental of \$15 per month payable on the first of each month in advance. Mr. Wickes, as the agent for his daughter, the lessor, on May 28, 1937, listed the gas station property for sale with L. J. Lowry, a real estate broker, for the sum of \$2,500. He testified that he then told Lowry that "Mr. Hudson's lease had expired and that he wanted the privilege of moving off on account of his health and I told him at the time that if he would stay there I would reduce the rent to \$15.00 a month with the privilege of moving his equipment off according to the original lease."

May 28, 1937, Mrs. Thornton, the owner of the property, signed a written agreement to sell the gas station lot to the I. G. Zumwalt Company for \$2,500, which was subsequently fully paid and a duly executed deed therefor was delivered to the purchaser on June 8th of that year. At that time a copy of Hudson's written lease was delivered to I. G. Zumwalt. Mr. Lowry, the real estate agent, told him the lease had expired and that Mr. Hudson was holding possession of the property from month to month at \$25 rental per month. Lowry testified that he did not learn of the oral agreement of Mr. Wickes for Hudson to retain possession from month to month for the reduced rental of \$15 per month until after the sale to Zumwalt had been consummated. Zumwalt testified that he had no such knowledge. In May and June, 1937, Mr. Hudson paid Wickes \$15 rent for each of those two months.

July 1st Hudson first learned that the property had been sold to the Zumwalt Company, and on the 6th of that month he visited Mr. I. G. Zumwalt at Colusa, and offered to pay \$15 rent for July with his check on a Willows bank. Zumwalt refused to accept it, saying the amount of his rent was \$25. Mr. Hudson testified that he replied, "Well, if it's going to be \$25.00 I will go home and move off." Mr. Zumwalt said: "Oh, no, you can't move that equipment off from my property." Mr. Hudson further testified that: "I said 'Mr. Zumwalt, my agreement with Mr. Wickes is that I can move off. The law is on my side. I will go home and move

off by the first of the month.' And he said 'I don't care what your agreement is with Mr. Wickes or what the law is, I know how to get around the law. I will throw you in court and hold you there until you will be glad to sell', so I said 'Well, I offered you my rent of \$15.00 and I will give you \$10.00 more and I will go home and be gone by the 1st of the month.' He said, 'Well, maybe your rent will be \$75.00', and I knew there was no use of arguing further, so I got up and walked out."

July 14th, I. G. Zumwalt served Mr. Hudson with notice of the termination of his lease and to quit the premises.

During the trial of the possessory action, by agreement between respective parties, that suit was dismissed. The restraining order was dissolved. Zumwalt waived the rent which was due, and consented to the removal of the equipment by the lessee. Zumwalt bought one of the tanks from Hudson. The lessee sold his entire equipment for \$750. He did not operate his gas station after August 6th, when the temporary restraining order was issued and served. It prohibited him during the pendency of the action from removing the "buildings, improvements, fixtures, including tanks buried in the ground."

This suit for malicious prosecution was commenced October 29, 1939. It is contended there is no evidence to support the judgment for damages on the undertaking bond for \$1,000 based on the first count, and that there is no evidence to support the penalty of \$4,000 on the second count for malicious prosecution of the possessory action.

[1] We are of the opinion the judgment for damages in the sum of \$1,000 sustained on account of the sale of plaintiff's equipment and improvement is supported by the evidence. There is evidence that Mr. Hudson in June, 1937, had an agreement to sell his improvements and equipment to Clarence O. Swarner for \$2,500, if he could find a suitable location to which he could remove it; that he did find such location at Live Oak, and was anxious to complete the purchase, but the injunction then prevented the sale. There is evidence that the improvements and equipment which Hudson placed on the premises cost him \$3,050. He had used this property only about a year, but the deterioration and cost of removal would reduce its value considerably. It is true

that the plaintiff did include in his complaint as an element of damages counsel fees incident to the vacating of the restraining order, and a loss of income on account of the suit. He testified that his income was reduced on account of the injunction from \$10 a day to about \$1.40 per day. But those elements of damages are of slight consequence. He operated the business only about a month after the restraining order was issued. But without the last-mentioned items the evidence is sufficient to support damages on the first count in the sum of \$1,000.

A more serious question is presented as to whether there is sufficient evidence to support the judgment of \$4,000 for malicious prosecution.

[2-7] It becomes necessary to determine whether the former suit was commenced maliciously without probable cause, and that it terminated favorably to J. L. Hudson. The burden is on one who seeks to recover damages for malicious prosecution to prove the foregoing issues. *Griswold v. Griswold*, 143 Cal. 617, 77 P. 672; *Garfield v. Peoples Finance & Thrift Co.*, 24 Cal.App.2d 144, 157, 74 P.2d 1061; 16 Cal.Jur. 734, sec. 7. Malice does not necessarily infer the presence of anger or vindictiveness. It is sufficient if it appears that the former suit was commenced in bad faith to vex, annoy or wrong the adverse party. Sec. 7, subd. 4, Penal Code; *Griswold v. Griswold*, supra, 143 Cal. 617, 620, 77 P. 672; *MacGruer v. Denivelle*, 113 Cal.App. 49, 54, 297 P. 633; 16 Cal. Jur. 736, sec. 8. "Probable cause", as it relates to actions for malicious prosecution, may exist when one possesses a suspicion or draws a conclusion which is founded on circumstances sufficiently strong to warrant a reasonable person to assume the truth of the charge. *Lee v. Levison*, 173 Cal. 166, 159 P. 438; *Sebastian v. Crowley*, 38 Cal.App.2d 194, 101 P.2d 120; *Perry v. Washington National Ins. Co.*, 14 Cal.App.2d 609, 58 P.2d 701, 59 P.2d 158. The mere proof of probable cause is not sufficient to justify a verdict or judgment for malicious prosecution. It is also necessary to prove actual malice. *Vesper v. Crane Co.*, 165 Cal. 36, 130 P. 876, L.R.A. 1915A, 541. There is no distinction in that regard between civil suits and criminal actions. 16 Cal.Jur. 735, sec. 8. The knowledge of facts which may justify the alleged malicious suit is that which is possessed at the time of its com-

mencement and not that which is subsequently acquired. *Richter v. Neilson*, 11 Cal.App.2d 503, 515, 54 P.2d 54. While it is necessary to prove that the former malicious action was terminated favorably to the party claiming injury, it need not be shown that it was finally decided on its merits. It is sufficient if it was disposed of in such a manner as to require the plaintiff to institute another action to try the issues presented. *Hurgren v. Union Mutual Life Ins. Co.*, 141 Cal. 585, 75 P. 168; *Jaffe v. Stone*, 18 Cal.2d 146, 114 P.2d 335, 135 A.L.R. 775; 16 Cal.Jur. 734, sec. 7; 135 A.L.R. 793, note.

While there is a conflict of evidence in this case regarding the good faith or motive which prompted Mr. Zumwalt to bring the suit against Hudson for unlawful detention of the property, there is adequate proof that it was maliciously instituted to vex and annoy the lessee or to force him to sell his trade fixtures. The written lease specifically provides that if the lessee held over after the expiration of one year, for which it was executed, "such tenancy shall be from month to month." Sec. 1946, Civil Code. That tenancy required one month's notice to terminate it. After the expiration of the written lease the lessor orally agreed to reduce his rent to \$15 per month and authorized him to remove his improvements and fixtures. Proof of that oral reduction of rent appears from the fact that the owner accepted two \$15 payments of rent for the months of May and June. When Mr. Hudson discovered that Zumwalt had purchased the property he went to see him at Colusa on July 6th to pay his rent, which he offered to do by means of a \$15 check. A dispute then occurred as to whether the rent for July was to be \$25 or only \$15. Hudson then told Mr. Zumwalt it had been reduced to \$15, which he refused to accept. It is immaterial for the purposes of this malicious prosecution suit that Hudson failed to make his tender good by depositing the check in a bank and giving notice thereof to the creditor as provided by Section 1500 of the Civil Code, for Zumwalt positively refused to accept that sum in full payment of the rent. He did not then question the validity of the check. The statements which were then made furnish some evidence of malice on his part. When Hudson told him that if the rent was to be \$25 per month "I will go home and move off", Mr. Zumwalt replied, "Oh, no, you can't move that equip-

ment off from my property, * * *. I don't care what your agreement is with Mr. Wickes, or what the law is, I know how to get around the law, I will throw you in court and hold you there until you will be glad to sell." It is true that Mr. Zumwalt denied making those statements, but the truthfulness of those statements was a matter for the determination of the jury. With its conclusions in that regard we may not interfere.

The next question to be determined is whether there was probable cause to believe that the suit in unlawful detainer under Section 1161 of the Code of Civil Procedure was justified and brought in good faith. It was said by the Supreme Court in *Paskle v. Williams*, 214 Cal. 482, at page 487, 6 P.2d 505, at page 507:

"The motive, even if malicious, of defendants is unimportant if legal ground existed upon which to predicate the suit in question."

[8] Mr. Zumwalt had the written lease in his possession. He exhibited it to his attorney. He must have known that it provided for tenure "from month to month", after the expiration of the written lease. The tenancy from month to month could not be lawfully terminated for non-payment of rent for the month of July, except upon notice as provided by either Section 1161, Subdivision 2, of the Code of Civil Procedure, or Section 827 of the Civil Code. 15 Cal.Jur. 640, sec. 48. The notice which was given was for immediate possession. It did not contemplate a change of the terms of the lease then in force by increasing the rent from \$15 to \$25 per month, under Section 827 of the Civil Code. The owner did not then have a valid cause of action for unlawful detention and immediate possession of the property. If he desired to evict the lessee for failure to pay the rent, then his notice under Section 1161, *supra*, should have been in the alternative, to pay the rent or surrender possession. *Colyear v. Tobriner*, 7 Cal.2d 735, 742, 62 P.2d 741. In the case last cited, under similar circumstances with respect to the termination of a lease for a specified rental, the Supreme Court held that Section 827 of the Civil Code was not applicable, and that Section 1161, Subdivision 2, of the Code of Civil Procedure required notice to be given in the alternative to pay the rent demanded or surrender possession of the premises. In the present case Mr. Hudson had offered to pay \$15

rent for the month of July, which was in accordance with the terms of his agreement.

Moreover, the purchaser of the property wrongfully procured the issuance of the temporary restraining order prohibiting the lessee from removing "the buildings, improvements, fixtures, including tanks buried in the ground." The lease authorized him to remove those fixtures and improvements. Section 1019 of the Civil Code authorizes the removal of trade fixtures during the continuance of the term of the lease.

[9] We are therefore impelled to assume the appellant, I. G. Zumwalt, did not have a valid cause of action for unlawful detention of the property; that there is substantial evidence of a lack of probable cause for instituting the suit, and of the existence of malice.

[10] It may be a complete defense to a suit for malicious prosecution to prove that the defendant made a full and fair statement of all the material facts involved to his attorney, and that he relied upon his advice in commencing the suit complained of, provided it also appears that he was in good faith in so doing. 16 Cal.Jur. 742, sec. 11. We are of the opinion the defense of reliance upon the advice of counsel is not available under the circumstances of this case. Mr. Zumwalt was himself an attorney who had previously enjoyed an active practice of the law. He was told by Mr. Hudson on July 6th that he was holding possession of the property from month to month on a definite oral agreement of the former owner to pay rent in the sum of \$15 per month after the expiration of the written lease. That important fact was not told to Mr. Zumwalt's attorney. If he doubted the truthfulness of that statement, he could have easily confirmed it by communicating with the former owner, before he went to his lawyer to commence the action. He failed to do so. Moreover, his reply to the statement regarding the amount of rent fixed by the previous owner was "I don't care what your agreement is with Mr. Wickes, or what the law is. * * * I will throw you in court and hold you there until you will be glad to sell." That is some evidence of a lack of good faith in commencing the unlawful detainer action.

[11] It does seem that the amount of the verdict and judgment for malicious

prosecution is disproportionate to the damages found to have been incurred by the plaintiff. But that amount is not challenged as excessive. In 16 California Jurisprudence, page 754, section 20, it is said that a verdict in a malicious prosecution action will not be disturbed as excessive unless the amount is so large as to be presumptively the result of passion and prejudice.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.



64 Cal.App.2d 798

ANDERSON v. NEW YORK LIFE INS. CO.
Civ. 14206.

District Court of Appeal, Second District,
Division 3, California.

June 9, 1944.

Hearing Denied Aug. 7, 1944.

Insurance ◀536

Under life policies providing for disability benefits upon insurer's receipt "before default in payment of premiums" of proof that insured "is" totally disabled and that such disability "will continue for life", insured's failure to claim disability benefits during his lifetime barred his executrix from claiming such benefits.

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by Beulah Anderson, as executrix of the last will and testament of William L. Anderson, deceased, against the New York Life Insurance Company to recover disability benefits on life policies issued by defendant to deceased. From a judgment for defendant, plaintiff appeals.

Affirmed.

Harry C. Cogen, of Los Angeles, for appellant.

Meserve, Mumper & Hughes, of Los Angeles, for respondent.

DESMOND, Presiding Justice.

This is an appeal from a judgment in favor of the defendant insurance company

in a case tried before a jury. It is contended that the evidence submitted was insufficient to sustain the verdict and that error arose when the trial court gave to the jury an allegedly erroneous instruction on the subject of waiver by the insured.

Mrs. Beulah Anderson, as executrix of her husband's estate, brought suit to collect disability benefits provided for in five separate policies of insurance which her husband had secured from the defendant company. Before the case was submitted to the jury she voluntarily dismissed two causes of action involving two of the policies.

The disability provision upon which Mrs. Anderson sought to recover appeared as a special and additional feature in policies primarily of life insurance, and the three policies which the jury was called upon to consider were written in the respective amounts of \$5,000, \$25,000 and \$20,000. They were all issued on February 6, 1928, and contained identical disability provisions, reading as follows:

"Total and Permanent Disability

"Disability shall be considered total whenever the Insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit, provided such disability occurred after the insurance under this policy took effect and before the anniversary of the policy on which the Insured's age at nearest birthday is sixty.

"Upon receipt at the Company's Home Office, before default in payment of premium, of due proof that the insured is totally disabled as above defined, and will be continuously so totally disabled for life, or if the proof submitted is not conclusive as to the permanency of such disability, but establishes that the Insured is, and for a period of not less than three consecutive months immediately preceding receipt of proof has been, totally disabled as above defined, the following benefits will be granted:

"(a) Waiver of Premium.—The Company will waive the payment of any premium falling due during the period of continuous total disability, the premium waived to be the annual, semi-annual or quarterly premium according to the mode of payment in effect when disability occurred.

"(b) Income Payments.—The Company will pay to the Insured the monthly income

stated on the first page hereof (\$10 per \$1,000 of the face of this policy) for each completed month from the commencement of and during the period of continuous total disability. If disability results from insanity, payment will be made to the beneficiary in lieu of the Insured.

"In event of default in payment of premium after the Insured has become totally disabled as above defined, the policy will be restored and the benefits shall be the same as if said default had not occurred, provided due proof that the Insured is and has been continuously from date of default so totally disabled and that such disability will continue for life or has continued for a period of not less than three consecutive months, is received by the Company not later than six months after said default.

"The total and irrecoverable loss of the sight of both eyes or the use of both hands or of both feet or of one hand and one foot shall constitute total disability for life.

"Before making any income payment or waiving any premium, the Company may demand due proof of the continuance of total disability, but such proof will not be required oftener than once a year after such disability has continued for two full years. Upon failure to furnish such proof, or if the Insured performs any work, or follows any occupation, or engages in any business for remuneration or profit, no further income payments shall be made nor premiums waived."

The \$5,000 life insurance policy provided for waiver of premiums during disability and payments of \$50 per month as disability benefit; the \$25,000 policy provided for waiver of premiums and \$250 per month; and the \$20,000 policy provided merely for waiver of premiums. A certain stated amount of the annual premium upon each policy was applicable, by its terms, to the total and permanent disability benefits in each case.

In the appellant's opening brief, the statement is made that "the policies were in good standing up to the time of Mr. Anderson's decease and he paid all premiums falling due on each of said policies." It may be assumed, therefore, that Mrs. Anderson, who had become the beneficiary under each policy, received the full amount of the face value of each upon proof of her husband's death.

Mr. Anderson died April 9, 1941, without having made any claim for disability

benefits, or notified the defendant company that he was disabled in any way, but on June 9, 1941, his wife, as executrix of his estate, made demand upon the company for payment and, failing to receive such payment, on December 6, 1941, filed this action consisting of five causes, each relating to a separate policy. She alleged "That on or about September 7th, 1938, said insured became wholly and permanently disabled and said disability was and remained continuous and permanent from the 7th day of September, 1938 to the 9th day of April, 1941, upon which latter date the said insured died at the age of forty-seven (47) years." The first and second causes of action were those as to which dismissals were filed. As to the other three policies, the sums claimed as due, because of disability during the period mentioned, approximately 2½ years, amounted to \$2,318.60 on the \$5,000 policy, and \$10,156.75 on the \$25,000 policy. On the \$20,000 policy, which provided for a waiver of premiums during the period of disability but not for any cash payment, the total amount claimed as due for premiums paid was \$1,731. The defendant answered, denying the disability of the insured during the period mentioned and setting up, as an affirmative defense, that no notice or proof of disability was given prior to Mr. Anderson's death and, further, that under the provisions of section 10401 of the California Insurance Code, St.1935, p. 651, the insurance company was prohibited from making or permitting any discrimination between insureds of the same class.

It appeared from the evidence produced at the trial that in September of 1938, Mr. Anderson, the insured, became ill with a serious heart ailment and his physician recommended a complete and immediate vacation from the business in which he was engaged for many years and which appellant says "could well be denominated a 'one-man business,'" consisting, as it did, of establishing facilities for the housing and feeding of workmen employed on industrial projects where such facilities were not otherwise available. The insured failed to discontinue his activities, as recommended by his doctor, although he did, in the two or three years prior to his death, turn over to a Mr. Dunham some of his work. He died suddenly at the age of 47 years of coronary thrombosis. The defendant presented no witnesses and at the conclusion of the case, and over the objections of the plaintiff, filed an amend-

ment to its answer, setting up the affirmative defenses of waiver and estoppel.

In discussing the contention that the evidence was insufficient to sustain the verdict, the appellant says, "In order to establish a claim for disability benefits under the policies in question, we are compelled to meet three separate issues: 1. Was the insured totally disabled under the terms of said policy? II. How long did such disability exist? III. Did the insured's failure to claim disability benefits during his lifetime bar the executrix of his estate from claiming such benefits?" In our opinion, it is unnecessary to answer the first and second questions thus propounded for this reason: even if it be assumed that the insured was totally disabled under the terms of the policy within the period, September 7, 1938, to the date of death, still his failure to claim disability and offer proof thereof during his lifetime acted as a bar to such claim on the part of his executrix. As will be seen by reference to the disability provisions of the policy, the benefits will be granted "Upon receipt at the Company's Home Office, *before default in payment of premium*, of due proof that the insured is totally disabled as above defined, and will be continuously so totally disabled for life [etc.]" This language, by reason of the present and future tenses employed, certainly refers to a condition existing during the lifetime of the person insured, and the phrase which we have italicized, "before default in payment of premium," connotes a policy in force during the lifetime of the insured, for after the death of the insured no payment is due and therefore no default in payment of premium could arise. It may be noted, also, that the policy provides that even where a default occurs in the payment of premium after the insured has become disabled, "the policy will be restored and the benefits shall be the same as if said default had not occurred, provided due proof that the Insured is and has been continuously from date of default so totally disabled and that such disability *will continue for life* [etc.]" (Italics added.) This provision and the language used indicate that the policies in question contemplated the payment of benefits during the lifetime of the deceased and only after due proof of disability was made to the company. In other words, in order to realize disability payments upon any of the policies, fulfillment of a condition precedent, namely, due proof in the life-

time of insured of the disability insured against, rested upon him as one of the contracting parties. The policy also provides that "before making any income payment or waiving any premium, the Company may demand due proof of the continuance of total disability."

All these matters are discussed in *Kantor v. New York Life Ins. Co.*, 1935, 219 Iowa 1005, 258 N.W. 759, at page 760, where the court was considering a policy identical with those involved in the instant case, so far as disability provisions are concerned, and had this to say: "It will be noted that the language of the policy above quoted provides that the appellee company is to pay the disability benefits upon receipt of due proof that the insured is totally disabled and will be continuously so disabled for life. It is further provided that, before making any payments, the company may demand proof of the continuance of total disability. It is obvious that proof furnished after the insured has died does not establish that the insured is permanently disabled and will be permanently disabled for the remainder of his life. Moreover, in such a situation, the insurer could not demand proof of the continuance of such disability. These provisions of the policy cannot be reconciled with the proposition that there is an obligation on the part of the insurer to pay disability benefits to the representatives of the estate of the insured after the death of the insured and upon proof furnished by the representatives of his estate that before his death the insured had been disabled, although no proof of such disability or even notice thereof was ever given to the insurer. The proof thus furnished by the representatives of the estate would show the death of the insured. The insurer's obligation on receipt of that character of proof was to pay the sum of \$5,000 to the beneficiary. That payment it made. Its obligation to pay disability payments and waive premium depended upon receipt of proof that the insured was living, that he was in being, that 'he is permanently disabled,' and 'he will continue to be permanently disabled.' Such requirements of the contract are not met by proof that the insured is dead. * * * See *Yohalem v. Columbian Nat. Life Insurance Co.*, 136 Misc. 748, 240 N.Y.S. 666. * * *" In the latter case, the court said, 240 N.Y.S. at page 667: "I am satisfied that both the definite language of the policy and the decisions in other juris-

dictions do not sustain plaintiff's contention. The language of the insurance contract 'that *he is and will be*' permanently disabled has reference to a condition present during the lifetime of the insured. * * * It is fundamental in such cases that the insurer, in order to protect itself from fraud, may provide for such notice as will enable it to investigate the claim of disability. Notice of disability and indorsement of the waiver of premiums were substantial provisions of the contract and became conditions precedent to recovery." See also *Hinkley v. Penn Mut. Life Ins. Co.*, D.C., 37 F.Supp. 1018. Also, *Bergholm v. Peoria L. Ins. Co.*, 1931, 284 U.S. 489, 52 S.Ct. 230, 231, 76 L.Ed. 416, where the following appears: "Here the obligation of the company does not rest upon the existence of the disability; but it is the receipt by the company of *proof* of the disability which is definitely made a condition precedent to an assumption by it of payment of the premiums *becoming due after the receipt of such proof*. The provision to that effect is wholly free from the ambiguity which the court thought existed in the Marshall policy [referring to *Minnesota Mut. L. Ins. Co. v. Marshall*, 8 Cir., 29 F.2d 977, in which it was held that disability alone established the obligation of the company to waive premiums under the policy there considered and that proof was not a condition precedent but could be furnished within a reasonable time after the occurrence of the disability]. It is true that where the terms of a policy are of doubtful meaning, that construction most favorable to the insured will be adopted. (Cases) This canon of construction is both reasonable and just, since the words of the policy are chosen by the insurance company; but it furnishes no warrant for avoiding hard consequences by importing into a contract an ambiguity which otherwise would not exist, or, under the guise of construction, by forcing from plain words unusual and unnatural meanings. Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary, and popular sense." The court, in *Morris v. New York Life Ins. Co.*, 1935, 6 Cal.App.2d 30, 43 P.2d 572, quotes this language, and in *Cochens v. Prudential Ins. Co. of America*, 1935, 4 Cal.App.2d 172, 175, 40 P.2d 902, 903, is found an additional quotation from the

Bergholm case, as follows: "The pertinent provisions of the policy there [i. e. *Minnesota Mut. L. Ins. Co. v. Marshall*], however, differ from those found in the policy here under consideration." Our comment in the instant case is the same.

Appellant calls attention to the fact that the language used in the disability provisions of the 1928 policies here involved differs, in some respects, from the language employed in the disability provisions of the two policies as to which a dismissal was entered in this trial and which were written in 1920. We have examined all the policies and are not persuaded that the difference in language means a difference in meaning. We are still convinced that the language employed in the 1928 policies imposed a condition precedent upon the insured to make proof of his disability during his lifetime.

Our conclusion that the jury in this case rendered the only verdict consonant with legal principles makes unnecessary consideration of the claim that the jury was erroneously instructed.

Judgment affirmed.

SHINN and PARKER WOOD, JJ., concur.



64 Cal.App.2d 636

In re CLARK'S ESTATE.

JACKSON et al. v. WALDSMITH et al.

Civ. 14361.

District Court of Appeal, Second District,
Division 2, California.

May 31, 1944.

As Modified June 12, 1944.

Hearing Denied July 27, 1944.

1. Wills ⚔439

In construing will, testator's intent, if ascertainable, must be enforced. Probate Code, § 101.

2. Wills ⚔452

Where testamentary provision is capable of two interpretations, that which passes inheritance to legatees of testator's blood, rather than to stranger, must be preferred.

3. Wills ⚭523

A testamentary "gift to a class" is gift of aggregate sum to a body of persons, uncertain in number, to be ascertained at future time, in definite proportions depending on ultimate number of class.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift to a Class".

4. Wills ⚭547

On death of member of class to which testamentary gift is made, surviving members take deceased member's share to exclusion of such member's devisees or heirs at law.

5. Wills ⚭523

The probability of fluctuation in number of beneficiaries of testamentary "gift to a class" differentiates such gift from bequest to individuals.

6. Wills ⚭524(6)

The recipients of testamentary gift of income must be determined at each periodic distribution by applying formula prescribed by testator.

7. Wills ⚭532, 557

Where will requires that deceased distributees of property bequeathed to a class be represented by their living issue, interest of each member of class is "life estate", with remainder to his surviving lawful issue, and, if no such issue survive, deceased member's share goes to surviving distributees per stirpes.

See Words and Phrases, Permanent Edition, for all other definitions of "Life Estate".

8. Wills ⚭524(1)

A class to which testamentary gift is made must be ascertained when duty arises to convey and deliver, and survivorship at time of death of deceased member of class is condition of gift to surviving issue of such member.

9. Wills ⚭523

A testamentary gift to legatee's "surviving lawful issue" is not to named individuals, but to class of designated persons, members of which are to be ascertained either at specified beneficiary's death or at time of distribution.

See Words and Phrases, Permanent Edition, for all other definitions of "Surviving Lawful Issue".

10. Wills ⚭523

A bequest to testator's deceased child's legal heirs or to named beneficiary's survivors is a "bequest to a class".

See Words and Phrases, Permanent Edition, for all other definitions of "Bequest to a Class".

11. Wills ⚭524(6)

When possession of class legacy is postponed to future period, class includes not only every person answering description thereof at testator's death, but all persons coming within description before time to which possession is postponed. Probate Code, § 123.

12. Wills ⚭524(6)

Where possession of inheritance is postponed by will to designated time, all reference to death or survivorship must be referred to time of possession. Probate Code, § 122.

13. Wills ⚭470

Any ambiguous or doubtful part of will may be explained by reference to another portion of same document. Probate Code, § 103.

14. Executors and administrators ⚭315(5)

Under final distribution decree, providing that if any of testator's sisters, nephews, or nieces, to whom net income of testamentary trust estate was bequeathed, died without lawful issue before time for payment, decedent's portion of such income should be paid to survivors of named beneficiaries, two of three children of testator's deceased nephew became entitled to all of such nephew's share of estate on third child's death without lawful surviving issue to exclusion of such child's husband and adopted children.

Appeal from Superior Court, Los Angeles County; Wm. R. McKay, Judge.

In the matter of the trust estate of J. Ross Clark, deceased. From orders and a judgment in favor of Laura Miller Waldsmith and another, trust beneficiaries, on a petition by Miriam A. Clark and others, trustees, for instructions, Robert Miller Jackson and another, minors, by their guardians, and another, appeal.

Affirmed.

E. Everett Bennett, Edward C. Renwick, and Arnold Praeger, all of Los Angeles, for appellants.

Newlin & Ashburn, of Los Angeles (A. W. Ashburn, of Los Angeles, of counsel), for respondents.

MOORE, Presiding Justice.

The question for decision is whether a beneficiary of a trust is vested with an indefeasible equitable title to a share of the income and corpus where the decree creating the trust directed payment to be made to a class consisting of a nephew and his surviving lawful issue, the perpetuity of the interest of each of the three in any installment of income or principal being conditioned upon the survival of himself or of his lawful issue to the time of such payment.

The trust estate of J. Ross Clark was by decree of final distribution distributed to the testamentary trustees on January 7, 1929. The chief beneficiaries of the trust were Miriam Clark and J. Ross Clark, II, widow and grandson of the testator. The trust was to continue until J. Ross Clark, II, should attain the age of 40 years, or until the death of both Miriam and the grandson, if both events should occur before the boy should attain the age of 40 years. Having authorized the payment of 75 per cent of the income of the trust to the widow and the grandson, section 1(c) of the decree of distribution provides that after making certain designated expenditures the remaining 25 per cent of the net income of the estate shall be divided into five shares, five per cent for each of testator's three living sisters and five per cent for the children of his deceased sister, Margaret Miller, and five per cent for the grand children of his deceased sister, Sarah Bonner. Margaret's five children included Walter C. Miller, who during his lifetime received the income from one per cent of the entire trust estate. The same section, anticipating the possible death of any one of the collateral kin, provided that if any of those named should be deceased at the time such income shall be payable, then the share of such deceased "shall be paid to the surviving lawful issue of such deceased. * * * If any of said sisters, nephews, niece, grandnephew or grandniece shall be deceased at the time such income would be payable to her or to him, leaving no lawful issue, then the portion of said income which would be payable to such sister, nephew, niece, grandnephew or grandniece, shall be held and paid by said trustees to the then survivors of the

beneficiaries named in this section, in the proportions specified therein calculated as between such survivors, and excluding from such calculation the beneficiary dying without lawful issue."

Walter C. Miller deceased on October 31, 1935, leaving as his lawful issue one son and two daughters, to wit, Walter C. Miller, Jr., Margaret Miller Jackson, and Laura Miller Waldsmith. Each of these children became entitled to, and did, receive one third of the portion of the income from the trust that had gone to their father. On July 4, 1942, Mrs. Jackson, who had become Mrs. Dorstewitz, died without leaving issue of her body. However, both her brother Walter and her sister Laura survived her. Also, she left as her legal heirs her husband and two adopted children, Robert and Sue Jackson, who were not in existence at the date of the Clark will. Neither were they in contemplation at that time, nor had they been adopted by Margaret at the date of the decree of final distribution.

Such was the situation that confronted the trustees when they petitioned the court below for instructions as to (1) whether the interest of Margaret was forfeited at her death which had occurred prior to the termination of the trust; (2) whether the adopted children of Margaret should receive the share of the income from, and principal of, the trust estate which would have gone to Margaret but for her death; or (3) whether it should now go to Walter C., Jr., and Laura who, by their answer, claimed that as "sole surviving lawful issue" of Walter C. Miller they are entitled to receive the entire income from the one per cent of the trust estate formerly enjoyed by their father. The Jackson children and the personal representative of Margaret as contestants alleged in their answers that upon the death of Mr. Miller the corpus and the income of the trust estate vested indefeasibly in his three children and that upon Margaret's death her interest in the corpus and income became an asset of her estate and vested in her "heirs at law," subject to administration.

Following a hearing the court made its findings that both Walter C. Miller, Jr., and Laura Miller Waldsmith, surviving issue of nephew Walter C. Miller, are now living and that both have children of their own; that Margaret Miller Dorstewitz died on July 4, 1942, leaving no issue of her body, but only her two adopted chil-

dren and a husband, Robert J. Dorstewitz; that the gift of the income and principal of the trust to surviving lawful issue of Walter C. Miller was a class gift, "conditioned upon survivorship between the members of the class"; that the interest of each member of such class in the share of Walter C. Miller "was and is conditioned upon his or her survival until the time for payment of each future installment of income and of principal * * *"; that the equitable estate of each child of Walter C. Miller is not an indefeasible fee; that the estate or interest of Margaret terminated at her death, whereupon Walter C., Jr., and Laura as the surviving lawful issue of their father became entitled to receive in equal shares the entirety of each installment of income and of principal of the trust so long as they live. The judgment ordered payment accordingly.

On this appeal appellants make the same contentions as in the court below. They insist that Margaret, on the death of her father, was vested with an equitable title to a share in the corpus of the trust estate to be inalienable by her and inheritable by her heirs, and that such equitable title was a fee estate because it had all the characteristics of an estate of inheritance. Citing Title Insurance & Trust Co. v. Duffill, 191 Cal. 629, 218 P. 14, which is inapplicable.

[1-10] The judgment is abundantly fortified. It is a paramount rule of construction that if the intent of the testator can be ascertained its effect must be enforced. Sec. 101, Probate Code. From the decree of distribution and the authorities it is clear that such intent was contrary to the contention of the appellant. Another rule is that if a testamentary provision is capable of two interpretations, that is to be preferred which passes the inheritance to the legatees of the blood of the testator rather than to a stranger. Estate of Hartson, 218 Cal. 536, 540, 24 P.2d 171. Moreover, each bequest to the collateral kin was a gift to a class. Section 1(c) of the decree of distribution awards one per cent of the trust estate to a class consisting of Walter C. Miller and his "surviving lawful issue." A gift to a class is a gift of an aggregate sum to a body of persons uncertain in number to be ascertained at a future time, all to take in some definite proportions, the amount of the share of each being dependent upon the ultimate number of the class. 6 Jar-

man on Wills, Sec. 232; Rest. Law of Property, p. 1451. When members of a class pass on, the surviving members take to the exclusion of the devisees or heirs at law of such deceased member. 3 Page on Wills, Lifetime Edition, Sec. 1058. Thereby, the share of a deceased member increases the share of the survivors of the group. In re Wood's Estate, 321 Pa. 497, 184 A. 13. The fact that there will probably be a fluctuation in the number of the beneficiaries differentiates the class gift from a bequest to individuals. Rest. Law of Property, p. 1453. In the case of a gift of income the recipients thereof must be determined at each periodic distribution by applying the formula prescribed by the testator. Rowland's Estate, 151 Pa. 25, 24 A. 1091. If he has required that deceased distributees be represented by their living issue, the interest of each member of the class is a life estate with remainder to go to his surviving lawful issue; if no issue survive, then the share of such deceased goes to the surviving distributees, per stirpes. The class is to be ascertained when the duty arises to convey and deliver, and survivorship at that time is one of the conditions of the gift. Helvering v. Hallock, 309 U.S. 106, 117, 60 S.Ct. 444, 84 L.Ed. 604, 125 A.L.R. 1368. A gift to "surviving lawful issue" is not to individuals named but to a class of designated persons the members of which are to be ascertained either at the death of the specified beneficiary or at the time of distribution. In re Leverich's Will, 125 Misc. 130, 210 N.Y.S. 605, 607. A bequest to "the legal heirs of a deceased child" is a bequest to a class. Estate of Hartson, supra [218 Cal. 536, 24 P.2d 173]. So, also, is a bequest to "the then survivors of the beneficiaries named."

In order more securely to keep the legacy where it would serve only those of the class to which the gift was made, the Clark decree of distribution declares that if a nephew shall be deceased at the time such income shall be payable to him, then his share must be paid to his surviving lawful issue; but if he be deceased "at the time such income would have been payable to him, leaving no lawful issue," then the portion of income payable to him shall be held and paid by the trustees "to the then survivors of the beneficiaries named in this section * * * in the proportions specified therein, calculated as between such survivors, and *excluding from such*

calculation the beneficiary dying without lawful issue." The italicized language appears in two other sections of the decree, viz., 1(d), in disposing of his widow's share should she die prior to a designated date during the continuance of the trust, and 1(f) in disposing of the share of the grandson should the latter decease prior to the termination of the trust. The share of income or of the corpus set aside for Walter C. Miller could be vested in his "surviving lawful issue" only in the event such issue should be living at the date of payment of any installment of the income or at the date of the termination of the trust. The decree is equally emphatic that if any of the three children of Walter C. Miller should die leaving no issue, in that event those of his children then surviving should take his entire share to the exclusion of the lawful heirs of such deceased child.

[11] When Margaret failed to survive to the time when payment of the next installment of income was due, and left no lawful issue surviving her right to receive it perished with her. The portion of the income she had received must be paid to the surviving members of the class, viz., "the surviving lawful issue" of Walter C. Miller. Rest. Law of Property, p. 1607. When possession of a legacy is postponed to a future period it includes not only every person answering the description at the testator's death, but also all persons coming within the description before the time to which possession is postponed. Sec. 123, Probate Code. In the Winter case, 114 Cal. 186, 45 P. 1063, the widow took only a life estate in the ranch which at her death was to be sold and the proceeds divided among her testator's brothers and sisters then surviving. It was held that survivorship referred to the "period of division," the date of the widow's death. In the Hartson Estate payment of a share of the income from a trust estate was payable to a son, Ephriam, and his daughter, Ethel, during the lifetime of the children of testatrix, provided that on the death of the son his share be paid to his legal heirs, if any, and if not, then to be "divided between the remaining living children." After the son's decease, his widow, Elizabeth, received the income from his share until her own death. It was held that Elizabeth's sisters were excluded from inheriting her share because (1) she was not of the blood of the testatrix and (2)

the decree of distribution had ordered payment to the "legal heirs of her said deceased child," which could only mean Ethel. In the Estate of Easter, Cal.Sup., 148 P.2d 601, 602, by decree of distribution Catherine, the widow, received a monthly income from the trust estate, the balance to three daughters and a daughter in law, with a provision that upon the death of Catherine the trust terminate and the corpus "vest in the heirs at law" of the testator in accordance with a specified statute of succession. Upon the death of the widow, her administrator and that of the son who had died childless undertook to obtain a share. The claims of both were rejected. Only the two daughters surviving and the two grandchildren by a deceased daughter could inherit. Not more than a contingent interest had been distributed to the children, "the contingency being their survivorship of the testator's wife upon whose death the trust terminated."

Under these decisions, Mrs. Dorstewitz could not have been vested with an "indefeasible estate," for the reason that she had died before the termination of the trust. Hence her estate could not pass to her adopted children. Under the rule of those cases the legatee class at Margaret's death included only the surviving, consanguineal posterity of Walter C. Miller. 33 C.J. p. 817; 1 Bouv. Law Dict., Rawle's Third Revision, p. 1686. Section 1(c) makes survival of such issue to the date of payment of income or principal the guiding rule by which to determine the members of the legatee class.

[12] If possession of an inheritance is by the will postponed to a designated time, all reference to death or survivorship must be referred to the time of possession. Sec. 122, Probate Code. Under any reasonable view the time for determining the rights of Walter's successors is the time at which the income becomes payable, and certainly no sooner than the death of Walter's daughter who left no lawful issue.

[13] Other sections of the decree justify the interpretation we have given. Any ambiguous or doubtful part of a will may be explained by reference to another portion of the same document. Sec. 103, Probate Code. Not only is the language of section 1(c) used in 1(d) and 1(f), but section 1(g) prescribes the formula for disposing of the grandson's share of the income should he die before attaining his

majority and during the continuance of the trust. It is there provided that if J. Ross Clark, II, leave no widow or child, then such income shall go to the same collateral kin before named and in the same manner and order as prescribed in section 1(c). When Margaret passed on leaving no issue such event thrust the entire share of the trust estate enjoyed by Walter C. Miller upon his then two surviving children: Walter C., Jr., and Laura. This conclusion is further borne out by section 2(b) which provides for distribution of a share of the corpus upon the grandson's attaining the age of 35 years, and 3(b) which makes provision for the distribution of the entire estate upon the termination of the trust. Both contain the same contingent bequest to Walter C. Miller, and the restrictions against the gifts' passing to strangers to the blood are identical with those in sections 1(c) and 1(g).

[14] It follows that the court below has correctly interpreted the decree of final distribution in ordering the distribution of all income and principal of the Walter C. Miller share to Walter C. Miller, Jr., and Laura or to the lawful issue of them surviving on the dates of distribution.

Having assumed that at her father's death Margaret was vested with an equitable title to one third of his share, appellants present an elaborate argument and cite innumerable authorities to support the propositions (1) that the decree of distribution makes no provision for a forfeiture by Margaret of her portion; (2) that it contains no provision for divesting an interest once acquired. Margaret having deceased without lawful issue, the right to the income from her father's share was vested in her brother and sister. She was not deprived of it by "forfeiture." Her estate merely terminated at her death.

In support of the contention that Margaret owned an indefeasible right upon the death of her father and was entitled promptly to be vested therewith, appellants cite numerous authorities. *Miller v. Oliver*, 54 Cal.App. 495, 202 P. 168; *In re De Vries*, 17 Cal.App. 184, 119 P. 109; *Estate of Washburn*, 11 Cal.App. 735, 106 P. 415; *Estate of Lawrence*, 17 Cal.2d 1, 108 P.2d 893; *Williams v. Williams*, 73 Cal. 99, 14 P. 394; *Estate of Rider*, 199 Cal. 724, 738, 251 P. 799; *Litten v. Warren*, 11 Cal.App.2d 635, 637, 54 P.2d 39; *In re Shoemaker*, 211 Cal. 457, 295 P 830; *Estate*

of Newman, 68 Cal.App. 420, 424, 229 P. 898; *Estate of Whitney*, 176 Cal. 12, 167 P. 399; *Rest. Law of Property*, pp. 1217, 1218, 1219. Except for the fact that they contain statements of general principles, "very little aid can be procured from adjudged cases on the construction of wills." *Estate of Wilson*, 184 Cal. 63, 68, 193 P. 581, 583. The cited cases are merely illustrative of the rule (Sec. 140, Probate Code) that where it is the clear intention of the testator that property should pass to legatees or devisees named upon the happening of a specified occurrence, intervening events do not defeat such intention of the testator. Neither "indefeasible vesting" nor "early vesting" can be involved unless it be first determined that the testator intended some sort of vesting. We have shown by the decree of distribution that his clear intent was that Margaret should hold a life estate only, with a perpetual ownership in her surviving lawful issue, and if none, her share to go to her brother and sister subject to the same limitation with respect to their surviving lawful issue.

Had all three of the Miller children survived until the termination of the trust, each would have been vested with a fee in one third of the corpus of the trust. But when Margaret died pending the trust without surviving lawful issue, all payments of income thereafter must go to the "surviving lawful issue" of Walter C. Miller. When the testator, in order to prevent strangers to his blood from enjoying his estate, provided that if any of Mr. Miller's children should die without lawful issue surviving the share that might have gone to such issue must "be held and paid to the then surviving issue of Walter C. Miller," he exercised a prerogative of ownership which cannot under law be denied him.

It follows that since Mrs. Dorstewitz never had more than a life estate in the portion she enjoyed, nothing passed to her husband and adopted children. Her "lawful heirs" cannot be substituted for "surviving lawful issue" as a device for perpetuating in her heirs the enjoyment of the estate which had been restricted by the hand of the benefactor to those of his own blood.

Orders affirmed.

W. J. WOOD and McCOMB, JJ., concur.

64 Cal.App.2d 876

HUNTON et al. v. CALIFORNIA PORTLAND CEMENT CO. et al.
Civ. No. 3315.

District Court of Appeal, Fourth District,
California.
June 14, 1944.

1. Trial $\hookrightarrow$ 296(3)

In action for damages resulting from a collision between defendant's truck and truck operated by plaintiff's son, where two instructions relative to contributory negligence of plaintiff which omitted any reference to contributory negligence of son were corrected by more specific instruction, failure to similarly correct a third instruction was not reversible error, where instruction was only a part of a general instruction and was followed by specific instructions covering the issues.

2. New trial $\hookrightarrow$ 143(1)

Where jury was recalled for purpose of correcting instruction which referred to contributory negligence of plaintiff alone and not of plaintiff's deceased son, and upon returning to jury room the vote was ten to two for plaintiff, as it had been before corrected instructions were given, affidavits of two jurors voting against plaintiff and of one juror voting for plaintiff stating that verdict was reached without regard to corrected instructions were properly stricken.

3. New trial $\hookrightarrow$ 144

Where jury reached a verdict for plaintiff on a ten to two vote which was not changed after court had corrected erroneous instruction, affidavits of the two jurors voting against plaintiff and of one other juror were insufficient to establish that verdict was reached without regard to corrected instruction.

4. Death $\hookrightarrow$ 81

Recovery for death of a minor must be limited to the financial loss occasioned by the death and includes the value of services during minority, above any living expenses furnished, and some allowance for the pecuniary loss of the comfort, society, and protection of minor.

5. Death $\hookrightarrow$ 77

In assessing amount of pecuniary loss for death of a minor, some discretion must

be left to the fact-finding body, but the discretion must not be abused and the amount allowed must be reasonably supported by the evidence.

6. Damages $\hookrightarrow$ 127

A judgment can be held excessive only when it appears so as a matter of law, as being unsupported by evidence, or when it is such as to suggest passion, prejudice or corruption on part of jury.

7. Death $\hookrightarrow$ 99(3)

A verdict of \$18,000, as reduced by the court from jury's verdict of \$40,000, for a father 39 years old engaged in an established business, for the death of a 17 year old son, who assisted the father, was still excessive and reduced to \$10,000.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by G. M. Hunton and G. M. Hunton, doing business as Valencia Truck Company, against California Portland Cement Company and another for the death of plaintiff's minor son and for damages to a truck resulting from a collision with defendant's truck and truck driven by plaintiff's minor son. The jury returned a verdict of \$40,000 for the death of the son and \$1,592.78 for damage to the truck, and in connection with a motion for new trial, the court reduced the \$40,000 item to \$18,000, which reduction was accepted by plaintiff, and defendants appeal from the judgment thereon.

Affirmed on condition.

Gray, Cary, Ames & Driscoll and John M. Cranston, all of San Diego, for appellants.

Nottbusch & Nottbusch, of San Diego, and Head, Wellington & Jacobs, of Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an action for damages. A heavily loaded truck, owned by the plaintiff and driven by his minor son, collided with another heavily loaded truck owned and driven by the defendants, respectively, when the latter truck was stopped on a paved highway which was being widened. The death of the plaintiff's son resulted from this collision. On a former appeal, a jury having returned a verdict for \$6,500 in favor of the plaintiff, it was held

that the question of negligence on the part of the defendants was one of fact for the jury. *Hunton v. California Portland Cement Co.*, 50 Cal.App.2d 684, 123 P.2d 947. The general facts are stated in that opinion and need not be here repeated. On a retrial of the action a jury returned a verdict for the plaintiff in the sum of \$41,592.78, being \$40,000 for the death of the son and \$1,592.78 on a second cause of action for damage to the truck. In connection with a motion for a new trial the court reduced the \$40,000 item to \$18,000, which reduction was accepted by the plaintiff, and the defendants have appealed from the judgment which followed.

It is first contended that the court gave three erroneous instructions, that while the court corrected two of these instructions before a verdict was returned it failed to correct the third, and that this left a conflict between the third instruction and the two corrected instructions. It is then argued that this judgment must be reversed on the general rule that the giving of contradictory instructions is reversible error where it cannot be told which was followed by the jury. See, *Westberg v. Wilde*, 14 Cal.2d 360, 94 P.2d 590; *Anderson v. Mothershead*, 19 Cal.App.2d 97, 64 P.2d 995; *Alcamisi v. Market St. R. Co.*, 67 Cal.App. 710, 228 P. 410; *Ferguson v. Nakahara*, 43 Cal.App.2d 435, 110 P.2d 1091; *Van Fleet v. Heyler*, 51 Cal. App.2d 719, 125 P.2d 586.

In the trial of this case an issue was presented as to contributory negligence on the part of the deceased, and a further issue as to such negligence on the part of the respondent himself, involving the condition of the truck and the manner in which it was loaded. In the first of the three instructions referred to, so far as material here, the jury was told, in effect, that if it found contributory negligence on the part of the "plaintiff" its verdict must be for the defendants, but all reference to contributory negligence on the part of the deceased was omitted. The second of these instructions told the jury that under certain conditions "the defense of contributory negligence is good as against the father and shall not constitute a bar to recovery by him, * * *."

Before a verdict was returned the error in these two instructions was called to the attention of the court. The judge recalled the jury and ordered the jury to disregard them. In lieu thereof, he then gave

two new or correcting instructions, directing the jury to consider these along with all the other instructions previously given. No contention is made that the corrected instructions thus given were erroneous.

[1] It is argued, however, that a third erroneous instruction was not corrected and that contradictory instructions thus appear. The language complained of reads as follows:

"To establish the defence of contributory negligence, the burden is upon the defendant to prove by a preponderance of evidence that the plaintiff was negligent and that such negligence contributed in some degree as a proximate cause of the injury."

It is argued that this was erroneous here because it failed to cover the further issue as to contributory negligence on the part of the deceased. The language thus used was a part of a general instruction on the burden of proof resting upon the plaintiff and the defendants, respectively. After that instruction was given the court gave more specific instructions relating to the various issues raised, including the issues as to contributory negligence, among which were the two erroneous instructions above mentioned which were corrected in the manner described. Thereafter, the court gave some half dozen specific instructions mentioning the deceased by name, in which the jury was clearly and definitely told that if it found that either the plaintiff or the deceased was guilty of any negligence, however slight, which proximately contributed to the happening of the accident its verdict must be for the defendants, notwithstanding any finding of negligence on their part.

We are unable to agree with appellant's contentions that this portion of an instruction so conflicts with the other instructions that it cannot be told which was followed by the jury, or that instead of being merely incomplete it is so erroneous and conflicting that it cannot be reconciled with the others. It was in no sense a "formula" instruction, and it did not purport to cover all matters necessary to a verdict. It was a part of a general instruction and was followed by specific instructions covering the issues in question, and the two were supplemental rather than contradictory. When the instructions are considered as a whole, as they should be under the circumstances here appearing, neither conflict nor prejudice appears. *Westover v. City*

of Los Angeles, 20 Cal.2d 635, 128 P.2d 350; Los Angeles County F. C. Dist. v. Abbot, 24 Cal.App.2d 728, 76 P.2d 188; Barlow v. Crome, 44 Cal.App.2d 356, 112 P.2d 303.

[2,3] It is next contended that, in any event, the jury paid no attention to the court's attempted correction of the instructions. In support of this contention it is argued that the court committed prejudicial error in striking the affidavits of three jurors which were offered in support of a motion for a new trial; that these affidavits should have been admitted and considered; and that they establish the fact that the jury based its verdict entirely upon the prior erroneous instructions and refused to consider the corrected instructions later given by the court.

It appears that after the two instructions were corrected, as above indicated, the jury was sent back to the jury room and that it returned a verdict 26 minutes later. The jurors were polled and in response to an inquiry as to whether this was their verdict ten of the jurors responded "Yes" and two responded "No". Two of these affidavits, being those of the two jurors who thus responded "No" are identical and read as follows:

"That she was a juror before whom the above entitled case was tried; that prior to the Court reinstructing the jury and correcting the errors in the instructions, the jury had reached its verdict and had notified the Clerk of the Court that they had so reached a verdict; that subsequent to the reinstruction of the jury by the Court and upon their retirement to the jury room your affiant and several other jurors attempted to reopen the deliberations of the jury and reconsider the case in the light of the new instructions; that the foreman of the jury and others refused to permit the reopening of their deliberations or any discussion of the case in the light of the new and corrected instructions. That no vote was taken on any issue or phase of the case subsequent to the Court's new instructions and your affiant was afforded no opportunity to reconsider her decision or verdict."

The third affidavit, being that of a juror who responded "Yes" when the jury was polled, reads practically the same, but adds the statement "That your affiant's views of the case were changed to some degree by the Court's new instructions but your

affiant was afforded no opportunity to reconsider her decision or verdict." While the appellants concede the general rule that affidavits of jurors cannot be considered to show misconduct of the jury it is argued that these affidavits were offered to show an irregularity in the proceedings of the jury, as distinguished from misconduct, and that they were admissible and should have been considered.

The verdict of the jury as rendered was ten to two in favor of the respondent. The effect of the third affidavit was plainly to impeach the verdict of that juror as she had voted in favor of the verdict when the jury was polled. She then had an opportunity to reconsider and change her decision or verdict, and the statement to the contrary in her affidavit is entirely without foundation in fact. A similar situation appears in lesser degree in connection with the other two affidavits. Apparently these two jurors neither changed their minds nor desired to do so after the new instructions were given although they had an opportunity to do so when the jury was polled. The fact that no further vote was taken after the correction of the instructions is not controlling and the affidavits are entirely insufficient to show, as claimed by the appellants, that the jury paid no attention to the corrected instructions or refused to consider the case in the light thereof. The jury was then out 26 minutes. It is not alleged in any of the affidavits that during any discussion which occurred any juror announced a change of mind, or even a doubt, as a result of the new instructions. Even the juror who made the third affidavit, in which she alleged that her views were changed "to some degree" does not allege that she informed the other jurors of this fact, and she refrains from alleging that her views were sufficiently changed to have had any effect upon her verdict. Her vote when the jury was polled would indicate the contrary. It would appear from the affidavits that ten of the jurors had agreed upon a verdict in favor of the respondent before the instructions were corrected. If a verdict had then been returned, in view of the original instructions, there would have been a doubt as to whether it might have been rendered in spite of the fact that it may have been found that the deceased was guilty of contributory negligence. But this error in the instruc-

tions was corrected and the jury then returned the same verdict as previously agreed upon. The only reasonable inference from this is that a sufficient number of the jurors remained of the same opinion in the light of the new instructions. In other words, it now appears that these jurors were of the opinion that neither the deceased nor the respondent was guilty of contributory negligence. It cannot be presumed that the jurors would deliberately fail to consider and follow the instructions given by the court, and there is nothing in these affidavits which establishes, or even indicates, that this occurred. Rather than indicating a failure to consider the evidence in the light of the corrected instructions these affidavits indicate that a sufficient number of the jurors had not changed their minds in the light of the new instructions, and that they did not consider it necessary to further argue the matter or to take another vote. This is confirmed by the response made when the jury was polled.

While we think all three affidavits were properly stricken, under rules well established in this state (*People v. Gidney*, 10 Cal.2d 138, 73 P.2d 1186; *Roselle v. Beach*, 51 Cal.App.2d 579, 125 P.2d 77; *Crabtree v. Western Pac. R. Co.*, 33 Cal. App.2d 35, 90 P.2d 835), it would not affect the result if they were to be considered, since they are insufficient to show that the jury paid no attention to the court's correction of the instructions.

The last point raised is that the amount of the judgment is excessive with respect to the allowance for the death of the respondent's son. In this regard, the verdict was for \$40,000, which was reduced by the court to \$18,000, which amount is here claimed to be excessive. The respondent was 39 years old at the time of the accident and the deceased was 17 years and eight months old. The respondent was engaged in the trucking business and the deceased had quit school without graduating, about two months before the accident. He was assisting his father as "a general utility man" and although he received no salary he was given irregular amounts whenever he needed money. It also appears that the deceased had assisted his father, to a certain extent and at intervals, before he quit school. The respondent states that his pecuniary loss cannot be more forcibly presented than by the remarks of the trial judge after hearing the

motion for a new trial. The judge there remarked that this boy was doing work for his parents of the value of \$200 a month; that they were reimbursing him, roughly, \$80 to \$100 a month; that his present employment was of a value to them of about \$1,200 a year; and that his minority would have continued for four years, which would amount to \$4,800 "assuming those conditions went on". The court then said:

"With gold now at \$35.00 an ounce, in place of \$17.50 or \$18.00, money is worth half of what it was when most of these cases were decided. So this boy was a very unique loss. Considering those various elements, I think that the verdict for general damages should be reduced to \$18,000.00."

In thus reasoning, the court jumped from \$4,800 to \$18,000 because of changed monetary conditions. It may be observed that this change in the value of money not only has a bearing upon the amount of the judgment but is also reflected in the \$200 a month valuation placed upon the services of the deceased.

[4] It is well settled that in such a case the recovery must be limited to the financial loss occasioned by the death of the minor. This has usually been held to include the value of services during minority, above any living expense furnished, and some allowance for the pecuniary loss, if any, "of the comfort, society and protection of a deceased child." In proper cases there has also been included some allowance for contributions during the old age of the parents, where the evidence shows that such could have been reasonably expected. Possibly this latter element is becoming more questionable and less extensive in view of certain well known modern social theories.

[5,6] The cases involving the death of a minor recognize that the available means for assessing the amount of pecuniary loss are somewhat inadequate and indefinite and that some discretion must be left to the fact-finding body. But it has been universally held in this state that this discretion must not be abused and that the amount allowed must be reasonably supported by the evidence. A judgment can be held excessive only when it appears so as a matter of law, as being unsupported by the evidence, or when it is such as to suggest at first blush passion, prejudice or corruption on the part of the jury. In

recent years, for well known reasons, somewhat larger judgments have been sustained than was formerly the case. In *Wiezorek v. Ferris*, 176 Cal. 353, 167 P. 234, 236, a judgment for \$10,000 was reversed as lacking evidentiary support. The court there said:

"We are of the opinion that the award of \$10,000 in this case is excessive. There was no averment or proof of special damage, nor anything to show that the pecuniary value of the child to his parents would have been any greater than that of the ordinary boy of his age. For a number of years to come he would have been a source of expense to them; his pecuniary value to his parents after that could by no permissible rule of compensation have equaled the award made by the jury. Even conceding that the child would have been of help to his parents after minority, which is only conjectural, the verdict is still excessive."

In *O'Meara v. Haiden*, 204 Cal. 354, 268 P. 334, 60 A.L.R. 1381, such a judgment was sustained largely on the ground of a change in conditions over those prevailing ten or fifteen years earlier. Since that decision, judgments around \$10,000 have been sustained in several such cases. In at least two such cases a judgment for \$12,000 has been affirmed, upon the evidence there appearing. *House v. Pacific Greyhound Lines*, 35 Cal.App.2d 336, 95 P.2d 465; *Rocca v. Tuolumne County Elec., etc., Co.*, 76 Cal.App. 569, 245 P. 468. In *Wheeler v. Brown*, 47 Cal.App.2d 239, 117 P.2d 707, a verdict for \$20,000, reduced by the court to \$15,000, was held not excessive under the circumstances there appearing. While the facts in this regard are not fully stated it would seem from the opinion that some evidence was received not only as to the age and needs of the mother of the deceased, but also as to contributions made by the son and the possibility and probability of their continuance.

[7] In the instant case, there can be no question that the allowance of \$40,000 made by the jury was excessive both as not supported by the evidence and as indicating passion or prejudice. A former jury appraised the same loss, including the value of the truck, at \$6,500. The question

before us now is whether the court, in reducing this improper verdict, reduced it to an amount which may reasonably be said to be supported by the evidence. There is no definite evidence of pecuniary damage other than with respect to the value of deceased's services during the remainder of his minority, a little over three years. There is no evidence of other pecuniary loss any greater than would be the case with the ordinary boy of that age. An allowance of \$3,000 or \$4,000 for the services of the deceased during the remainder of his minority would have been liberal. The allowance for the value of his comfort, society and protection must bear a reasonable relation to such pecuniary loss as is shown by the evidence, and could not be very large. *Zeller v. Reid*, 38 Cal.App. 2d 622, 101 P.2d 730. The respondent was 39 years old and engaged in a long established business, and any contributions from the deceased for support in his old age were not only remote and problematical but an allowance therefor in excess of \$3,000 or \$4,000 would hardly be supported by any evidence. Taking all of these things into consideration we are of the opinion that the amount to which the verdict was reduced by the court is still excessive, and that the largest amount which could be held to find any support in the evidence is \$10,000.

It is therefore ordered that: (1) With respect to the second cause of action the judgment is affirmed. (2) If within thirty days after the filing of this opinion the respondent files with the clerk of this court a written agreement to the reduction of the amount of the damage awarded him on the first cause of action, involving the death of his son, to the sum of \$10,000 the judgment therefor will be reduced to that amount and will be affirmed. (3) If no such written agreement be filed within said thirty days that part of the judgment will be reversed and the cause remanded for a new trial on the question of damages alone, with instructions to the trial court to enter judgment for the plaintiff for the amount found on a retrial of that issue.

MARKS and GRIFFIN, JJ., concur.

64 Cal.App.2d 903

KENNELLY v. LOWERY, County Auditor.
Civ. 14347.

District Court of Appeal, Second District,
Division 2, California.

June 15, 1944.

Rehearing Denied July 5, 1944.

Hearing Denied Aug. 10, 1944.

1. Statutes $\Rightarrow$ 248

A statute has no force until the date it takes effect, and until that date the statute is inoperative and all acts purported to have been done under it are void.

2. Courts $\Rightarrow$ 57(1)

Where statute under which petitioner claimed to be an official phonographic reporter of Superior Court did not become effective until after date of alleged appointment of petitioner by judges of Superior Court, the purported appointment was a nullity, and petitioner was not a "de jure" phonographic reporter, but at best a mere "de facto" reporter. Code Civ.Proc. § 261b, enacted by St.1943, p. 2968.

See Words and Phrases, Permanent Edition, for all other definitions of "De Facto" and "De Jure".

3. Mandamus $\Rightarrow$ 107

One occupying a place in a de facto capacity is not, in absence of a statutory provision to the contrary, entitled to a writ of mandate to collect salary provided for the office or position.

4. Mandamus $\Rightarrow$ 107

A de facto phonographic reporter of Superior Court was not entitled to a writ of mandate to compel payment of salary in absence of any statute authorizing issuance of a writ under such circumstances. Code Civ.Proc. § 261b, enacted by St.1943, p. 2968.

Original application for a writ of mandate by G. J. Kennelly against J. M. Lowery, Auditor of the County of Los Angeles, State of California, to compel the respondent to issue a warrant in favor of the petitioner for salary allegedly due the petitioner as an official phonographic reporter of the Superior Court.

Writ of mandate denied.

Cantillon & Glover, of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, and S. V. O. Prichard, Asst. Co. Counsel, both of Los Angeles, for respondent.

McCOMB, Justice.

This is an original application for a writ of mandate by which petitioner seeks to compel respondent to issue a warrant in his favor in the sum of \$400, less legal deductions, for salary, alleged to be due petitioner as an official phonographic reporter of the Superior Court of Los Angeles County for the month of October, 1943.

These material facts alleged in the petition are admitted by the answer:

That pursuant to a resolution and order adopted by a majority of the judges of the superior court, July 27, 1943, petitioner was appointed, effective as of October 1, 1943, a regular official phonographic reporter for said court; and that under the terms of section 261b* of the Code of Civil Procedure petitioner is entitled to receive a salary of \$400 for the month of October, 1943.

It is only necessary for us to decide two questions which will be stated and answered hereunder seriatim:

First: *Was petitioner a de jure official phonographic reporter for the superior court during the month of October, 1943?*

[1] This question must be answered in the negative. The law is established in California that a statute has no force whatever until the date it takes effect; that until the time arrives when it is to become effective the statute is inoperative for any purpose and all acts purporting to have been done under it prior to its effective date are void. (People v. Righthouse, 10 Cal.2d 86, 88, 72 P.2d 867; County of Fresno v. Brix Estate Co., 194 Cal. 85, 92, 226 P. 77; Harrison v. Colgan, 148 Cal. 69, 76, 82 P. 674; Miller v. Kister, 68 Cal. 142, 145, 8 P. 813; People v. Johnston, 6 Cal. 673, 674; Bayside Fish Flour Co. v. Zellerbach, 109 Cal.App. 707, 710, 293 P. 834; Gilmore v. Pearson, 71 Cal.App. 284, 287, 235 P. 665 et seq.)

[2] Applying the foregoing rules to the facts admitted by the pleadings in the present case, since the statute (section 261b of the Code of Civil Procedure) under which petitioner claims to be an official phonographic reporter of the Superior

* Section 261b of the Code of Civil Procedure became effective August 4, 1943. (Statutes and Amendments to

the Codes of 1943, Chapter 1031, page 2968.)

Court of Los Angeles County did not become effective until August 4, 1943, his purported appointment as an official reporter by a majority of the judges of the Superior Court of Los Angeles County on July 27, 1943, was a nullity and of no effect.

Petitioner was not a de jure phonographic reporter of the court; he at best was a de facto reporter.

Second: *May a de facto phonographic reporter compel the payment of salary by obtaining a writ of mandate?*

[3] This question must likewise be answered in the negative. The law is settled in this state that one who occupies a place merely in a de facto capacity is not, in the absence of a statutory provision to the contrary, entitled to a writ of mandate to collect the salary provided for the office or position. *Lopez v. Payne*, 51 Cal.App. 447, 449, 196 P. 919; *Legerton v. Chambers*, 32 Cal.App. 601, 604, 163 P. 678.

[4] As petitioner was merely a de facto phonographic reporter of the Superior Court of Los Angeles County, and there is no statute authorizing the issuance of a writ of mandate to assist him in collecting salary which he alleges is due him, he is not entitled to a writ of mandate.

In view of our conclusions it is unnecessary to discuss other questions urged by counsel.

For the foregoing reasons the alternative writ heretofore issued is discharged and a writ of mandate is denied.

W. J. WOOD, J., concurs.

MOORE, Presiding Justice (concurring).

I concur. However, I think that the nature and importance of the case require a treatment of its merits rather than its disposition on account of the oversight of a technicality in the appointment of petitioner. Because the statute whereunder the position was created is new and because a similar situation may recur at any time, it is imperative that the status of the official phonographic court reporter under the new statute, Secs. 261b, Code Civil Proc., Chap. 1031, Statutes 1943, be established by a decision upon the contentions presented by this case.

Prior to October, 1943, petitioner had been duly appointed by the judges of the Superior Court as one of its phonographic reporters who serve its fifty departments

and he had been assigned to a particular judge "to work in the department to which that judge is assigned, so long as that department is in session." Rule 5, Rules of Superior Court, Los Angeles County. On a regular court day of that month, when his department was not in session, petitioner was not employed, and so reported to the presiding judge. On the same day a department of the same court sitting in Long Beach was engaged in the conduct of a judicial proceeding and the services of a reporter were required, whereupon the presiding judge pursuant to the same rule made an order directing petitioner to serve the Long Beach department. Petitioner refused the assignment, ignored the order and defied the court. Here we have rebellion—rebellion in a quarter where it should be least expected—resistance by an officer of a court against the very court that employed him. Whether he was serving de jure or de facto, he was a veteran court reporter, was familiar with the technique of court procedure and knew the paramountcy of obedience to judicial orders. He was familiar with Rule 5 whereby the presiding judge is free to assign a reporter to another department where his services are required, when "the particular judge" to which he has been assigned is holding no session. Frustration of the court's orderly procedure must not be tolerated. No relationship however intimate, no personality, however winsome, may with impunity mock the authority of a court in its effort to maintain the mechanics for the administration of justice.

Rule 5 was adopted by the entire court and was designed for the guidance and the governance of the presiding judge in the administration of the court's business. It cannot by him be lightly set aside to accommodate the whim of one, or the pleasure of all, of the reporters of the court. In making assignments of reporters the presiding judge exercises the power of the whole court. *White v. Superior Court*, 110 Cal. 60, 42 P. 480; *Brown v. Campbell*, 110 Cal. 644, 648, 43 P. 12; *Haines v. Commercial Mortgage Co.*, 206 Cal. 10, 12, 273 P. 35. While it is true, as petitioner contends, that he was appointed by a majority of the judges, it is equally true that all the judges had adopted the rule conferring upon their presiding judge authority to act for the court in assigning unemployed reporters to busy departments. Hence the order assigning petitioner was valid.

Notwithstanding that every court has power to control the conduct of its ministerial officers and to compel obedience to its orders, Sec. 128, Code Civil Proc., and although petitioner had scorned the authority which had placed him in a position of honor and responsibility, he invokes the power of this court to reinforce him in his contumacious behavior. We dare not do so. There is no equity in his bill. While he stands in contempt of a valid order of the Superior Court he is in no position to demand from us relief from such order. *El Camino Land Corporation v. Board of Sup'rs*, 43 Cal.App.2d 351, 354, 110 P.2d 1076; *Bashore v. Superior Court*, 152 Cal. 1, 4, 91 P. 801. Where it appears that with reference to the very question at issue the conduct of a petitioner has been such as to render it inequitable to grant him relief by mandamus, the court may properly deny the writ. *Bashore v. Superior Court*, supra. Even though petitioner had clearly shown a legal right for which mandamus would be an appropriate remedy the court is not obliged to allow it. *El Camino, etc., v. Board of Sup'rs*, supra. Petitioner has taken no steps to exculpate himself; has done no penance for his contempt. Having himself done no equity he seeks it in vain. *El Camino, etc., v. Board of Sup'rs*, supra. To grant his petition would "result in grievous public wrong" (18 R.C.L. p. 138); would impair the prestige of the courts; would exalt the behavior of him who would enjoy the distinction and profit of a reporter's position but condemn the court at his pleasure or caprice.

Petitioner bases his claim upon the assumption that he holds a public office. That assumption has no legal basis. To him no part of the sovereign power is delegated. The performance of his duties is no part of the governmental function. His tenure is transient and incidental. *Sharpe v. City of Los Angeles*, 136 Cal.App. 732, 737, 29 P.2d 797; *Barry v. County of Glenn*, 42 Cal.App.2d 76, 108 P.2d 81. The reporter is an "adjunct of the court"; a part of its machinery; a ministerial officer. *Stevens v. Truman*, 127 Cal. 155, 161, 59 P. 397. He is not enumerated as a county officer. Pol. Code, § 4103 [now § 4013]. The reference in the code to the reporter as occupying an "office" is to be attributed to the poverty of our language and not to an intent on the part of the legislature to invest him with the rights and prerogatives of one who exercises a part of sovereignty.

In view of these sentiments I think the decision of this court upon the facts of this case should serve as a warning to these officers of courts who would disdain order duly made in the administration of the court's business as well as those made in the conduct of judicial proceedings.



64 Cal.App.2d 916

DRULEY v. PEYTON.

Civ. 14403.

District Court of Appeal, Second District,
Division 2, California.

June 16, 1944.

Hearing Denied Aug. 15, 1944.

See 150 P.2d 887.

1. Courts ⇨122

If under complaint plaintiff is entitled to amount equal to or in excess of superior court's jurisdictional minimum, that court has jurisdiction of cause notwithstanding judgment is for amount less than jurisdictional minimum. Code Civ.Proc. § 89(a); Const. art. 6, § 5.

2. Courts ⇨122

A complaint showing that plaintiff was entitled to \$2,325 stated cause of action within \$2,000 jurisdictional minimum of superior court, notwithstanding superior court gave judgment for only \$939.49. Code Civ.Proc. § 89(a); Const. art. 6, § 1.

3. Joint adventures ⇨5(2)

In action on contract whereby defendant agreed to purchase for himself and plaintiff a one-fourth interest in a business, plaintiff and defendant to pay one-half of purchase price and to divide profits equally, evidence sustained findings that defendant had received profits and had not shared them with plaintiff.

4. Appeal and error ⇨1033(1)

Appellant could not complain of error favorable to himself.

5. Evidence ⇨471(2)

In action on contract whereby defendant agreed to purchase for himself and plaintiff a one-fourth interest in a business

and to divide the profits with plaintiff, questions propounded to vendor whether amount paid by vendor to defendant would have been paid for his services regardless of the interest in the business were objectionable as calling for conclusions.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by N. E. Druley against J. A. Peyton to recover a sum of money alleged to be due pursuant to an agreement between plaintiff and defendant. From a judgment for plaintiff, and from an order denying defendant's motion to vacate and set aside the judgment and to enter another and different judgment, the defendant appeals.

Judgment and order affirmed.

McLaughlin & McGinley, of Los Angeles, for plaintiff and respondent.

George F. Cook and L. E. Dadmum, both of Los Angeles, for defendant and appellant.

McCOMB, Justice.

From a judgment in favor of plaintiff in the sum of \$939.49, after trial before the court without a jury, in an action to recover a sum of money alleged to be due pursuant to an agreement between plaintiff and defendant, defendant appeals.

There is also an appeal from the trial court's order denying defendant's motion to vacate and set aside the judgment and to enter another and different judgment.

The essential allegations in the complaint are that:

(1) On or about April 18, 1940, plaintiff and defendant entered into an agreement whereby defendant agreed to acquire, on behalf of himself and plaintiff, a one-fourth interest in a business known as the "Automotive Sales" for the sum of \$3,500; each of the parties to pay one-half of the purchase price; plaintiff to pay \$1,000 at the time the agreement was made and the bal-

ance of \$750 when and after defendant had paid \$1,000 of his share of the purchase price to the vendor of the Automotive Sales business; all profits and moneys derived from the one-fourth interest in the business to be paid to the vendor of the business until the purchase price of the one-fourth interest, to wit, \$3,500, had been paid, and thereafter all moneys derived from their share in the business to be divided equally between plaintiff and defendant.

(2) Plaintiff paid to defendant the sum of \$1,000.*

(3) Defendant purchased a one-fourth interest in the automotive business from Ed Hale and applied the \$1,000 received from plaintiff on account of the purchase price of the interest in said business.

(4) Defendant did not advance or pay any additional amount on account of the purchase price of said interest in the automotive business.

(5) \$2,500 due as earnings upon the one-fourth interest in the business was applied by the vendor in payment of the balance of the purchase price, and an additional amount exceeding the sum of \$5,400, representing earnings on the one-fourth interest, was paid by Ed Hale to defendant; and

(6) Defendant has not paid to plaintiff any moneys received by him from Ed. Hale on account of the one-fourth interest in the automotive business excepting the sum of \$1,000, leaving a balance due and unpaid from defendant to plaintiff in a sum exceeding \$2,000.

There are three questions necessary for us to determine which will be stated and answered hereunder seriatim:

First: *Was the amount in controversy sufficient to confer jurisdiction upon the superior court?*

This question must be answered in the affirmative and is governed by the following pertinent rules:

(1) The Superior Court of Los Angeles County has jurisdiction in all actions to

* Defendant gave plaintiff a receipt that read as follows:

"Received of N. E. Druley the sum of One Thousand dollars. Said one thousand dollars as payment on one eight interest in Automotive Sales. Said interest in Automotive Sales to cost seventeen hundred and fifty dollars. It is agreed that J. A. Peyton will pay Ed Hale the next thousand dollars before Druley is to pay the balance of seven

hundred and fifty dollars. It is agreed between Druley and Peyton that all principal and profits derived from Automotive Sales will go to Ed Hale till the entire quarter interest is paid.

"After that all moneys derived from said quarter interest in Automotive Sales will be divided equally between Peyton and Druley.

"J. A. Peyton."

recover damages for breach of the terms of a contract where the amount involved exceeds \$2,000. Constitution of California, Art. VI, sec. 5; Sec. 89(a) of the Code of Civil Procedure.

[1] (2) If under the allegations of a complaint plaintiff is entitled to an amount equal to or in excess of the superior court's jurisdictional minimum, that court has jurisdiction of the cause even though the judgment is for an amount less than the jurisdictional amount of the superior court. (*Sellery v. Ward*, 21 Cal.2d 300, 305, 131 P.2d 550; *Hammell v. Superior Court*, 217 Cal. 5, 7, 17 P.2d 101; *Warfield v. Basso*, 62 Cal.App. 47, 50, 216 P. 48. See also *Consolidated, etc., Co. v. Superior Court*, 189 Cal. 92, 94, 207 P. 552; *Frost v. Mighetto*, 22 Cal.App.2d 612, 614, 71 P.2d 932.)

It appears that the account between plaintiff and defendant was as follows:

Charge defendant:

Received from plaintiff.....	\$1,000
Received from Ed Hale on ac- of profits on $\frac{1}{4}$ interest in au- tomotive business	\$5,400
Amount agreed to be paid to Ed Hale by defendant	1,000
Total	\$7,400

Credit plaintiff:

Amount due from plaintiff to defendant under contract.....	\$ 750
Amount paid to Ed Hale.....	1,000
Amount paid to plaintiff.....	1,000
Total	\$2,750

Balance of profit	\$4,650
Half of profit to which plaintiff was entitled according to his agreement with defendant	\$2,325.

[2] Therefore, since the allegations of the complaint showed that plaintiff was entitled to \$2,325, the complaint stated a cause of action within the jurisdictional amount of the superior court even though the trial court gave a judgment for less than the amount plaintiff sought to recover.

[3,4] Second: *Was there substantial evidence to sustain the trial court's findings of fact?*

This question must be answered in the affirmative. The evidence being viewed according to the rules set forth in *Kling v. Crown Finance Corp.*, 63 Cal.App.2d 33, 146 P.2d 54, 56, supports the trial court's findings of fact. For example, Mr. Ed Hale testified that he gave defendant a check for \$1,835.62, which plus certain

credits defendant was allowed made a total of \$6,003.37, representing the profits which defendant received from the Automotive Sales business. One-half of this total is \$1,503.19. Plaintiff admitted receiving \$1,000 on account of the profits which left a balance due him of \$503.19. In addition to this later sum plaintiff was entitled to \$875. This sum equals the amount plaintiff's share in the profits would have been increased had defendant abided by the terms of his agreement and paid \$1,750 to Mr. Ed Hale on account of the purchase price of the interest which he purchased in the Automotive Sales business. The amount due plaintiff thus appears to be \$1,378.19, and since the judgment was only for \$939.-49, the error being favorable to defendant may not be urged by him as grounds for a reversal.

[5] Third: *Did the trial court err in ruling upon the admissibility of evidence during the cross-examination of plaintiff's witness, Mr. Ed Hale?*

This question must be answered in the negative. The questions, objections, and rulings under consideration are as follows:

"Q. Then the total amount that Mr. Peyton received from you for the two years' supervision of the Automotive Sales was only \$3006.37?

"Mr. McLaughlin: I want to make an objection to that on the ground that it calls for a conclusion of the witness, and is immaterial.

"Mr. Dadmun: I don't think it calls for a conclusion at all.

"The Court: What it was for would be a conclusion; the total amount he received would not. The total amount received by Mr. Peyton from the Automotive Sales was \$3,006.37. That part will remain.

"A. Correct.

"Q. And that sum of \$3006.37 which Mr. Peyton received for his two years' labor as supervisor of the Automotive Sales in Los Angeles in your behalf would have been paid him regardless of the fourth interest or not in the business, would it not?

"Mr. McLaughlin: Now, I want to object to that on the ground that it calls for a conclusion of the witness, first, that this was received for his labor, and further asking for a conclusion as to whether or not he would have paid it had he not had the fourth interest in the business.

"The Court: It is immaterial and the objection will be sustained.

"Q. If there hadn't been any discussion between you and Peyton relative to the purchase of the one-fourth interest, he still would have received the same amount, wouldn't he; isn't that right?

"Mr. McLaughlin: That is objected to as immaterial and calling for a conclusion of the witness, and as being the same question.

"The Court: The objection will be sustained."

In our opinion the questions were vulnerable to the objections stated by plaintiff and the trial court's rulings were correct.

In view of our conclusions, it is unnecessary to discuss other points urged by defendant.

For the foregoing reasons the judgment and order are and each is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.



64 Cal.App.2d 835

PEOPLE v. ROATH et al.

Civ. 14236.

District Court of Appeal, Second District,
Division 1, California.

June 14, 1944.

Hearing Denied Aug. 10, 1944.

I. Licenses $\hookrightarrow$ 26

Sureties on bond conditioned for payment by principal of all license taxes, penalties, and other obligations arising out of Motor Vehicle Fuel License Tax Act could not be held liable for any amount for which the principal was not legally liable. St. 1923, p. 571, as amended; St. 1941, p. 2680, § 2.

2. Licenses $\hookrightarrow$ 26

Where State Controller seized motor fuel distributor's plant in attempt to recover delinquent taxes and penalties, but Controller's efforts were unavailing because distributor was adjudged bankrupt before sale of property, cost of seizing, preserving, and attempting to sell property

was an "obligation" of distributor within bond given under Motor Vehicle Fuel License Tax Act, and sureties on bond were liable for such obligation. St. 1923, p. 571, as amended; St. 1941, pp. 2680, 2684, §§ 2, 4; Bankr. Act § 1 et seq., 11 U.S.C.A. § 1 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Obligation".

3. Statutes $\hookrightarrow$ 245

Taxing statutes must be strictly construed in favor of taxpayer.

4. Statutes $\hookrightarrow$ 181(2)

Where language of statute is susceptible of two constructions, one of which would render it reasonable, fair, and harmonious with its manifest purpose, and another which would be productive of absurd or unjust consequences, the reasonable construction will be adopted.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by the People of the State of California against Marshall B. Roath, doing business as Cascade Oil & Refining Company, and others on a bond for unpaid motor vehicle fuel license taxes, penalties, and other obligations. From a judgment denying certain relief, plaintiff appeals.

Portion of judgment from which appeal was taken reversed and cause remanded with directions.

Robert W. Kenny, H. H. Linney, John L. Nourse, and Daniel N. Stevens, all of Los Angeles, for appellant.

Paul Nourse and Jennings & Belcher, all of Los Angeles, for respondents.

WHITE, Justice.

The people of the State of California commenced this action upon bonds conditioned for the payment by defendant Roath "of all license taxes, penalties and other obligations of said principal arising out of" the State Motor Vehicle Fuel License Tax Act, Stats. 1923, p. 571, as amended. This cause was before us once before in a proceeding wherein respondents sought a dismissal of the appeal and which motion was denied. People v. Roath, 62 Cal.App. 2d 241, 144 P.2d 648. Reference is hereby made to such decision for a detailed

statement of the factual background surrounding this litigation. In so far as this appeal is concerned, suffice it to say that by their complaint herein the people sought to recover upon the aforesaid bonds for accrued delinquent taxes and penalties in the amount of \$25,118.76 and also, in the same action, to recover expense items totaling \$2,262.60 incurred by the State Controller in seizing defendant Roath's distributing plant; preserving and advertising the same for sale as authorized by section 4 of the above mentioned act, but which sale was not consummated for reasons set forth in *People v. Roath*, supra.

Paragraph VI of plaintiff's complaint, which had to do with the attempted collection of the expense items last referred to, was stricken and the cause proceeded to trial upon the sole issue of the delinquent taxes and penalties, resulting in a judgment in favor of plaintiff for the full amount thereof. This judgment was satisfied of record.

This appeal is prosecuted by plaintiff from the aforesaid judgment, and "specifically from that portion of said judgment which, by limiting plaintiff's recovery to the sum of \$25,118.76, denied plaintiff's recovery of the additional sum of \$2,262.60 prayed for in its complaint".

Paragraph VI of plaintiff's complaint, with which we are solely concerned, reads as follows:

"That said taxes and penalties not being paid, the Controller of the State of California, as required by and pursuant to the provisions of said Act, endeavored to collect the same by seizure and sale of assets of said defendant Marshall B. Roath, but that said efforts were unavailing and said Controller was thereafter ordered and required by the District Court of the United States for the Southern District of California, Central Division, in the Matter of Marshall Roath, Bankrupt, No. 35,760-C, to turn over to Hubert F. Laugharn, as trustee in bankruptcy of said estate, all property both real and personal theretofore seized or levied upon by him and it was further ordered by said Court that all of such assets be administered in the above entitled estate under and in accordance with the terms of the National Bankruptcy Act [11 U.S.C.A. § 1 et seq.].

"That said Controller in seizing said assets, as aforesaid and in advertising the same for sale as authorized by said Act

incurred costs and expenses in the amount of \$2,262.60, no part of which has been repaid to plaintiff. That pursuant to the provisions of said Act there is now due and owing from defendant Marshall B. Roath to plaintiff, in addition to all other amounts herein mentioned, the said sum of \$2,262.60."

The pertinent language of the aforesaid section 4 of the Act, as amended by St. 1941, p. 2684, reads:

"The Controller shall seize any property, real or personal, used by such distributor in the operation of his business, and thereafter sell at public auction such property so seized, or a sufficient portion thereof, to pay the tax due hereunder, together with any penalty or penalties imposed hereby for such delinquency, *and any and all costs that may have been incurred on account of such seizure and sale.* * * *" (Emphasis supplied.)

Said section also contains the following provisions:

"The Controller must also immediately transmit notice of such delinquency to the Attorney General who shall at once proceed to *collect all sums due to the State from any such distributor* hereunder by bringing suit against the necessary parties to effect forfeiture of the bond or bonds of the distributor or of the money or securities deposited by the distributor with the State Treasurer in accordance with the terms of Section 2 of this act, *reducing any deficiency to judgment against the distributor.*

"It is expressly provided that the foregoing remedies of the State shall be cumulative and that no action taken by the Controller or the Attorney General shall be or be construed to be an election on the part of the State or any of its officers to pursue any remedy hereunder to the exclusion of any other remedy for which provision is made in this act. In any suit brought to enforce the rights of the State hereunder the assessment roll prepared by the State Board of Equalization pursuant to Section 6 of this act, or a copy of so much thereof as is applicable in such suit, duly certified by the Controller showing unpaid license taxes assessed against any distributor, shall be prima facie evidence of the assessment of the license tax, the delinquency thereof, *the amount of the license tax, penalties and costs due and unpaid to the State*, that the distributor

is indebted to the people of the State of California in the amount of such license tax and penalties therein appearing unpaid and that all the forms of law in relation to the assessment and levy of such license tax have been fully complied with by all persons required to perform administrative duties under this act." (Emphasis supplied.)

[1] It must be conceded as a matter of law that respondents, as sureties on defendant Roath's bond, cannot be held liable for any amount for which their principal Roath is not legally liable. Therefore, the sole question presented for determination upon this appeal may be thus stated: Was Roath, the principal on the bonds sued upon, liable, other than from the proceeds of a sale of his distributing plant, for the costs of seizing, preserving and attempting to sell such property; or in other words, were such costs payable only out of proceeds realized from a sale of the seized property? The bonds here in question were executed pursuant to the provisions of section 2 of the Motor Vehicle Fuel License Tax Act, wherein it is provided that, prior to the granting of any license authorizing a person, firm, association or corporation to engage in business as a distributor, the State Board of Equalization must require the filing of a bond conditioned upon faithful performance of all the requirements of the Act and "expressly providing for the payment of all license taxes, penalties and other obligations of such person * * * arising out of this act." (Emphasis added.) Thus we find in the bonds here under consideration the following provision:

"If the above bounden principal shall well and truly comply with all the provisions of said Act and amendments thereto, and in particular pay all license taxes, penalties and other obligations of said principal arising out of said Act, then this obligation shall be null and void; otherwise to remain in full force and effect". (Emphasis added.)

We are persuaded that with reference to the liability of defendant's sureties it may fairly be stated that such liability is dependent upon whether the cost of seizure incurred by the State Controller in pursuing the remedy provided by section 4 of the Act is an "obligation" of the taxpayer "arising out of said Act". If the seizure cost is such an "obligation", then, accord-

ing to the very terms of the bonds, the sureties thereon must be held liable.

In support of their claims that the costs incurred by the State Controller in seizing, preserving and selling the distributor's property may be satisfied only out of the proceeds of such sale, respondents urge that section 4 of the Act confers upon the State two cumulative remedies.

First: The right to enforce its lien upon the taxpayer's property by seizing such property and selling it at public auction. Then after such sale the State may apply the proceeds thereof to the payment of "the tax due * * * together with any penalty or penalties * * * and any and all costs that may have been incurred on account of such seizure and sale. * * *".

Second: To bring a suit against the distributor and the sureties upon his bond to collect all sums due to the State from such distributor.

In further support of their contention that in the event of a sale respondent sureties are not liable, our attention is directed by them to the fact that section 4 provides that in any such suit brought by the State, the assessment roll "prepared by the State Board of Equalization shall be *prima facie* evidence of three things: (1) 'of the assessment of the license tax, the delinquency thereof, the amount of license tax, penalties and costs due and unpaid to the State'; (2) '*that the distributor is indebted to the people of the State of California in the amount of such license tax and penalties therein appearing unpaid*'; and (3) that all forms of law have been complied with". Respondents argue that the portion of section 4 just quoted indicates that the legislature did not intend to create any liability whatsoever upon the part of the distributor, but thereby intended only to prescribe the procedure through which the liability of the taxpayer created by other portions of the Act might be enforced. Respondents' argument in this regard is thus epitomized by them in their brief:

"Two remedies are given to the State to enforce payment of the *tax and penalties*. It may pursue either or both of these remedies, but each remedy is separate and apart from the other.

"If the State chooses to enforce its remedy of seizure and sale it must, in ad-

dition to seizing the property, sell it; and upon the sale may recover out of the proceeds thereof its cost of pursuing that remedy, and the portion of the statute granting this remedy is not rendered inoperative by the failure to impose upon the taxpayer personal liability for costs incurred in an abortive attempt to pursue this remedy, that is, an attempt to pursue it which does not result in a sale through which the State can be reimbursed for costs incurred by it in partially pursuing this remedy. The remedy given is seizure and sale, and not seizure *without sale* or sale without seizure. The purpose of this first remedy was to facilitate foreclosure of the lien for taxes and penalties granted to the State and the imposition of that lien did not, in itself, create any personal obligation on the part of the taxpayer to pay anything which he was not otherwise liable to pay. (Civil Code, Sec. 2890.)"

However, we are impressed that respondents' argument is effectively and completely answered by the 6th paragraph of section 4, Deering's General Laws 1937, Act 2964, p. 1409, which, after stating that the remedies afforded the State shall be cumulative, provides:

"That no action taken by the controller or the attorney general *shall be or be construed to be an election on the part of the state or any of its officers to pursue* any remedy hereunder to the exclusion of any other remedy for which provision is made in this act." (Emphasis added.)

[2] It seems to us, from a reading of paragraph 2 of section 4 of the Act, which directs the Controller to seize any property, real or personal, used by the distributor in the operation of his business, sell the same, and out of the proceeds of such sale pay the taxes and penalties due "and any and all costs that may have been incurred on account of such seizure and sale" that thereby there arose an "obligation" upon the part of the distributor to pay such costs. And certainly such "obligation" arises out of the Motor Vehicle Fuel Tax Act and is brought into existence because of tax delinquencies on the part of the distributor under the Act. To us the conclusion seems inescapable that the "obligation" to pay costs of seizure, whether such seizure proceeds to sale or not is an obligation of the taxpayer and that it arises out

of the Act. Such being the case, manifestly, under the terms of the bonds herein, the defendant sureties are liable.

[3,4] We are not unmindful of the rules of statutory interpretation which prescribe that taxing statutes must be strictly construed in favor of the taxpayer, and that where the language of the statute is susceptible of two constructions, one of which would render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd or unjust consequences, the reasonable construction will be adopted. To us, however, it seems clear that the intention of the legislature, as evidenced by the language of the statute, was to make the costs of the seizure and sale of a delinquent taxpayer's property an "obligation" of such taxpayer to be borne by him. To hold otherwise would mean that in the event a sale of the seized property did not for any reason take place, the costs incurred in proceeding against the delinquent taxpayer, who is himself at fault because of his own conduct in failing to discharge his duty to pay taxes, would be thrust upon the taxpaying public. That such a situation was contemplated by the legislature does not seem reasonable to us, and to give the statute such a construction would serve to defeat the tax plan provided for in the Act. On the other hand, to hold that the costs incurred by the State Controller in pursuing the remedy of seizure is an "obligation" of the distributor taxpayer "arising out of this act" would, in our judgment, make the application of the tax act practicable, fair and reasonable; and such construction should therefore be adopted.

From what we have herein said, it follows that the trial court erred in granting the motion to strike paragraph VI of appellant's complaint which contained allegations relating to the seizure of the distributor's property and the costs incurred by the State Controller in pursuing such remedy.

That portion of the judgment from which this appeal was specifically taken is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

YORK, P. J., and DORAN, J., concur.

64 Cal.App.2d 767

In re MATHIE'S ESTATE.

MATHIE v. SCHWARZE et al.

Civ. 14334.

District Court of Appeal, Second District,
Division 3, California.

June 8, 1944.

As Modified June 12, 1944.

1. Appeal and error §989

The appellate function, in reviewing findings of fact, is to consider not the relative weight of conflicting evidence, but only the legal sufficiency of evidence to support the findings.

2. Wills §667

Evidence sustained finding that testatrix' husband fraudulently destroyed or withheld and concealed testatrix' last will, as regards whether husband's acts constituted a contest of such will within provision revoking the share of any legatee contesting the will.

3. Wills §651

A provision in will for forfeiture of legacy if will is contested by legatee is valid, and must be effectuated according to testator's intent.

4. Wills §660

Whether there has been a contest of will within provision for forfeiture of legacy in event of contest by legatee must be determined according to particular circumstances.

5. Wills §665

A proceeding to probate a revoked will need not be carried to unsuccessful conclusion in order to constitute a "contest" within provision forfeiting bequest to any legatee contesting the will.

See Words and Phrases, Permanent Edition, for all other definitions of "Contest".

6. Wills §665

A legatee's acts in bad faith in filing petition for letters of administration, for probate of revoked will, for a homestead alleging that property was community property, and fraudulently destroying or concealing testatrix' latest will constituted a "contest" within provision forfeiting bequest to any legatee contesting the will.

7. Wills §858(1)

Ineffectual legacies and devises pass into residuum unless will shows contrary intention.

8. Executors and administrators §289

Testatrix' debts and expenses of last illness and burial were required by law to be paid irrespective of provisions in will.

9. Wills §587(1)

A testamentary provision bequeathing "all the rest, residue and remainder" of testatrix' estate, after directing payment of all debts and expenses of last illness and burial, was not a "residuary clause".

See Words and Phrases, Permanent Edition, for all other definitions of "Residuary Clause".

10. Wills §865(1)

Where there was no residuary legacy or devise, testatrix died intestate as to portion of estate which her husband would have received under will if he had not contested it, unless that portion was otherwise disposed of by the will.

11. Wills §665

Under will bequeathing estate in equal shares to testatrix' husband and daughter subject to revocation if a legatee contested the will, the provision that except as "otherwise in this will specified" testatrix intentionally omitted to provide for her heirs did not prohibit the husband who contested the will from receiving any portion of estate as an heir.

12. Wills §849

Where will bequeathed entire estate in equal shares to testatrix' husband and daughter subject to revocation of "share" bequeathed if a legatee contested the will, daughter was not entitled to receive the portion which husband would have received if he had not contested the will on ground that will provided that no heir other than the two mentioned should receive any part of estate so that daughter was only remaining eligible heir since court cannot add to or change provisions of the will.

13. Wills §849

Where will bequeathed entire estate to testatrix' husband and daughter subject to revocation of "share" bequeathed if a legatee contested the will, and will contained no residuary clause but provided that except as "otherwise in this will specified"

testatrix intentionally omitted to provide for her heirs, testatrix died intestate as to portion bequeathed to husband which he could not receive because of his contest.

14. Appeal and error ☞714(5)

Points and authorities appended to appellant's brief did not constitute part of record on appeal.

15. Appeal and error ☞653(1)

The appellate court could not on its own motion order that record be augmented to include points and authorities allegedly attached to appellant's notice of intention to move for new trial. Rules on Appeal, rule 12(a).

16. Appeal and error ☞175

Where ultimate question before trial court was interpretation of will which provided for forfeiture of bequest if legatee contested the will, question as to how estate should be distributed under finding that a legatee contested the will was properly before appellate court irrespective of whether matter of distributing portion of estate under laws of succession was presented to trial court.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

In the matter of the estate of Eloisa S. Mathie, deceased, wherein the Farmers & Merchants National Bank of Los Angeles, a national banking association, was executor of the last will and testament of deceased. From an order for ratable distribution decreeing that Edward Mathie, deceased's husband, contested the will and therefore forfeited all right to have any portion of the estate distributed to him, but that all of the estate should be distributed to deceased's daughter Serenita Gutierrez Schwarze, Edward Mathie appeals.

Modified and as modified affirmed.

Horace E. Vedder and David A. Sondel, both of Los Angeles, for appellant.

Avery M. Blount, of Los Angeles, for respondent Serenita Gutierrez Schwarze.

George I. Devor, of Los Angeles, for respondent bank.

PARKER WOOD, Justice.

Under a will, dated June 15, 1939, and admitted to probate as a lost or destroyed

will, decedent gave her property in equal shares to her husband and daughter, and provided therein that should "any devisee or legatee" contest said will his "share" should be revoked. This is an appeal by the husband from an order for "Ratable Distribution" decreeing that he contested said will; that he forfeited all right to have any portion of the estate distributed to him; and that all of the estate (except a certain sum retained for taxes and costs) be distributed to decedent's daughter, subject only to the probate homestead which had been set aside to the husband for his lifetime. He also appeals from a judgment of "Determination of Heirship" that the daughter was the only person entitled to take under the will, and that the whole of the estate be distributed to the daughter. The approximate value of the estate is \$34,000.

Decedent and appellant were married in 1914, when appellant was 50 years of age and decedent was 56 years of age. Appellant had not been married previously, but decedent had been married. The daughter referred to herein was decedent's daughter by such previous marriage. Appellant and decedent lived together until the time of her death on May 21, 1941.

On May 26, 1941, appellant filed a petition for letters of administration on decedent's estate. At a hearing on said petition on June 19, 1941, the petition was granted. Later that same day the clerk of the court telephoned to appellant's attorney and stated that the Farmers & Merchants Bank had sent a letter to the county clerk, dated June 3, 1941, enclosing a copy of a will executed by decedent on February 18, 1927; that the will had been filed in the office of the county clerk on June 5, 1941, but it had just been sent over to the courtroom, and for that reason the hearing on the petition for letters of administration was being continued. (It appears that the order of June 19, 1941, granting said petition was vacated and not entered—the matter having been continued.) No attempt was made to probate the will of February 18, 1927.

On June 24, 1941, the appellant filed a petition for probate of a will dated August 16, 1938, and alleged that he had found the will after making a search of his home. That will gave \$100 to decedent's brother; \$50 a month for life to decedent's sister; \$100 a month for life to decedent's daughter (the last two bequests to be paid from

oil royalties, and to decrease in proportion to any decreases in said income); and the residue to appellant.

After said petitions had been filed, an attorney, who had prepared a will for decedent which had been executed at the Farmers & Merchants Bank on June 15, 1939, asked appellant's attorney whether he had a copy of said will. The bank did not have a copy of that will. Thereafter appellant allegedly made another search for a will and found a copy of the 1939 will. He delivered said copy to his attorney, who delivered it to the attorney who had prepared the will.

On July 11, 1941, the bank filed its petition for probate of the will of June 15, 1939, as a lost or destroyed will, and attached said copy of the will to the petition. On September 30, 1941, the bank filed an amended petition for probate of said will. In said amended petition it was alleged: that on the day said will was executed the appellant took the will into his possession; that said will was never revoked or cancelled, and it had been lost or destroyed; and that said will expressly revoked the will dated August 16, 1938, and named the bank as executor.

The three aforesaid petitions—for letters of administration, for probate of the will of August 16, 1938, and for probate of the lost or destroyed will of June 15, 1939—came on for hearing on October 27, 1941, at which time appellant dismissed his petition for probate of the will of August 16, 1938. The court, upon the hearing on the petition for probate of a lost or destroyed will, found: that the will of June 15, 1939, was decedent's last will and testament; that immediately after the execution of said will appellant took it into his possession; and that it "was lost or destroyed subsequent to the death of said decedent or it was destroyed fraudulently in the lifetime of the decedent without her knowledge." The court admitted the will of June 15, 1939, to probate as a lost or destroyed will, and dismissed the petition for letters of administration.

On June 2, 1942, appellant filed a petition for an order setting apart to him a probate homestead of five lots and a house thereon, where he resided, and alleged therein that the property selected for a homestead was community property of decedent and appellant. The daughter filed objections to the petition for a homestead,

and the bank filed an answer to said petition. The daughter and the bank denied that the property was community property, and alleged it was separate property of decedent. On July 21, 1942, appellant stipulated, and the court found, that the property was separate property of decedent; and the court made an order setting aside two and one-half of said lots, and the house thereon, as a homestead for appellant for the period of his life.

The executor filed its first account, and petitioned for ratable distribution. The daughter filed objections to said petition, and also filed a petition to determine who was entitled to distribution of the estate. She alleged, in part, in said petition: that appellant took possession of the original will (the will dated June 15, 1939, and admitted to probate as a lost or destroyed will) on the day of its execution and without the consent of decedent; that thereafter he fraudulently destroyed it, or fraudulently withheld and concealed it; that his subsequent acts in petitioning for letters of administration, in petitioning for probate of the 1938 will, and in inducing a witness to testify in opposition to the probate of the will of June 15, 1939, "with reference to the burning of said will," were fraudulent and in bad faith; that decedent did not have any conversation with appellant about burning the will as detailed by him in his testimony (referring to testimony given at the hearing on the petition for probate of a lost will); that appellant's petition for a homestead was false in that it stated said property was community property when he knew it was separate property of decedent; that by reason of all of said acts appellant contested the will of 1939 and attempted to defeat its provisions; and that appellant had forfeited all right to any of the estate, and petitioner (daughter) was entitled to the whole thereof. Appellant in his answer to said petition denied said allegations and alleged that he had searched in good faith for a will before he filed his petition for letters of administration, and that said petition "was permitted to remain on file pending the determination of the court as to the said lost or destroyed Will." The court, upon the hearing concerning distribution, found: that the will dated June 15, 1939, was decedent's valid and existing last will; that appellant had taken possession of it immediately after its execution without the

consent of decedent, and thereafter fraudulently destroyed or concealed it; and that the daughter's allegations in her said petition were true. (Said allegations, as above shown, included an allegation that appellant contested the will of 1939.) In the conclusions of law the trial court stated that appellant "contested the last Will * * * of * * * decedent." The court decreed that the whole of said estate be distributed to the daughter, subject only to the probate homestead previously set aside to appellant for the period of his life.

Appellant's contentions on appeal are: that he did not contest the will; and that even if he did contest the will, thereby revoking the "share" provided for him in said will, that he was entitled to receive, under the laws of succession as one of the two heirs of decedent, one-half of the "share" so revoked, since the will contained no provision for the disposition of ineffectual bequests or devises.

There is no contention on this appeal that the property listed in the inventory of the estate was community property. Appellant, as above stated, filed a petition for a probate homestead in which he sought to have five lots and a house thereon, where he resided, set apart to him as a homestead. He alleged that said property was community property. At the hearing on said petition it was stipulated by appellant and found by the court that said property was separate property of decedent, and that there was no community property of appellant and decedent. No appeal was taken from that order, in which the court found that the estate property was the separate property of decedent, and the order has become final. The property set apart to appellant as a homestead was the house and one-half of the five lots, and was for the period of his life. Apparently it was appellant's intention, in alleging that the property was community property, to obtain it absolutely and in fee instead of obtaining the use of it, as separate property, for a limited time.

A question arises as to whether there was sufficient evidence to support the trial court's finding that appellant fraudulently destroyed or withheld and concealed the original will dated June 15, 1939. The evidence shows that: appellant and decedent went to the bank in an automobile driven by appellant, but at that time he did not know her purpose in going there was to

sign a will; decedent alighted from the automobile in front of the bank, and entered the bank; appellant then drove about one block farther, parked the automobile, and returned to the bank; he entered the office of a trust officer of the bank where decedent, the trust officer and two other employees of the bank (the two subscribing witnesses) were assembled.

The three bank employees testified that as appellant entered the room he asked what was going on; that the trust officer told him that Mrs. Mathie had just executed a will; that appellant walked over to the desk, took the will, and that was the last they saw of it. Two of the said employees testified that appellant put the will in his pocket; that he appeared excited or angry, and that he stated he did not want decedent doing anything he didn't know about. The third bank employee testified that when the trust officer "informed Mr. Mathie that Mrs. Mathie had just executed her will," the appellant said, "I will take that out, she doesn't know what she is doing."

There were many inconsistencies in the testimony of appellant as to his demeanor and as to other happenings when, and after, he learned that his wife had made the 1939 will. Appellant testified that when he entered the trust officer's office he (appellant) said, "Boys, you are rushing things here. What are you doing?" and that the trust officer said, "Your wife just signed a will here, gives you and the daughter 50-50"; that he (appellant) said he "didn't like the idea," and, as far as he could remember, he said the will "didn't suit" him, that it "left out her sister and her brother"; that he "opened the will and then read the part of the 50-50"; that his wife "sat there just like she was stunned" and "didn't have nothing to say at all that day"; that, if he did put the will in his pocket, he later took it out and gave it to decedent and she put it in her purse; that he did not see the will again "until the next morning" when he saw decedent go out in the yard with the will in one hand and matches in the other, whereupon he said, "What are you doing there, Pet?" and she replied, "I am burning the will,"—"I don't like it"; and that she burned it "and when she got through stamped on it." He also testified that he never saw the will again after decedent put it in her purse; that they did not discuss it on the way home from the bank; that after they reached home he

"looked it over, but she simply put it away." Some of the testimony was as follows:

"Q. When you got home, on that occasion, did you see that will in your home? A. I must have seen it because I knew what was in it. * * *

"The Court: At home, you said, 'Yes, I looked it over.' Now, did you? A. Yes. I seen the section in there about anybody contesting that will. It did nothing. It left it out, you see. * * *

"By the Court: Then you did read it after you got home? A. Yes".

"Q. [by counsel for daughter] Well, now, when after you got home did you talk—did you read that will? A. Well, after we got home.

"Q. That night or the next day or when? * * * A. I had time all day to do it, and the night.

"Q. You did what? A. I read it at home at certain times.

"Q. Well, what time did you read it at home? A. What time? I don't remember that. * * *

"The Court: He wants to know what those certain times are. A. Oh, I don't remember that. * * *

"Q. [by counsel for daughter] You don't remember? A. No.

"Q. Well, do you remember in what room you were when you read it? A. Yes. * * * In the kitchen. * * *

"Q. But you don't remember whether it was at night or next day or when it was that you read it? A. I certainly read it. I didn't wait until the next day. I read it that day."

Appellant testified that he "wanted to see if there was anything after the 50-50, who was going to get the property," and as soon as they got home, about noon, he asked her for the will and "She got it. She always hid everything." He also testified that he did not like the will because it left out "the sister and brother." When asked if he told her what he did not like about the will, he answered, "The poor woman at that time was in a bad mental condition and I didn't argue with her much, either way. I was thinking of the old will." Further testimony was:

"Q. I am asking you, and when you say you talked with her, did you object to it because the sister and brother were left out? A. I can't answer you things that

are so strange for you to understand. * * *

"The Court: Did you talk it over with her? A. No, I didn't talk about it at all with her."

Appellant's petition for letters of administration stated that "due search and inquiry have been made to ascertain if said deceased left any Will and Testament, but none has been found, and according to the best knowledge, information and belief of your petitioner said deceased died intestate." He did not make inquiry, however, of the daughter or at the bank where the 1939 will was executed. His testimony indicates he had knowledge of the existence of the 1938 will at the time he filed his petition for letters of administration. He first testified that he did not know of the execution of the 1938 will until he found it in a drawer after the petition for letters of administration had been filed, that "She done that alone," and "She never told me about it." He testified also that he found the 1938 will before his wife's death, "months before, I think." He testified also that he "couldn't say," when he found it; that he did not remember when he found it; that "she must have been dead" when he found it; that he had "never" seen it before she died; and that he "only found it once" before she died. He testified also: "Well, I might find somebody that was there when I found it and told him, I might look him up. * * *

"Q. You don't know, then, whether there was any person present when you found it or not? A. I don't know that, no, but I have had nurses there time and again.

"Q. But the nurse wasn't there after your wife died? A. No, she died in the hospital."

He testified also: that when his wife executed the 1939 will at the bank, he (appellant) knew about the 1938 will; that his recollection was entirely clear on the 1938 will, and that he did not see it until after his wife's death; that he didn't know she had made a previous will in which her brother and sister had been provided for, "she seemed to keep that as a secret." A witness, who was a real estate broker, called by appellant, testified that he had known decedent about 40 years and appellant about 35 years; that he had drawn many documents for decedent, including a will in 1936 and one in 1938, both of which he witnessed; that he thought appellant

was the one who telephoned him to come to the Mathie home to make the 1936 will, but there "was nobody present" when the will was drawn except decedent and the witnesses; that he was "satisfied" that appellant was not present when he drew the 1938 will; that decedent called him later to come to her home to draw some other documents for her and the witness asked her if it was another will, and she answered "No," that she had "burned the will." (It does not appear which will was so referred to.) The other witness to the 1936 and 1938 wills testified that on one of the occasions, when she witnessed decedent's will, she went to the Mathie home to be such a witness, and appellant was present; that on the other occasion decedent and the other witness (the broker) brought the will to the home of the witness, but she could not remember whether it was the 1936 or the 1938 will which they brought to her home.

[1,2] The trial court had the benefit of personal observation of the witnesses. The appellate function, in reviewing findings of fact, is to consider not the relative weight of conflicting evidence, but only the legal sufficiency of the evidence to support the findings. *Dell v. Hjorth*, 1942, 51 Cal. App.2d 576, 578, 125 P.2d 505. The trial court found, by necessary implication from the findings of fact that were made, that the testimony of appellant that decedent burned the 1939 will was untrue. The evidence was sufficient to support the trial court's findings that appellant took possession of the original 1939 will on the day of its execution, without the consent of decedent, and thereafter fraudulently destroyed or concealed it; that he was acting in bad faith when he filed his petitions for letters of administration, for probate of the 1938 will, and for a homestead—alleging that the property was community property. It is to be noted that the judge, who presided at the hearing of the petition for probate of the 1939 will as a lost or destroyed will, made findings which were similar to the findings of the trial court herein with respect to the loss or destruction of the 1939 will.

[3-6] It is next to be determined whether appellant's acts constituted a *contest* of the 1939 will. Appellant contends that he did not contest the will. The provision of that will with reference to a "contest" is: "*If any devisee or legatee here-*

under contest this Will, or any part or provision hereof, any share given to such devisee or legatee is hereby revoked and shall become void." (Italics added.) Such a provision in a will is valid, and is to be given effect according to the intent of the testator. *Lobb v. Brown*, 1929, 208 Cal. 476, 484, 485, 281 P. 1010. Whether there has been a contest within the meaning of the language used in a will is to be determined according to the circumstances in each particular case. In the *Estate of Hite*, 1909, 155 Cal. 436, at page 441, 101 P. 443, at page 445, 21 L.R.A.,N.S., 953, 17 Ann. Cas. 993, it was said that the word "contest," as used in a will therein, was not to be "construed according to its popular and primary meanings—to oppose, dispute, contend, or controvert," but was to be given legal significance, and (page 442 of 155 Cal., at page 445 of 101 P.) "there are various legal significations in which the word may be employed." It was further stated in that case, at page 442 of 155 Cal., at page 445 of 101 P.: "The basic question for determination is the meaning of the word *as employed by the testator*, and that determination is to be arrived at from a consideration of his purpose, and the end which he sought to attain. * * * [and at page 443 of 155 Cal., at page 445 of 101 P.] What, then, was the real purpose which the testator sought to effectuate by the simple and understandable word which he employed? For, having found that meaning, the law will give it due effect. That purpose, it seems to us, is plainly to be discerned. It was, as said by the supreme Court of the United States in the *Smithsonian Institution* case, *supra* [*Smithsonian Institution v. Meech*, 169 U.S. 398, 18 S.Ct. 396, 42 L.Ed. 793], to prevent the invocation of any of the technical rules of law to be employed to thwart his expressed wishes. It was to prevent all attacks upon his character, reputation, or sanity by dragging into publicity his private life; and it was equally to secure to the beneficiaries whom he named the fruits of his bounty. When it appears that the effect of the legal action which a contestant has taken has been to thwart the testator in any of these most obvious purposes, can the party, who has deliberately and designedly taken such action, be heard to say that he has not contested? We think not." In the present case the will provided that all of decedent's estate

was to be distributed to appellant and her daughter "in equal shares," and further that she had "intentionally" omitted to provide for her heirs except as provided for in the will. The testatrix desired that her entire estate be divided equally between her daughter and the appellant only. The effect of the 1938 will, had it been admitted to probate, would have been to defeat those intentions of the testatrix and would have placed appellant in a more favorable position with respect to the estate. If the probate homestead had been awarded to appellant absolutely, on the basis that the property was community property, the intention of testatrix that her estate should be divided equally between her daughter and appellant would have been defeated. It is to be noted that if appellant's petition for letters of administration had been granted and the estate distributed under the rules of succession, that appellant and the daughter, being the only heirs, would have received the same proportions of the estate as provided for them in the 1939 will. In either event each would have received one-half. Appellant asserts that he filed his petition for probate of the 1938 will before the bank filed its petition for probate of the 1939 will, and that "when it had become apparent that such will had been revoked by the later will of June 15, 1939," appellant voluntarily dismissed his petition for probate of the 1938 will, and therefore such petition did not amount to a contest. It was not necessary that the proceeding be carried to an unsuccessful conclusion in order to constitute a contest. In the Estate of Bergland, 1919, 180 Cal. 629, 182 P. 277, 5 A.L.R. 1363, a will contained a clause revoking the legacy of any legatee who should contest the will. A daughter of the testator, who was a legatee in that will, petitioned for the probate of an alleged later will, but she did not know it was a spurious will. She dismissed her petition when it came on for hearing. The court held (page 636 of 180 Cal., page 280 of 182 P., 5 A.L.R. 1363) that "an attempt in good faith to probate a later purported will, spurious in fact, but believed to be genuine by the party seeking its probate, does not fall within the forfeiture clause [regarding a contest]," and that the daughter had not contested the will. Further, in response to a contention that in order to amount to a contest "the proceedings must have been carried to the point of a hearing and trial,"

the court said at page 635 of 180 Cal., at page 280 of 182 P., 5 A.L.R. 1363: "The attempt was there, manifested by overt acts designed, and taken for the purpose of bringing about a different disposition of the estate, assuming that the instrument was known to the daughter not to be genuine. The fact that she desisted from her attempt before actually going to trial is immaterial. The attempt was made, and that is enough." Although appellant dismissed his petition for probate of the 1938 will, the evidence was sufficient to support the finding of the trial court that appellant had acted in bad faith in filing that petition and in other respects as above stated. The combination of the acts of appellant in filing petitions for letters of administration, for probate of the 1938 will, for a homestead on five lots alleging the property was community property, which acts were committed in bad faith as found by the trial court upon sufficient evidence, and the act of appellant in fraudulently destroying or concealing the 1939 will as found by the trial court upon sufficient evidence, constituted a contest of the 1939 will within the meaning of the word "contest" as used therein. In addition to this appellant testified that he had seen his wife burn the will. Had he succeeded in convincing the court that it had been so destroyed he would have accomplished a direct and effective contest of the will within the meaning of the contest clause.

Appellant contends further, as above stated, that even if he did contest the will, thereby revoking the "share" provided for him in the will, he was entitled to receive, under the laws of succession as one of the two heirs of decedent, one-half of the "share" so revoked, since the will contained no provision for the disposition of ineffectual bequests or devises.

The 1939 will provided in part:

"I, Eloisa S. Mathie * * * do make, publish and declare this my last Will and Testament and hereby revoke all former Wills and Codicils:

"First: I direct my Executor to pay my just debts and expenses of last illness and burial.

"Second: "I give, devise and bequeath all the rest, residue and remainder of my estate, real and personal, of whatsoever consisting and wheresoever situate, in equal shares, to my daughter, Serineta Gutierrez

Schwarze, and my husband, Edward Mathie.

"Third: I have, except as otherwise in this Will specified, intentionally and with full knowledge omitted to provide for my heirs living at the time of my decease.

"Fourth: If any devisee or legatee hereunder contest this Will, or any part or provision hereof, any share given to such devisee or legatee is hereby revoked and shall become void.

"Fifth: I appoint as Executor hereof The Farmers and Merchants National Bank of Los Angeles. * * *

[7-9] The "Fourth" paragraph of the will provides that any share given to a legatee or devisee who contests the will shall be revoked and become void. but it does not provide that such legatee or devisee shall not receive any part of the estate. Ineffectual legacies and devises pass into the residuum unless a contrary intention is shown by the will. Estate of Walker, 1925, 196 Cal. 323, 327, 237 P. 1070. In considering whether there is a residuary legacy or devise in the will, it is to be noted that the "Second" paragraph which refers to "all the rest, residue and remainder" is the only provision in the will which makes any disposition of the estate. That provision disposes of her entire estate. The "First" paragraph merely directs the payment of debts and expenses of last illness and burial, which were required by law to be paid irrespective of the provisions in the will. In *Childs v. Gross*, 1940, 41 Cal.App.2d 680, at page 684, 107 P.2d 424, at page 426, it was said: "The debts and funeral expenses are charges against the estate, and could not constitute bequests. A 'residuary clause' has been defined to be the clause in a will by which that part of the property is disposed of which remains after satisfying bequests and devises. 69 C.J., p. 413, sec. 1472. As there were no bequests or devises other than the trust provision which disposed of the entire estate, there was no 'residue' involved." See Estate of Moorehouse, Cal. App., 1944, 148 P.2d 385. There is no residuary legacy or devise in the present will.

[10-13] Since there is no residuary legacy or devise, the decedent died intestate as to the portion of the estate which appellant would have received under the will, unless that portion was otherwise disposed of by the will. There is no pro-

vision in the will directing what disposition shall be made of a "share" which is "revoked" and becomes "void," as a result of a contest of the will. It was argued by the daughter that paragraph "Third" of the will prohibits appellant, after a contest of the will by him, from receiving a portion of the estate as an heir. That paragraph states: "I have, except as otherwise in this Will specified, intentionally * * * omitted to provide for my heirs * * *" Appellant is one of the two heirs, and provision for him was "otherwise in this Will specified," in that, it was provided in another paragraph of the will he should receive one-half of the estate, subject to the revocation of such provision if he should contest the will. The testator, therefore, did not omit to provide for appellant, who was an heir. Even if a proper construction of said paragraph "Third" is that the testatrix did not intend that appellant should receive any part of her estate if he contested the will; nevertheless, the testatrix did not direct what disposition should be made of the portion appellant would have taken if he had not made a contest. Paragraph "Fourth" merely provides that "any share" of a beneficiary shall be revoked and "become void" in the event of a contest by such beneficiary. Said paragraph does not include the provision that is frequently in a contest clause that if a beneficiary contests the will he shall not receive any part of the estate. Even if said paragraph "Fourth" had included such a provision that the beneficiary should not receive anything if he contested the will, there was no provision therein directing what disposition should be made of the portion appellant would have received if he had not contested. It was also argued by the daughter that the other heir mentioned as a beneficiary in the will, the daughter, would be entitled to receive the portion which appellant would have received, since the will provided that no heir other than the two mentioned should receive any part of the estate, and since the appellant could not receive his portion that the daughter is the only remaining heir not prohibited by the will from receiving a part of the estate. The will provided, however, that the daughter should receive only one-half of the estate, and did not provide that she should receive the portion which appellant would have received if he had not contested the will. The court cannot add to

or change the provisions of the will, and therefore cannot order that the ineffectual legacy or devise, the portion provided for appellant, be distributed to the daughter. A provision, allegedly disinheriting heirs, and similar to paragraph three of testatrix' will, was involved in the Estate of Fritze, 1927, 85 Cal.App. 500, 259 P. 992, 993, wherein testatrix made several bequests, including two to charitable institutions and one to one of her three sisters, and further provided: "It is my will and intent that not any of my relatives or heirs, other than as hereinbefore set forth, shall take or receive any share or portion of my estate. I do not leave anything to my sisters, Margaret and Catherine, of Malden, Massachusetts, as each of them has plenty of this life's possessions." There was no residuary clause, and a portion of the charitable bequests lapsed because the bequests were in excess of the amount allowed by law to be left to such institutions. The trial court awarded the entire lapsed portion to the sister who was a legatee under the will, and decreed that Margaret and Catherine were not entitled to share in the distribution of such lapsed legacy. In reversing the trial court, the District Court of Appeal stated (page 505 of 85 Cal.App., page 994 of 259 P.): "A testator must do more than merely evince an intention to disinherit before the heir's right of succession can be cut off—he must make a valid disposition of his property. Estate of Walkerly, 108 Cal. 627, 41 P. 772, 49 Am.St.Rep. 97; Campbell-Kawannanaka v. Campbell, 152 Cal. 201, 207, 92 P. 184. The rules of construction to be applied in cases of this character are well settled. The primary purpose of all such rules is to ascertain the testator's intention (section 1317, Civ.Code), not some undeclared purpose which may be supposed to have been in his mind, but the intention disclosed by the words he has used. If the plan adopted by the testatrix cannot be given effect because it violates the rules of law, the court is not authorized to substitute for the illegal provisions some other which it may suppose would have been adopted by her if she had known that the directions actually given could not be carried out; in other words, the court cannot, under the guise of construction, make a will for the testatrix in place of the one she has made. * * * As in the case of innumerable wills, the testatrix did not anticipate the invalidity of her gift to charity and did

not provide for the disposition of the lapsed gift in the event of such invalidity, which she could easily have done if she so desired. What her actual intent may have been in the event of the invalidity of such gift to charity we have no means of knowing. It cannot be assumed that she would have given all of this excess to her sister Mary Malone [the legatee]. * * * she might have divided it equally among all of the legatees, or given it to other persons not mentioned in her will at all * * *. The situation is one where, as in the Estate of Hittell, 141 Cal. 432, 75 P. 53, the testatrix did not anticipate every contingency. That she so failed furnishes no excuse for the execution of a will by judicial construction." The portion provided for appellant which he could not receive by reason of the contest was not disposed of by will, and decedent died intestate as to that portion of her estate.

[14-16] Respondent contends that the matter of intestacy as to the portion provided for appellant in the will could not be raised for the first time on appeal. The reporter's transcript includes appellant's notice of intention to move for a new trial, but does not include his points and authorities which appellant asserts were attached thereto. Appellant's reply brief includes a copy of the points and authorities which appellant asserts were attached to his said notice of intention to move for a new trial. Those points and authorities show that appellant made the same contention, regarding intestacy, on the motion for a new trial that he has made on this appeal. Said points and authorities, being appended to appellant's brief, do not constitute part of the record herein. This court could, on its own motion, order that the record be augmented to include said points and authorities (Rules on Appeal, rule 12(a)). It appears that if the record were so augmented, it would then show that the question concerning the distribution of one-half of the estate under the laws of succession was not raised for the first time on appeal. The ultimate question before the trial court, after determining the question of fact as to whether there was a contest, was a question of law as to the interpretation of the will. It is not necessary to augment the record, in the respect above mentioned, for the reason that the question before this court, after the facts necessary for a proper interpretation of the will have been determined by the

trial court upon sufficient evidence to support such determination, is a question of law as to the interpretation of the will. The question of law as to how the estate should be distributed, under the facts found by the trial court, is properly before this court, irrespective of whether the matter of distributing a portion of the estate under the laws of succession was presented to the trial court.

The order and judgment are modified by directing that one-half of said estate be distributed according to the laws of succession; and, except as so modified, the said order and judgment are affirmed. Appellant to recover costs on appeal.

DESMOND, P. J., and SHINN, J., concur.

24 Cal.2d 344

Ex parte STEWART.

Cr. No. 4538.

Supreme Court of California.

June 7, 1944.

1. Pardon ☞13

If order by Governor commuting death sentence was ambiguous, a construction should be given it which would be favorable to prisoner.

2. Pardon ☞2

The parole law is humanitarian in character and its purpose is to mitigate rigor of old penitentiary system.

3. Criminal law ☞13

A citizen should not be deprived of his liberty for violation of a law which is uncertain and ambiguous.

4. Pardon ☞13

Use of word "natural" by Governor in commuting prisoner's death sentence on condition that he be imprisoned during term of his "natural life", without more, could not be construed as indicating intention that prisoner should not be entitled to privilege of parole law. Pen.Code, §§ 671, 1168, 3046.

See Words and Phrases, Permanent Edition, for all other definitions of "Natural Life".

SCHAUER and EDMONDS, JJ., dissenting.

In Bank.

Proceeding in habeas corpus to secure release of Albert M. Stewart from custody.

Writ denied.

Albert M. Stewart, in pro. per.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

CURTIS, Justice.

Petitioner herein is an inmate of the State Prison at Folsom, California. He is now, and has been ever since the 7th day of June, 1928, in the custody of the warden under and by virtue of a warrant issued out of the Superior Court of Sacramento. By said warrant the warden of said State Prison was commanded to cause petitioner to be put to death in the man-

ner and by the means then provided by the laws of this state for the execution of the death sentence.

Upon application of petitioner and on March 11, 1931, Hon. James Rolph, Jr., as Governor of the State of California, commuted "the sentence of death imposed on Albert M. Stewart on condition that he be imprisoned during the term of his natural life in the State Prison at Folsom." At a later date, after petitioner had served a considerable period of time beyond seven years of his life sentence, he applied for parole under the Parole Law of 1913, St. 1913, p. 1048, and section 1168 of the Penal Code. The parole law or statute was incorporated into the Penal Code in 1941, and section 3046 of said Code provides as did the Parole Law of 1913 that "no prisoner imprisoned under a life sentence may be paroled until he has served at least seven calendar years." Section 1168 provides for the indeterminate sentence. In response to petitioner's application for parole, the Board of Prison Terms and Paroles informed him that "due to the particular wording of your commutation of sentence, which said in effect 'for your natural life,' * * * no action can be taken on a parole application in your case by the Board of Prison Terms and Paroles until such time as this provision is removed from the record."

On February 21, 1944, petitioner filed herein his petition for a writ of habeas corpus for the purpose of testing his right to a hearing before the board upon his application for parole, and to "be restored to his lawful rights." Respondents do not question the applicability of the remedy now sought by petitioner to determine his right to a hearing upon said application before the board. This court granted the writ. The respondents have filed their return thereto. The facts are not in dispute and are substantially as set out above. The only problem before us is to determine the meaning of the words "during the term of his natural life" as used by Governor Rolph in his order commuting petitioner's sentence.

Petitioner contends that there is no difference between a term of imprisonment for life and one for the natural life of the prisoner; that if a prisoner is sentenced to prison for life he must serve during his entire natural life, unless sooner pardoned or placed on parole; and that had Governor Rolph intended that peti-

tioner should serve his life sentence without parole, it would have been a simple matter for him to have inserted in his order the words "without parole" or words of similar import. On the other hand, the Board of Prison Terms and Paroles, as its members are advised by the Attorney General, contends that some effect must be given to the word "natural" as used in Governor Rolph's order of commutation; that had the Governor intended that petitioner should serve only an ordinary life sentence, as that term is usually used in criminal judgments, he would not have taken the pains to definitely state that petitioner "should be imprisoned during the term of his natural life"; and that had the Governor intended that petitioner's term of imprisonment was to be subject to parole, he could easily have, and no doubt would have, so stated in his order.

Our attention has been directed to but a single instance in which the words "imprisonment during his natural life" have been used in our Penal Code, and that is in section 671, which reads as follows:

"Imprisonment for life: Whenever any person is declared punishable for a crime by imprisonment in the state prison for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the court authorized to pronounce judgment upon such conviction may, in its discretion, sentence such offender to imprisonment during his natural life, or for any number of years not less than that prescribed."

Evidently the term "natural life," as used in this section of the Code, cannot be given the meaning claimed for it by the Board of Prison Terms and Paroles, and it is just as evident that it is used in this section as synonymous with the word "life." No one, we think, would contend for a moment that a prisoner sentenced under this provision of the Code would not be entitled to the benefit of the parole law of the state.

There has been received in evidence at this hearing a certified copy of an order by Governor Rolph of date July 12, 1932, commuting a death sentence to life imprisonment, which in part reads as follows:

"I, James Rolph, Jr., Governor of the State of California, by virtue of the authority conferred upon me, do hereby

commute the sentence of Raymond C. West to imprisonment for life, provided, however, this commutation is made upon the following conditions: His imprisonment shall be for the term of his natural life. During his imprisonment, he will faithfully comply with all the rules and regulations governing the penitentiary wherein he may be imprisoned. He will not hereafter be released from imprisonment and will not apply for parole to the Board of Prison Terms and Paroles or to any Board, Commission or officer authorized by law to grant parole, nor will he during his imprisonment accept parole from any such Board, Commission or Officer."

While each of the two orders of Governor Rolph provide for imprisonment for the natural life of the prisoner, we think it would be unreasonable to hold that they mean one and the same thing and that they each provide for life imprisonment without parole. On the other hand, as the West order expressly provides for imprisonment for natural life without parole and the order here in question provides simply for imprisonment for natural life, and says nothing about parole, a reasonable construction to be given to the latter order would be that the limitation as to parole was expressly omitted therefrom. The order of Governor Rolph in the West application expressly and meticulously, and we might add laboriously, imposed as a condition upon which the order was made that the prisoner will neither apply for nor accept parole. Had he any intention to impose like limitations upon the order commuting petitioner's sentence, it is only reasonable to expect that he would have used, if not the same language that is found in the West order, at least some word or words which would indicate that a similar condition was intended to be imposed upon petitioner. Finding none, we think it is apparent that it was not the intention of Governor Rolph, in commuting petitioner's sentence, to impose as a condition of his order of commutation that petitioner should not be subject to the parole law of the state.

[1, 2] It might further be observed that if the order of commutation in petitioner's case is ambiguous or uncertain, and is really capable of two constructions equally reasonable, a construction should be given it which would be favorable to the prisoner. The parole law is humanitarian in

character and its purpose and object is to mitigate the rigor of the old penitentiary system. *Roberts v. Duffy*, 167 Cal. 629, 634, 140 P. 260.

[3] It is a fundamental rule of law that no citizen should be deprived of his liberty for the violation of a law which is uncertain and ambiguous (In re Peppers, 189 Cal. 682, 209 P. 896; *People v. Pace*, 73 Cal.App. 548, 238 P. 1089) and the same situation exists where one's liberty is questioned by an order or judgment which is not plain and certain in its terms. 8 Cal.Jur. 465, § 482; *Ex parte Harrison*, 63 Cal. 299. This is especially true where the questioned order or judgment is susceptible of two interpretations, one of which is favorable and the other is adverse to the rights and privileges of the person affected thereby.

[4] It is our opinion, and we therefore hold, that petitioner is entitled to all the benefits and privileges of the parole law of the state and that it is the duty of the Board of Prison Terms and Paroles to grant him a hearing under his application filed with said board. However, this does not entitle petitioner to be released from his present custody by the respondent warden of the State Prison at Folsom, California, and he is therefore hereby remanded to the custody of said warden.

GIBSON, C. J., and SHENK, CARTER, and TRAYNOR, JJ., concur.

SCHAUER, Justice.

I dissent. The majority opinion does not even mention the controlling question in this case. It assumes, without benefit of factual or legal basis, that, unless otherwise expressly provided in the order of commutation, the petitioner has a legal status no more restricted than that of a prisoner (twice convicted of felony) who has been sentenced to a term of imprisonment for life. Having made such assumption it declares, "The only problem before us is to determine the meaning of the words 'during the term of his natural life' as used by Governor Rolph in his order commuting petitioner's sentence." Such statement of the problem is wholly inadequate to this case.

If it were the function or prerogative of a Governor, in commuting a death sentence, to vacate the sentence which the court had imposed and to pronounce a new sentence and issue a new commitment,

and if in this case those things had been done, then the discussion of law in the majority opinion might be pertinent to the matter in hand. But no such matter is before this court.

This petitioner was convicted in the superior court of murder in the first degree. Pursuant to the law enacted by the people of this state, through their chosen representatives, the petitioner was sentenced to death. The court duly issued a commitment which contains the following language: "Now, Therefore, this warrant is to command you, the said Sheriff of the County of Sacramento, State of California, to take into your custody the said Albert M. Stewart, alias Zephic Saunders, who answers his true name to be Albert M. Stewart, and to keep him safely and in close confinement, and within ten days from the time of this judgment, to-wit, June seventh, A.D. 1928, deliver him into the custody of the Warden of the State Prison at Folsom, in the State of California, and at the same time deliver this warrant to the said Warden.

"And You, the Warden of the State Prison at Folsom, State of California, are hereby ordered and commanded to execute the said judgment by receiving into your custody the said Albert M. Stewart, alias Zephic Saunders, who answers his true name to be Albert M. Stewart, and keeping him safely and in close confinement until Friday, the 17th day of August, A. D. 1928, upon which day, between the hours of Nine (9) o'clock a.m. and Six (6) o'clock p.m., you will take him, the said Albert M. Stewart, alias Zephic Saunders, who answers his true name to be Albert M. Stewart, to a place of execution within the walls of the said State Prison at Folsom, State of California, and then and there hang him by the neck until he be dead."

The above-quoted provisions of the commitment truly follow and, in effect, constitute the judgment which was pronounced. It was that judgment which Governor Rolph *commuted*. He did not vacate or set aside that judgment; he did not pronounce a new and different sentence. His only power in the premises was that given him by section 1 of article VII of the state Constitution; i. e., "the power to grant reprieves, pardons, and commutations of sentence, after conviction."

Petitioner still remains in prison under the sentence imposed by the superior court

and the commitment issued by that court. It is only by the force of the court's judgment and the authority evidenced by the commitment that petitioner is held in custody; the only force of the commutation is that he has not been hanged. The commutation of sentence operates, in effect, as a mere stay of execution of that portion of the sentence which required petitioner be put to death. The language employed by Governor Rolph in effecting the commutation seems not ambiguous or uncertain to any degree. It is, in fact, a clear and concise statement. It was executed by the Governor on recommendation of four associate justices of this court. It reads as follows: "As the Honorable Justices who signed the letter are familiar with the facts of the case as disclosed by the record, I consider myself bound to act favorably upon their recommendation and do, therefore, commute the sentence of death imposed upon Albert M. Stewart on condition that he be imprisoned during the term of his natural life in the State Prison at Folsom."

The above-quoted commutation is characterized as much by language which is not used as by that which is used. The Governor says, "I * * * commute the sentence of death imposed upon Albert M. Stewart." He does *not* say, "I commute *to life imprisonment* the sentence of death." He says merely, "I * * * commute the *sentence of death* imposed upon Albert M. Stewart *on condition* that he be imprisoned during the term of his natural life in the State Prison at Folsom." The word "commute" in legal proceedings in criminal cases is ordinarily used with context to express the substitution for one penalty of another which is lighter. Here, it is obvious that Governor Rolph used it to denote a suspension of execution of that portion of the sentence which otherwise required—and, save for the continuing suspension, still requires—that the petitioner be put to death. But this suspension is expressly made subject to the "condition that he be imprisoned during the term of his natural life in the State Prison at Folsom." The controlling point in the case is that the provision for imprisonment "during the term of his natural life" is not a sentence which the Governor imposes; *it is a condition concurrent and continuing* on which the commutation of "the *sentence of death* imposed upon Albert M. Stewart" by the court is dependent. The

moment that Albert M. Stewart ceases to be "imprisoned during the term of his natural life in the State Prison at Folsom," that moment the commutation ceases and petitioner then remains subject to the whole of the penalty specified in the judgment pronounced by the superior court, under which judgment he is detained in prison awaiting execution except as stayed and suspended by the commutation.

The reference in the majority opinion to the language used in a commutation assertedly issued by Governor Rolph to one Raymond C. West is apparently an attempt to justify the conclusion reached in the instant case by a comparison of the language used in this commutation with the language used in that one. The West case has not the slightest relevancy or materiality to the case at bar. Neither the language used in that case nor that used in any other case can alter the plain import of the simple words used in this case or add words which are not used.

Before the commutation was issued the petitioner was under sentence to pay the extreme penalty. The law required that he be held in custody until he was put to death. *This was actually imprisonment for life without power of parole.* The commutation is in the nature of a bounty or charity from the Governor. The majority opinion treats the matter as though it were the function of the commutation to take away or limit some rights which the petitioner would otherwise have and construes the commutation as giving him all rights which are not unequivocally negated. That is not at all its function nor is the basis of construction tenable.

The commutation starts operating on a man against whom the sentence of death has become final. It merely grants some privilege or substitutes some lesser penalty or releases the subject from some part of the penalty which has been imposed. The petitioner was being held in custody *which was to endure until his death.* That was life imprisonment without right of parole but it was not imprisonment for the "term of his *natural life*" because his natural life term was to be cut short by his execution. All that Governor Rolph's commutation purports to do is to conditionally relieve the petitioner of the cutting short of his natural life. It still leaves the petitioner in custody for life without the right of parole but, by operation of the commutation, that custody is made to perdure for

"the term of his natural life" instead of until the term of his natural life is cut short by execution. The commutation as written does not purport to, and cannot legitimately be construed to, substitute a sentence of life imprisonment subject to parole in place of the sentence of death with its concomitant of imprisonment without parole until death.

The burden is not on the State to show that the commutation deprived the petitioner of the right of parole or of any other right. The burden, rather, is on the petitioner to show what rights or privileges the commutation conferred on him. Before the commutation was issued, did the petitioner have the right to be held eligible for parole? If he did not have that right then he does not possess it now unless the commutation granted it to him. And obviously the commutation did not grant it to him: the Governor declared, "I * * * commute the sentence of death * * * on condition that he be imprisoned during the term of his natural life in the State Prison at Folsom." Since the sentence which the Governor was commuting carried with it imprisonment without parole for the full term of petitioner's life until that life was to have been cut short by execution, if the only effect contemplated by the Governor was to relieve the petitioner of the cutting short of the term of his natural life by execution, it is difficult to conceive of any form of expression, not offending tautologically, which would be more apt to accomplish precisely that effect than the language which was used. Governor Rolph was relieving the petitioner from execution on an appointed day; i. e., he was permitting petitioner to live out "the term of his natural life." If that was the full extent of the bounty the Governor intended to confer it necessarily meant that the imprisonment of petitioner would perdure for the full term of his *natural* life instead of only for that portion of such term as would have elapsed prior to the execution. That—no more, no less—is the import of the words which were used.

I do not imply herein any view whatever as to whether the petitioner should or should not be granted a commutation which would entitle him to be considered as eligible for parole. That is not, at least at this time, a problem for this court. The Constitution of California vests the pardoning and commutation powers ex-

clusively in the Governor subject only to the recommendation of a majority of the justices of this court in cases "where the convict has been twice convicted of felony." (Cal.Const., art. VII, § 1.) This court should be as zealous in protecting the executive and legislative branches of government against encroachments by the judicial as it is in guarding its own field against the trespass of others.

The petitioner in this case may apply to the Governor for a new and different commutation giving him the privilege he wants and the Governor, by the constitutional provision above mentioned, is vested with the power to determine such application subject to the recommendation of a majority of the justices of this court. But this court should not invade the province of the Governor by reading into the commutation issued by Governor Rolph a privilege which he did not write.

The writ should be discharged and the petitioner remanded to the custody of the warden of the State Prison at Folsom to be there held "during the term of his natural life" under the sentence of death as conditionally commuted, and not under any assumed new and different sentence of so-called life imprisonment subject to the right of parole.

EDMONDS, J., concurred.



24 Cal.2d 323

In re EGAN.
Cr. 4415.

Supreme Court of California.
June 5, 1944.

1. Habeas corpus ☞87

Petitioners' motion to terminate original habeas corpus proceeding in Supreme Court would be denied where the court upon filing of the record and the report of the referee assumed exclusive control of the proceeding and set it for hearing.

2. Habeas corpus ☞87

Where record in original habeas corpus proceeding in Supreme Court did not support charge that referee was biased, or

that attorneys representing respondents were guilty of misconduct, motion to terminate proceeding would be denied.

3. Habeas corpus ☞80

In original habeas corpus proceeding in Supreme Court, motion by one petitioner on behalf of himself and another to strike out answers, returns and affidavits of respondents in opposition to petition would be considered though movant was a disbarred attorney. Pen.Code, § 1474.

4. Habeas corpus ☞80

In original habeas corpus proceedings in the Supreme Court, petitioners' motion to strike out answers, returns and affidavits in opposition to petition would be denied, where petitioners upon filing of return stipulated that their petition should be considered a denial of the return, and motion to strike was not made until full hearing had been had before referee and more than a month after filing of referee's report. Pen.Code, § 1484.

5. Habeas corpus ☞53

In original habeas corpus proceeding in the Supreme Court, the function of the petition is to obtain the issuance of the writ. Pen.Code, § 1484.

6. Habeas corpus ☞74, 83

In original habeas corpus proceedings in the Supreme Court, the return is not to the petition but to the writ, and issues are thereupon joined by denial or other controversion of the material matters set forth in the return. Pen.Code, § 1484.

7. Habeas corpus ☞83

In original habeas corpus proceeding in the Supreme Court, it could not be urged that general denial in return was insufficient to meet the issues tendered by the petition where there was a stipulation that the petition should be considered a traverse of the return, since by analogy the return was the complaint and the petition was the answer, and any new matter set up in the answer must be proved by the parties alleging it. Pen.Code, § 1484.

8. Habeas corpus ☞80

In original habeas corpus proceeding in Supreme Court, motion to strike out affidavits appended to the return would be denied where court did not proceed upon the affidavits but appointed referee to take testimony and report his findings. Pen.Code, § 1484.

9. Habeas corpus ☞80

In original habeas corpus proceedings in Supreme Court, where petitioners included a copy of each commitment in petition, petitioners thereby admitted authenticity of such commitments and could not complain that copies of commitments included in return were not certified by proper official, particularly where there was no evidence that authority by which petitioners were held was improper.

10. Criminal law ☞999(1)

The secretary of the Board of Prison Terms and Paroles at San Quentin was official custodian of prison records of which commitment was a part and was a proper person to certify to correctness of a copy of the commitment pursuant to the Penal Code. Pen.Code, § 969b.

11. Stipulations ☞14(11)

In original habeas corpus proceedings in Supreme Court, where counsel for petitioners waived presence of petitioner during reading of depositions, which waiver was accepted by the referee, and all that occurred during absence of petitioners was the reading of deposition and the making of objections thereto and referee's rulings thereon, and there was no showing of prejudice, petitioners were bound by stipulation of their counsel.

12. Habeas corpus ☞90

In original habeas corpus proceedings in Supreme Court, the absence of petitioners was immaterial where all that occurred was a discussion between referee and counsel, of means of obtaining re-appearance for further interrogation of a witness and postponement of the hearing.

13. Habeas corpus ☞85(1)

In original habeas corpus proceeding in the Supreme Court, evidence failed to show that either petitioner was convicted on testimony that was false as to any material matter, or that prosecuting officials or other representatives of the state suffered the introduction of false testimony knowing it to be false.

14. Habeas corpus ☞85(1)

In original habeas corpus proceeding in Supreme Court, burden was on petitioners claiming that deprivation of counsel resulted in an unfair trial, or in no trial at all, to show that there had been a substantial violation of constitutional rights.

Const. Cal. art. 1, § 13; U.S.C.A. Const. Amend. 14.

15. Constitutional law Ⓒ268

Where defendant in murder trial was represented by counsel of his own choosing until 20 minutes before end of closing argument in behalf of state and defendant's rights were protected by stipulation theretofore entered into by his counsel, and only service rendered by duly appointed counsel was refusal to waive written instructions and defendant's request to represent himself was recognized while instructions were read to jury, and the appointment of yet another attorney endured only for ten minutes while verdicts were returned, and defendant's consent to a date for judgment and sentence was obtained, and there was no showing of any conflict of interests between defendant and codefendant so as to render improper the appointment of attorney for codefendant to represent defendant after defendant's own counsel had been imprisoned for contempt of court, defendant was not deprived of due process. Const. Cal. art. 1, § 13; U.S.C.A. Const. Amend. 14.

In Bank.

Original habeas corpus proceedings in the Supreme Court in the matter of Frank Egan on behalf of Albert Tinnin and himself to secure release from custody.

Writ discharged.

Charles Bagby, John C. Jury, Francis C. Mackall, and Elizabeth Cassidy, all of San Francisco, for petitioners.

Earl Warren and Robert W. Kenny, Attys. Gen., W. T. Sweigert, Asst. Atty. Gen., David K. Lener, Deputy Atty. Gen., and Matthew Brady, Dist. Atty., and Leslie C. Gillen, Asst. Dist. Atty., both of San Francisco, for respondent.

SHEINK, Justice.

On February 2, 1942, Frank Egan, on behalf of himself and Albert Tinnin, filed in this court a petition for writs of habeas corpus. Egan is confined in the State Prison at San Quentin, and Tinnin in the State Prison at Folsom. The wardens of those prisons are the respondents. Egan and Tinnin are under sentences of life imprisonment for the murder of Mrs. Jessie Scott Hughes in April 1932. Also implicated in the homicide was Verne Doran, a

confessed accomplice, who turned state's evidence, and whose case was brought on for trial after the conviction of Egan and Tinnin. On the joint trial of Egan and Tinnin, Doran was examined under oath. This evidence, together with evidence of other circumstances connecting Egan and Tinnin was the commission of the crime, was, on the appeal of Tinnin, held sufficient to support the verdict. *People v. Tinnin*, 136 Cal.App. 301, 28 P.2d 951. The appeal of Egan was dismissed for failure to prosecute. *People v. Egan*, 135 Cal.App. 479, 27 P.2d 412. The opinion of the District Court of Appeal in the case of *People v. Tinnin*, supra, is referred to for a more extended recital of the facts leading to the trial and conviction of Egan and Tinnin, who will be referred to as the petitioners. A very brief résumé of the facts shown therein will suffice for the purposes of this proceeding.

In 1932 Frank Egan had been public defender of the city and county of San Francisco for a number of years. Acting as her attorney and business adviser, Egan managed the financial affairs of Mrs. Jessie Scott Hughes, who was a widow of 57 years at the time of her death. She had been the friend and benefactress of Egan since his youth. Egan had defended and befriended Tinnin and Doran, both of whom had criminal records, had served time for commission of felonies, and in 1932 were on parole. Egan became involved in his own and Mrs. Hughes' financial affairs. The three men connived and Tinnin and Doran executed a plan to dispose of Mrs. Hughes by attacking her in the basement of her home, running a heavy automobile over her body until she was dead, and then throwing the body into the street to make it appear that she had been the victim of a "hit and run" accident.

The petitioners were convicted and were committed on October 1, 1932. Doran pleaded guilty to manslaughter and was sentenced to San Quentin to serve the term prescribed by law. He was released on parole in November 1934.

In August 1938 Egan filed a petition for the writ of habeas corpus based in part on the alleged perjured testimony of Doran. The petition was denied by this court on September 15, 1938.

The petitioners now assert that on their trial for the murder of Jessie Scott Hughes they were denied due process of law, first,

in that their convictions were obtained by the perjured testimony of Verne Doran and others, the falsity of whose testimony was known to the prosecuting officials; and, second, in that the petitioner Frank Egan was unlawfully deprived of the assistance of counsel during the prosecution's closing argument to the jury.

On February 26, 1942, this court issued writs of habeas corpus returnable on March 5th following. On the return date the attorney general filed returns to the writs. By stipulation the petition was deemed a traverse to the returns. On March 9, 1942, this court made an order appointing the Honorable Edward I. Butler, judge of the Superior Court in and for the County of Marin, as referee to hear and record the testimony of witnesses to be examined, the examination, and findings and conclusions to be made and filed, to be directed to the issues involved in the proceeding, as follows:

1. Did any witness who testified against Frank Egan or Albert Tinnin in the trial which led to their convictions on the charges for which they are now deprived of their liberty, commit perjury as defined in section 118 of the Penal Code of the State of California, that is, did such witness testify to any material matter which he knew to be false?

2. In the event that such witness or witnesses did commit perjury, as so defined, did the representatives of the State of California, the district attorney, or any of his deputies or assistants cause or suffer such testimony to be introduced knowing that such testimony as given was perjured?

3. Was the petitioner, Frank Egan, deprived of the assistance of counsel for his defense during the trial which led to his conviction on the charge for which he is now deprived of his liberty?

[1,2] The referee entered upon the discharge of his duties and held numerous hearings commencing on March 20, 1942, and concluding on May 26, 1943. On the last hearing time was allowed for the submission of briefs. During the hearings numerous witnesses were examined, including Egan, Tinnin and Doran, in person. The transcript of the oral testimony taken before the referee comprises 555 pages. By stipulation and order the deposition of Herbert Emerson Wilson was taken on oral interrogatories at London, Ontario, before the Registrar of the Supreme Court of

Ontario, Dominion of Canada, during May 18, 1942, and subsequent days. Present at and participating in the taking of that deposition were David K. Lener, deputy attorney general of this state, Leslie C. Gillen, assistant district attorney of the city and county of San Francisco, and John Clare Jury, counsel then of record for the petitioners. That deposition comprises 96 thirty-line pages, and if transcribed under our rules would comprise approximately 130 pages. Reference to this record is made for the purpose of indicating the extent to which the issues involved in the proceeding have been explored by the parties before the referee, and also the task of the referee in preparing and making his report. On March 29, 1943, Egan dismissed in writing his attorney of record, John Clare Jury. On May 24, 1943, Egan, in propria persona, filed with the clerk of this court a document entitled, "Motion to Terminate This Continuing Miscarriage of Justice and Suspension of Writ of Habeas Corpus and Denial of Due Process of Law." The grounds of the motion are not stated, but it is gleaned from the recitals in the document that this petitioner was convinced that the proceeding before the referee had been unduly prolonged; that the referee entertained bias toward him, and that counsel for the State were guilty of conduct prejudicial to his interest. The prayer for relief was that this court immediately set aside the reference and resume exclusive charge of the proceeding. Tinnin did not join in this proposed motion but under date of December 8, 1943, his new counsel, Elizabeth Cassidy, filed an affidavit and request to have the briefs and other documents filed on behalf of Egan considered also on behalf of Tinnin so far as applicable. The request was granted; but the motion to terminate may not prevail for the reason that the court, upon the filing of the record and the report of the referee, assumed exclusive control of the proceeding and set the same for hearing on December 9, 1943; and for the further reason that the record does not support the charge of bias on the part of the referee or the charge of misconduct on the part of the attorneys representing the respondents.

[3] The referee filed his report on September 13, 1943. Before its content is further noted, another motion of the petitioner Egan, filed October 18, 1943, should be disposed of. The document is entitled, "Motion to Strike 'Answers and Returns to

Writ of Habeas Corpus' and 'Affidavits in Opposition to said Petition.'" It was filed by Egan on his own behalf and on behalf of Tinnin. The respondents object to the consideration of the motion in so far as it applies to Tinnin on the ground that it was not signed by Tinnin, that Egan has been disbarred (December 29, 1933), and therefore has no authority to appear for him. The objections may be disregarded for two reasons, first, the document may properly be included among those documents filed by Egan and deemed to be filed also on behalf of Tinnin; and secondly, the proceeding may be maintained either by the person for whose interest it is intended or by some person in his behalf. Pen.Code, § 1474. In filing the petition in behalf of Tinnin as well as himself, Egan did not purport to represent Tinnin as his counsel but, it must be assumed, under the authority of the Penal Code section.

The motion is 39 pages long, specifies 15 grounds in its support and is accompanied by a brief of 81 additional pages. Many of the grounds need not be separately discussed. They are answered briefly by the following conclusions which they elicit.

The answer and return of the respondents was filed on March 5, 1942. It contained a statement of the commitments of Egan and Tinnin, with copies of the judgments and commitments. It also contained affidavits of numerous persons, including Verne L. Doran, Charles W. Dullea, Matthew Brady, John R. Golden, William J. Quinn, Theodore J. Roche, Gerald J. Kenney, Walter McGovern, members of the public defender's office and police department, and other individuals. Under the stipulation, the petition was a traverse to the return.

[4] The action which the petitioners may take upon the filing of the return is specified in section 1484 of the Penal Code. They may deny or controvert any of the material facts or matters set forth in the return, or except to the sufficiency thereof, or allege any facts to show either that their imprisonment or detention is unlawful, or that they are entitled to their discharge. The section further provides that the court or judge must thereupon proceed in a summary way to hear such proof as may be produced against the imprisonment or detention, or in favor of the same, and to dispose of the party as the justice of the case requires, with full power and author-

ity to require and compel the attendance of witnesses, and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case. The only step taken by the petitioners upon the filing of the return was to stipulate that their petition be considered a denial of the matters set up in the return. The petitioners did not make the present objections to the return until full hearings had been had before the referee and more than a month after the filing of the referee's report. Objection to the return made at such time is not in accordance with the requirements of the Code and comes too late.

[5-7] Assuming timeliness, however, it also appears that an objection that the general denial in the return was insufficient to meet the issues tendered by the petition may not be made. The function of the petition is to obtain the issuance of the writ. The return is not to the petition, but to the writ. Issues are thereupon joined by denial or other controversion of the material matters set forth in the return, Pen.Code, § 1484, and were so joined in this case by the petition, considered as a traverse to the return pursuant to the stipulation. Thereupon the petition being considered the answer, allegations as to any new matter therein are deemed denied. By analogy, the return is the complaint and the traverse (the petition) is the answer. New matter set up in the answer is deemed denied and must be proved by the parties alleging it, namely the petitioners. In *re* Collins, 151 Cal. 340, 342, 343, 90 P. 827, 91 P. 397, 129 Am.St.Rep. 122.

[8] By the motion it was sought to strike the affidavits appended to the return, either in whole or in part, for various stated reasons. It is a further sufficient answer to such a motion made at this time to note that this court did not proceed upon the affidavits filed, but appointed a referee to take testimony and report his findings. The report of the referee and the determination of the issues of fact by this court were and are based, not on the affidavits on file, but on the facts appearing from the testimony taken pursuant to the reference.

[9, 10] No merit attaches to the objection that the copies of the commitments of Egan and Tinnin included in the return were not certified by the proper official or were not certified at all. Subdivision 3 of section 1480 of the Penal Code requires

that a copy of the commitment must be annexed to the return and the original produced and exhibited to the court or judge on the hearing. A copy of each commitment was also included in the petition of Egan and Tinnin. The petitioners thereby admitted authenticity, and no objection is made that evidence of the authority by which the petitioners were held was improper. Furthermore, Mark E. Noon, then secretary of the Board of Prison Terms and Paroles at San Quentin, who certified the copy of Egan's commitment, was the official custodian of the prison records of which the commitment was a part, and was therefore a proper person to certify to the correctness of a copy thereof pursuant to section 969b of the Penal Code.

[11, 12] As a further ground of the motion the petitioners appear to claim some infringement of their rights by reason of the fact that they or their counsel were not present at certain proceedings before the referee. At a session called for August 14, 1942, neither Egan nor Tinnin was present. Their presence was waived by their counsel and that waiver was accepted by the referee. All that transpired was a reading of the deposition of Herbert Emerson Wilson and the interposition of objections of counsel and the referee's rulings thereon. No good purpose could have been subserved by the presence of the petitioners on that day under the circumstances, and in the absence of prejudice to their rights, and none is shown, the agreement of their counsel to proceed without their presence, acted on by the referee, must be deemed binding upon them. See 29 C.J. p. 160, § 183, 39 C.J.S., Habeas Corpus, § 93, and cases cited. On Saturday, January 23, 1943, the petitioners were not present. However, no hearing was had on that day. The referee declined to go on with the hearing without the presence of the petitioners. The transcript shows that all that occurred was a discussion between the referee and counsel as to possible means of obtaining the reappearance for further interrogation of Verne L. Doran who had journeyed to Ogden, Utah, in the course of his employment in defense construction, and the postponement of the hearing until February 8, 1943. It was of no moment that the petitioners were not present. Their presence was not necessary for the mere purpose of a postponement. The petitioners appeared on February 8 following, but their respective counsel were ab-

sent. No hearing was had on that day. The referee merely informed the petitioners that their counsel had telephoned the message that Verne L. Doran had not yet arrived, and as the date of his arrival appeared to be uncertain, further hearing would be postponed until February 18th.

There is no substantial merit in any of the grounds of the motion to strike and the motion is therefore denied.

In his report the referee found against the contentions of the petitioners on all issues. The petitioners in person filed their objections to the report, and their counsel have filed briefs with particular reference to the issue whether Egan was deprived of the assistance of counsel during the trial. The report and findings of the referee and the objections thereto have been considered but the findings and conclusions hereinafter expressed are based on an independent examination of the evidence.

The Issues Relating to False Testimony.

The basis of the petitioner's allegations that false testimony was given on their trial is an unsigned forty-four page statement annexed to the petition as Exhibit "J," which purports to have been drafted between the latter part of 1933 and November 1934 by an inmate of San Quentin named Herbert Emerson Wilson from data claimed to have been written on sheets of paper and handed to him by Doran.

When Doran, a young man, arrived at San Quentin, he was assigned to Dormitory No. 2, designated the "old man's dormitory," and placed under "protection," that is, apart from the inmates of the prison who might molest him for having turned state's evidence. Dormitory No. 2 and its yard were separated from the other premises by an iron gate, usually kept locked, and a screen door. However, Doran could have entered the other yard, where Egan was detained. Wilson testified that he observed Egan and Doran conversing together frequently, and that the captain had given them permission to talk. Egan testified that he talked to Doran almost daily after the first meeting with him in the latter part of 1933 when he said Doran told him he had something to disclose. Subsequently, so Egan asserts, Doran informed him that he was going to make a statement to the effect that his (Doran's) testimony at the trial was perjured, and that he was forced into giving the false testimony by the prosecuting officials.

Egan admittedly took this apparently sensational news calmly, did not report it, and merely said to Doran, "It is your story—let your conscience be your guide." Wilson testified that he discussed the statement ten or more times with Egan, but that he received all the information concerning the facts from longhand or typewritten notes prepared by Doran which he, Wilson, embodied in the story with his own phraseology and composition. Egan states that he helped Doran only to the extent of identifying some of the dates and the figures involved in the proposed narrative.

At the time Wilson's deposition was taken he was past sixty-one years of age. In his youth he attended the public grammar schools in London, Ontario. He studied theology in that city, worked as an evangelist and as superintendent of a city mission which he founded. He then came to the United States where he continued his theological studies in Portland, Oregon. He also studied law for one year in Los Angeles. When he was about seventeen and living in London, Ontario, he was convicted of taking money from a grocery store, a felony, and served six months in a juvenile institution. In 1922, in Los Angeles County, he was convicted of the murder of one Cox, sentenced to life imprisonment, and committed to San Quentin where he served twelve years. In June 1935 he was paroled for deportation in consideration of having given information concerning the perpetration of mail robberies in the United States and as to which he, with others, had been informed against. In 1935 he returned to London, Ontario, where subsequently he was convicted of defrauding a finance company in a matter involving approximately \$100,000, and served time in the penitentiary in Ontario.

Doran first met Wilson in the fall of 1933 when the latter was assigned to "take charge" of Dormitory No. 2. According to Wilson's own testimony, he has been a prolific writer of books, short stories, articles, poems, and essays. He testified that Doran knew of his activities in that respect, had read one or two of his book-length manuscripts, and was impressed by his style and his "ability to give expression to things in a lucid way"; that Doran, in October 1933, approached him on the subject of the preparation of a statement; that Doran said he felt a little depressed at times because of his part in the conviction of Frank Egan; that he wanted to make a

statement; that he "requested me to help him to get his story in shape"; that at the request of Doran he prepared the statement, Exhibit "J," for future publication in an American periodical, Wilson and Doran to share equally in the royalties; that Doran said as soon as he was released he would take a boat, enter Canada by way of Boston, and sign the statement after he was out of the jurisdiction of the United States.

Wilson testified that Doran stated on at least a dozen different occasions, at some of which Egan was present, that both Egan and Tinnin were innocent of any connection with the crime and that he alone was responsible for the death of Mrs. Jessie Scott Hughes. The statement, Exhibit "J," does not contain the details of the crime, but it was Wilson's testimony that Doran said he would annex them to the proposed publication when he was safely domiciled in Canada.

Wilson also testified that he completed the statement and had it in shape for publication in May 1934. The statement purports to set forth a dramatic conspiracy on the part of the prosecuting officials and the judge presiding at the trial to implicate Egan and Tinnin in the commission of the crime. It contains recitals of day and night "third degree" torture and threats of personal harm and death by hanging, all designed to compel Doran to "play ball" with the police department and the district attorney's office. It states that as a consequence Doran gave false testimony at the trial of Egan and Tinnin; that the falsity of his and others' testimony was known to the prosecution; that the wrong done by him was at the demand and insistence of Mr. Golden, Mr. Dullea, Mr. Brady, and Superior Judge Frank H. Dunne who presided at the trial.

After his release on parole Doran made a trip on a boat through the Panama Canal. He communicated with Wilson while the latter was still in San Quentin. But Doran did not enter Canada, apparently did not see Wilson again, and the statement, Exhibit "J," was neither signed nor published. In December 1938 Doran submitted to an interview with one of the attorneys for Egan and Tinnin in the presence of Captain (now Chief) Dullea in which he was informed that the statute of limitations would prevent prosecution on any charge of perjury growing out of his testimony at the trial, but Doran then stated that his testimony at the trial was true. In his ap-

pearances before the referee under oath Doran denied that he had had any conversations with Wilson or Egan in regard to any such purported disclosure or any connection with the statement, and reaffirmed the truth of his testimony at the trial. There is therefore in the record of this proceeding no evidence whatsoever that the statement, Exhibit "J," was the statement of Doran, except the oral testimony of Wilson and Egan. Wilson could not produce even a scrap of paper showing any notes prepared by Doran. Although he said Doran made numerous alterations in the daily drafts composed by Wilson, the latter was unable to point to a single place in the forty-four pages where such a correction or alteration had been made. Wilson and Egan testified that Doran was given a copy of the statement and that he took it with him when he left the prison. It was the custom to have a prisoner's effects packed by others, but there is no evidence that the statement was seen by any one, except the assertion by Wilson that he saw it when he carried Doran's effects into the lieutenant's office. Egan testified that he was in the lieutenant's office and handled the effects after Wilson's part in handling them, but he was unable to say that he saw the statement.

[13] In short, there is no evidence confirming Wilson's or Egan's declaration that the unsigned statement proceeded from Doran. Doran denies any participation in its preparation, and he and others deny the truth of any of the charges of falsity or knowledge of falsity included therein. On such a record there is no basis whatsoever for a tenable conclusion that the petitioners or either of them were convicted on testimony as to any material matter which was false, or that the prosecuting officials or any other representatives of the State suffered the introduction of false testimony knowing it to be false. See *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406; *In re Mooney*, 10 Cal.2d 1, 73 P.2d 554.

The Issue Relating to Deprivation of Counsel.

The joint trial of Egan and Tinnin was commenced on August 8, 1932, before the court and jury, the Honorable Frank H. Dunne presiding. Egan was represented by Vincent Hallinan and Tinnin by Nathan Coghlan. About 4 o'clock on the afternoon of September 2, 1932, Isadore M.

Golden, Assistant District Attorney in charge of the prosecution, was engaged in the last few minutes of his closing argument when the court declared Egan's attorney, Hallinan, in contempt of court for "extremely and unduly loud, boisterous, harsh, offensive and contemptuous" interruptions, for breaching the peace of the judicial proceeding, and for conduct interfering with the course of the trial. The judgment of contempt was upheld in *Re Hallinan*, 126 Cal.App. 121, 14 P.2d 797, wherein it is set forth in full. Prior to the adjudication of contempt and during the closing argument of the prosecution, Hallinan had entered into a stipulation with the district attorney that the defendant Egan would be entitled to reserve and have the benefit of any and all possible exceptions and objections to the argument of the prosecuting attorney which could be lawfully made during the course of the argument, and that the defendant Egan would be deemed to have objected and excepted to any and all portions of the closing argument. Hallinan was sentenced to serve twenty-four hours in the county jail, and Tinnin's attorney, Nathan Coghlan, who was then present in the courtroom, was appointed by the court also to represent Egan. Both Coghlan and Egan objected to the appointment, Egan asserting that he desired to represent himself.

Mr. Golden closed his argument at 4:20 on the same afternoon. The court inquired whether written instructions were waived. Mr. Coghlan asked for written instructions. The court recessed until 8 o'clock that night. At that hour and again at 9 the court announced that the instructions were not completed, and adjourned until 10 o'clock the following morning. At the latter hour Hallinan, who in the meantime had been released upon a writ of habeas corpus, sought to resume his duties as defense counsel, but was denied admittance to the courtroom. Defendant Egan personally made a motion that the court permit Hallinan to re-enter the proceedings. The motion was denied. The court expressly recognized Egan's desire to represent himself during the instruction of the jury. Upon the completion of the charge the jury retired for deliberations. On the morning of Tuesday, September 6th, the jury announced that it was ready to return its verdict. The court reconvened. Egan again asked that his counsel Hallinan, who was outside, be permitted to

return, but permission was denied. Acting Public Defender Gerald Kenny was appointed to represent Egan in the proceeding to receive the jury's verdicts. Mr. Kenny was sent for, entered the courtroom and remained while the verdicts were read, the jury polled, and a date set for judgment, which was a date personally agreed to by Egan. Those proceedings were completed in about ten minutes. Thereafter Hallinan was permitted to and did appear and resume his representation of Egan. He made and argued a motion for a new trial on behalf of Egan. On September 14, 1932, a date agreed upon, he also appeared with Egan when judgment and sentence were pronounced. Also on behalf of Egan he gave notice of appeal.

The petitioner Egan contends that because of the enforced absence of Hallinan from the courtroom during the last twenty minutes of the closing argument of the prosecuting attorney and until his reappearance, he was deprived of counsel of his own choosing, was compelled to accept codefendant's counsel, and was thereby denied rights vouchsafed him by section 13 of article I of the state Constitution and the Fourteenth Amendment to the United States Constitution. Among other cases he relies on *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680, and *People v. Lanigan*, 22 Cal.2d 569, 140 P.2d 24, 148 A.L.R. 176, wherein, on appeals from the judgments, it was held that the appointment, over objection, of counsel of one codefendant to serve as counsel for the other codefendant, where a conflict of interests was manifest, was a denial of a fundamental right.

The respondents rely on *In re Connor*, 16 Cal.2d 701, 108 P.2d 10, and *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L. Ed. 1461, 146 A.L.R. 357, as support for their contention that the petitioner's point may not be raised on a proceeding in habeas corpus, but was reviewable only on appeal.

[14] It may be assumed that a petitioner would be entitled to release on habeas corpus if he could show that deprivation of counsel resulted in an unfair trial or in substance in no trial at all. A deprivation leading to such a result would be a violation of his right to counsel under the Constitution of this state, and a failure of due process under the Fourteenth Amend-

ment. But the conclusion may not properly be drawn from the record before us that the petitioner Egan has met the burden in this collateral proceeding of presenting such a case or of showing that there has been any substantial violation of his constitutional rights. It is noted that in each of the joint trials involved in the *Glasser* and *Lanigan* cases the attorney for one codefendant, who was appointed by the court to represent the other, acted for both defendants throughout the entire trial. The decisions on the appeals in those cases that the appointment, made over timely objection, resulted in a deprivation of the constitutional right to counsel, were based upon the presence of a conflict between the interests of the codefendants which prevented a fair trial and the protection of one if unwillingly represented by the attorney for the other. It was indicated in the *Lanigan* case that, pursuant to decisions such as in *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527, the appointment and compulsory representation of both defendants by the counsel of one would be a failure by the trial court to make an effective appointment of counsel so as to amount to a denial of due process and would justify the release of a petitioner in a habeas corpus proceeding. See, also, *Moore v. Dempsey*, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543; *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357; *Walker v. Johnston*, 312 U.S. 275, 61 S.Ct. 574, 85 L.Ed. 830; cf. *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595.

It is assumed that the interests of Egan and Tinnin on their joint trial for the murder of Mrs. Hughes were conflicting. Throughout the trial and until the few minutes before the completion of the People's closing argument, Hallinan, counsel of Egan's own choosing, had represented him and given undivided and full personal attention to his defense. The trial commenced on August 8, 1932, and the jury's verdict was returned on the following September 6th. Even during the twenty minutes of the closing argument when Hallinan was absent, Egan's rights were protected by the stipulation theretofore entered into by his own chosen counsel. The petitioner places great reliance on language appearing in the *Glasser* case, and applied in the *Lanigan* case, that the right under consideration was a fundamental right and that courts should

not indulge in nice calculations as to the amount of prejudice arising from its denial. So here also we are not concerned with nice questions of prejudice. A showing of a substantial deprivation of the right is essential. Unless the petitioner has established such a deprivation he may not prevail in this proceeding.

[15] Tinnin's counsel objected to his appointment as counsel for Egan, but neither he, Egan, nor any one else, either on the trial, on Tinnin's appeal, or on the previous application for the writ of habeas corpus, considered it necessary or appropriate to raise the objection of conflict of interest. It was not until after the decision in the Glasser case on January 19, 1942, that the question was raised in this proceeding. Lapse of time in itself would not of course foreclose relief under a proper showing. But here there is an absence of any substantial showing that Egan was denied the benefits of due process. To epitomize: Throughout the trial and until twenty minutes before the end of the closing argument Egan had been represented by counsel of his choice. All of the evidence had been received and his counsel's argument had been made to the jury. The jury had heard all of the arguments except a portion of the People's closing argument. Nothing occurred thereafter to render the appointment of other counsel ineffective. During the short period of Coghlan's service as the appointed counsel for Egan, the latter's rights were protected by the stipulation entered into by Hallinan. The only service Coghlan was called upon to render was his refusal to waive written instructions. Egan's request to represent himself was recognized during the period the instructions were read to the jury. The appointment of Kenny endured for ten minutes while the verdicts were returned and Egan's consent to a date for judgment and sentence was obtained. It is true that Kenny had been called as a witness for the prosecution but only to establish whether a Mrs. Barton had been a caller at Egan's office on April 30, 1932. Kenny was assistant to Egan as public defender and the friendliest relation between them was apparent. Hallinan was permitted to re-enter the case at a point when his client's interests again required his personal attention.

Finally, the petitioners are making a collateral attack on judgments rendered ten years before this particular proceeding was

initiated. The burden was upon them to show that they were deprived of some constitutional right. Neither has established such a deprivation on the basis of alleged false testimony given at the trial, and neither has proved that he was deprived of the assistance of counsel in a substantial sense. *Johnson v. Zerbst*, 304 U.S. 458, 468, 58 S. Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357. The court therefore would not be justified in declaring the judgments void.

The writs heretofore issued are discharged and the petitioners are remanded to custody.

GIBSON, C. J., and CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHANER, JJ., concurred.



24 Cal.2d 340

DOUGLAS AIRCRAFT CO., Inc., v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 18975.

Supreme Court of California.

June 6, 1944.

1. Workmen's compensation $\S$ 459, 463

Under workmen's compensation statute, where a child is living with his mother at time of accident in course of employment which resulted in her death, or the mother was legally liable for child's support, then, in the event that the father is living, the conclusive presumption of child's dependency applies if the father was not dependent upon the wife. St.1937, p. 268, § 3501 (b).

2. Workmen's compensation $\S$ 459, 463

Where the Industrial Accident Commission found that surviving father was not dependent upon his wife at time of her death resulting from an accident in the course of her employment, the commission properly awarded death benefit to minor children who were living with her, since under the compensation statute the children were conclusively presumed to be dependent upon her, and whether she was liable for their support was of no consequence. St.1937, pp. 268, 304, §§ 3501(b), 5952.

In Bank.

Proceeding to review an order of the Industrial Accident Commission awarding compensation for death. Award affirmed.

Proceeding by Douglas Aircraft Company, Incorporated, employer, to review an order of the Industrial Accident Commission awarding compensation to Nathan N. Meehan and others for the death of Hazel N. Meehan.

Award affirmed.

H. W. Elliott and Robert E. Moore, Jr., both of Los Angeles, for petitioner.

Leonard, Hanna & Brophy, of San Francisco, as amicus curiae on behalf of petitioner.

Everett A. Corten and Dan Murphy, Jr., both of San Francisco, and Katherine Adams Stoll, of Los Angeles, for respondents.

EDMONDS, Justice.

The Industrial Accident Commission awarded a death benefit to the minor children of a mother who was killed in an industrial accident. Douglas Aircraft Company, Inc., the mother's employer, by writ of review, now challenges the commission's jurisdiction to make the award, and the question for decision concerns the construction of section 3501(b) of the Labor Code, St.1937, p. 268, which declares that, under stated conditions, a minor child shall be conclusively presumed to have been wholly dependent upon a parent.

[1,2] There is no dispute as to the facts. In 1942, Nathan Meehan and Hazel N. Meehan, his wife, with their two minor children, came to California from Oklahoma where they had conducted a grocery store. Meehan found employment in a shipyard. Because his salary of about \$50 per week, less the deductions made for war bonds, federal income tax and social security payments, was insufficient to meet all of their living expenses, Mrs. Meehan secured a position at the aircraft factory and their salaries were pooled in a common fund for the support of the family. Three weeks after she went to work, Mrs. Meehan was killed in an accident arising out of and occurring in the course of her employment. Upon these facts the commission found that Meehan was not dependent upon his wife for support; also, that "said employee left surviving, wholly dependent," two minor children who are entitled to a death benefit of \$5,844.02, based upon stipulated earnings.

An award was made accordingly with an additional amount of \$150 for burial expenses.

The commission acted without or in excess of its power, Labor Code, § 5952, the employer asserts, because the uncontradicted testimony of the minors' father shows that at the time of the death of the mother, they were not wholly dependent upon her as they were receiving substantial support from him. Under these circumstances, says the employer, the conclusive presumption of total dependency specified in section 3501(b) of the Labor Code is not available to the minor children. In support of its award, the commission takes the position that, according to the express terms of that statute, a minor child is conclusively presumed to have been dependent upon a parent, either father or mother, with whom he was living at the time of an industrial accident by which such parent was killed. The commission also urges that its award should be upheld because Mrs. Meehan was legally liable for the support of her minor children. Adopting the same grounds for affirming the award as those stated by the commission, counsel for the children also say that as the employer is attacking only the amount allowed to the minors, the provision regarding dependency should be liberally construed in accordance with the legislative mandate requiring the enactments concerning workmen's compensation to be construed "with the purpose of extending their benefits for the protection of persons injured in the course of their employment." Labor Code, § 3202.

Section 3501 of the Labor Code reads as follows: "The following shall be conclusively presumed to be wholly dependent for support upon a deceased employee: (a) A wife upon a husband with whom she was living at the time of his injury, or for whose support such husband was legally liable at the time of his injury. (b) A child under the age of eighteen years * * * upon the parent with whom he is living at the time of the injury of the parent or for whose maintenance the parent was legally liable at the time of injury, there being no surviving dependent parent." The following section 3502, provides: "In all other cases, questions of entire or partial dependency and questions as to who are dependents and the extent of their dependency shall be determined in accordance with the facts as they exist at the time of the injury of the employee."

Usually, and particularly before war-time conditions brought married women into industry, the man of the family is the wage earner and the wife and minor child or children are dependent upon him. In accordance with a sound social policy, the Legislature has declared that there shall be a conclusive presumption of dependency as to a wife living with her husband, or for whose support he is legally liable. The same presumption applies to a minor child under eighteen years of age, but only if there is "no surviving dependent parent." Unquestionably, the legislative intent was to give particular consideration to a dependent surviving parent, and under all ordinary circumstances, this is the wife. If she was living with her husband at the time of the fatal accident, or he was then liable for her support, she, exclusively, is given the advantage of the conclusive presumption, and in practice, although the Industrial Accident Commission is not required to do so, Labor Code, §§ 4703, 4704, the entire death benefit is made to her. Only if the status of the wife at the time her husband sustained the fatal injury does not meet the conditions specified by the statute is a minor child under eighteen living with the father, or for whose support the father is liable, entitled to the conclusive presumption.

In the event of the death of a mother by industrial accident, the right of her minor child to a death benefit depends upon other provisions of section 3501. By the express terms of that statute, if the child was living with his mother at the time of the accident, or the mother was legally liable for his support, then, in the event that the father is living, the conclusive presumption applies to the child if the father was not dependent upon his wife. However, if it be determined, as an issue of fact, that the father was dependent upon his wife, a minor child may not be held, as a matter of law, to have been dependent upon her. Under this construction of the statute, the commission having found that Meehan was not dependent upon his wife at the time of her death, properly awarded a death benefit to the minor children who were living with

her. Whether or not she was liable for their support is of no consequence; the Legislature has stated that the conclusive presumption applies under either of the conditions mentioned.

The petitioner relies upon *Fox v. Industrial Acc.Comm.*, 194 Cal. 173, 228 P. 38, and *State Comp.Ins.Fund v. Industrial Acc.Comm.*, 125 Cal.App. 776, 14 P.2d 140, as holding that the conclusive presumption is operative only if the father is killed and the child's status comes within both of the conditions specified in the statute. However, in the *Fox* case the minor children were not living with either the mother or the father at the time of her death and the court declared that, as she was not legally liable for their maintenance, the conclusive presumption of dependency did not apply. And although the opinion includes a reference to the commission's contention that the statute (then § 14[a] of the Workmen's Compensation Act, Stats.1917, p. 844, as amended) applies to both parents, that point was expressly rejected as a ground of decision. In the later case the District Court of Appeal annulled an award of the commission upon an erroneous conclusion concerning the holding in *Fox v. Industrial Acc.Comm.*, *supra*. The decision of the District Court of Appeal is therefore disapproved.

Comment concerning the phrase "no surviving dependent parent" is also found in the case of *Baker v. Industrial Acc.Comm.*, 2 Cal.App.2d 730, 38 P.2d 822, 823, where the court characterized these words as obscure in meaning but ventured the opinion that where a claimant has a surviving parent upon whom he may rely for support, the conclusive presumption of dependency may not be applied. This statement, although dictum, is disapproved as being directly contrary to the conclusion now stated in regard to the conditions entitling a minor child to the benefit of the presumption.

The award is affirmed.

GIBSON, C. J., and SHENK, CURTIS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

24 Cal.2d 942

149 P.2d 705

**FIREMAN'S FUND INDEMNITY CO. v.
INDUSTRIAL ACCIDENT COM-
MISSION et al.
S. F. 17007.**

Supreme Court of California.

June 6, 1944.

I. Workmen's compensation $\S$ 459, 463

Where both husband and wife were employed and pooled their wages to pay living expenses, at time of accidental injury in course of employment resulting in wife's death, the Industrial Commission properly awarded compensation to minor child on ground that under statute the husband was not a "surviving dependent parent" and the child was conclusively presumed to be dependent on the mother. St.1937, p. 268, $\S$ 3501.

See Words and Phrases, Permanent Edition, for all other definitions of "Surviving Dependent Parent".

2. Constitutional law $\S$ 301

A compensation award to a minor for fatal industrial accident of child's mother, who was survived by a husband also employed and not dependent on wife, which award was based on ground that under statute child was conclusively presumed to be wholly dependent on mother, did not deprive employer or its insurance carrier of property without "due process of law." St.1937, p. 268, $\S$ 3501; Const. art. 1, $\S$ 13; art. 20, $\S$ 21; U.S.C.A.Const. Amend. 14, $\S$ 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

In Bank.

Proceeding by Fireman's Fund Indemnity Company, insurance carrier, to review an order of the Industrial Accident Commission awarding compensation to Betty Louise Graves, a minor, for the death of Mary I. Graves.

Award affirmed.

Leonard, Hanna & Brophy, of San Francisco, as amicus curiae on behalf of petitioner.

Everett A. Corten and Dan Murphy, Jr., both of San Francisco, for respondent.

EDMONDS, Justice.

By writ of review, the insurance carrier of Permanente Metals Corporation, the employer of Mary I. Graves at the time she sustained fatal injuries arising out of and occurring in the course of that employment, has attacked the award of a death benefit made to the woman's minor child. The facts are undisputed and the question for decision concerns the statute which was construed and applied in Douglas Aircraft Co., Inc., v. Industrial Acc. Comm., Cal. Sup., 149 P.2d 702.

[1,2] At the time of her death, Mrs. Graves and her husband were both employed at the same shipyard. Betty Louise Graves, about ten years old, is their minor child. The parents pooled their wages and from the total amount received by them paid the family's living expenses. Upon the application of the husband and child for a death benefit, the commission found that "by presumption" the child survives her mother as a total dependent and that "there was no surviving dependent parent." An award of a death benefit of \$6,000 was made to the child and an additional amount was allowed to the husband for burial expenses.

The insurance carrier charges that the commission in making the award has acted without and in excess of its power; that the findings and award are unreasonable; and that the findings of fact do not support the award. Other grounds stated by the petitioner are that "unless the award is annulled, your petitioner will be deprived of its property without due process of law in violation of Section 21 of Article XX, and of Section 13 of Article I of the Constitution of the State of California, and in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States of America." The commission, in support of its ruling declares that by the express terms of section 3501 of the Labor Code, St.1937, p. 268, a child under the age of eighteen years is conclusively presumed to have been wholly dependent upon a parent, male or female, with whom he is living at the time of a fatal industrial accident and that Graves is not a "surviving dependent parent" within the meaning of that statute.

The constitutional points presented by the petitioner are not supported by either argument or citation of authority. As to the construction of the statute, it argues

that under circumstances such as those shown in the present case, a child may only be found to be partially dependent upon the mother. The decision in the Douglas Aircraft Co. case is to the contrary and compels a determination accordingly.

The award is affirmed.

GIBSON, C. J., and SHENK, CURTIS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.



65 Cal.App.2d 16

LOWREY v. REGO.

REGO v. LOWREY.

Civ. 7008.

District Court of Appeal, Third District,
California.

June 21, 1944.

1. Executors and administrators ¶450

In suit by executor to recover amount of loan for purchase of a motortruck, which loan was alleged to have been procured by fraud, wherein defendant filed cross-complaint against executor individually for damages for wrongfully taking possession of truck, evidence, indicating that defendant fraudulently obtained loan from estate with intention of abandoning lease covering estate farm which he did immediately after procuring loan and purchasing truck, supported judgment for executor.

2. Executors and administrators ¶449

In suit by executor to recover amount of loan which was alleged to have been procured by fraud, defendant's contention that there was fatal variance between allegations of pleading and proof, because loan was made by plaintiff individually and not by estate of which he was executor, was not sustained by record.

3. Executors and administrators ¶86(1)

It is executor's duty to collect all assets belonging to estate. Probate Code, §§ 571, 573.

4. Money received ¶8

An action for money had and received will lie to recover moneys obtained by one person from another by false and fraudulent representations.

5. Executors and administrators ¶426

Where executor's suit to recover money of estate was primarily based on an action in assumpsit to recover money obtained by fraud and not on note, it was immaterial that purported note was payable to plaintiff individually and not to the estate.

6. Executors and administrators ¶437(1)

Where executor's suit to recover money of estate was primarily based on an action in assumpsit to recover money obtained by fraud and not on note, it was immaterial that note allegedly had not matured at time of filing of complaint.

7. Executors and administrators ¶437(1)

Where executor's suit to recover \$600 lent was based on fraud in procuring loan, the suit was not premature merely because the note, evidencing loan, and dated April 1, 1942, provided that money was to draw interest at rate of 7 per cent. annually until paid and \$200 on principal until paid.

8. Executors and administrators ¶448

In executor's suit to recover amount of loan for purchase of truck, which loan was alleged to have been procured by fraud, it was immaterial that amended complaint alleged notice of rescission of contract entered into with relation to loan and purchase of truck.

9. Pleading ¶35

Where complaint states a good cause of action for fraud and deceit, allegations relating to rescission of contract may be disregarded.

10. Appeal and error ¶1073(1)

Where defendant was found to have procured loan of \$600 for purchase of truck by means of fraud, defendant was not injured by cancellation of note evidencing loan and agreement relating to loan and purchase of truck.

11. Appeal and error ¶843(2)

In suit to recover amount of loan alleged to have been procured by fraud, where judgment did not decree cancellation of either agreement to loan money or note evidencing loan, prayer for cancellation was immaterial and could be disregarded.

12. Trover and conversion ⇨36

Where defendant claimed damages by reason of plaintiff's depriving defendant of use of motortruck, and testimony of defendant's witness indicated that his measure of damage was based on use of truck for particular business, exclusion of testimony was not error.

13. Appeal and error ⇨1033(3)

Where defendant claimed damages by reason of plaintiff's depriving defendant of use of motortruck, and answer of defendant's witness was based on his own charges for renting truck and not on knowledge of general local market, testimony might properly have been stricken out, but where it was not, the ruling did not constitute error as to defendant.

14. Trover and conversion ⇨67

Instruction that, if defendant owned motortruck and plaintiff deprived defendant of its use during any period of time, defendant was entitled to damages during time it was detained, was proper, and jury was properly instructed that under such circumstances measure of damages would be reasonable value of use of truck during period of detention.

15. Executors and administrators ⇨96

A contract or agreement which is otherwise valid, and which is entered into by an executor without consent of court, while not binding on estate, is nevertheless binding on maker in his individual capacity.

16. Executors and administrators ⇨106

Regardless of whether executor who, in good faith, loaned money belonging to estate, without first procuring order therefor, may receive credit for amount in his subsequent account with estate, if contract or loan is made in his individual name, he may become personally responsible therefor.

17. Release ⇨59
Trial ⇨252(4)

Where there was evidence of settlement between plaintiff and defendant of conflicting claims of ownership of truck and defendant's claim of damages for plaintiff's withholding of truck for short period of time, and that defendant was paid a specified sum of money which plaintiff claimed was in full satisfaction of defendant's demand on that account, court properly instructed jury on principles of accord and satisfaction.

18. Appeal and error ⇨1046(5)

Where during colloquy between counsel before suit brought by executor was argued, and before instructions were given, court inadvertently stated that plaintiff was also suing in his individual capacity, but court's attention was not called to statement, and it did not appear that defendant was prejudiced thereby, it did not constitute reversible error.

Appeal from Superior Court, Sutter County; Arthur Coats, Judge.

Suit by Vest Lowrey, as executor of the estate of Bedford Lowrey, deceased, against Joseph T. Rego, to recover the amount of a loan for the purchase of a truck, wherein the defendant filed a cross-complaint against Vest Lowrey. From a judgment for plaintiff, the defendant and cross-complainant appeals.

Affirmed.

Carlin & Fudge and W. E. Davies, all of Marysville, for appellant.

Lawrence J. Skirving, of Sacramento, for respondent.

THOMPSON, Justice.

This is an appeal by the defendant and cross-complainant from a judgment for the sum of \$600, which was rendered pursuant to a verdict, in a suit to recover the amount of a loan for the purchase of a truck, which loan was alleged to have been procured by fraud.

The amended complaint alleges that plaintiff, Vest Lowrey, is executor and sole devisee of the last will and estate of his brother Bedford Lowrey, deceased; that the estate consisted of a farm in Sutter County and \$1,229.36 in cash; that on October 23, 1941, plaintiff orally leased the ranch to the defendant, Joseph T. Rego, for a term from year to year; that on or about April 1, 1942, the defendant fraudulently induced the plaintiff, as executor of said estate, to loan him the sum of \$600 with which to purchase a truck, by representing that defendant needed the truck for use on the farm, and that if the loan was made defendant would remain on the ranch and properly farm it for the period of a year and that he would transfer the title and custody of the truck to plaintiff to be held as security for the payment of said debt; that pursuant to that agreement the plaintiff loaned defendant said sum of \$600 with

which the truck was purchased and at defendant's request a certificate of ownership of the truck was issued in the name of Vest Lowrey, and that the defendant executed and delivered to plaintiff a promissory note for payment of the debt, in the following language:

"This 1st day of April, 1942, I, Joseph T. Rego, hereby agree to pay to Vest Lowrey Six Hundred Dollars (\$600.00). This amount and note is secured by the pink slip of a GMC Truck (1937) model. This money is to draw interest at the rate of 7% annually until paid and \$200.00 on principal until paid.

"(Signed) Jos. T. Rego."

The complaint further alleges that, immediately after negotiating said loan and purchasing the truck, the defendant, Joseph T. Rego, contrary to his said agreement, on or about April 1, 1942, repudiated the lease and abandoned the farm "taking the truck for his own use and benefit." It is also alleged that on June 16, 1942, plaintiff rescinded the agreement by giving notice as required by law.

To the amended complaint the defendant filed his answer denying the material allegations thereof, and also filed a cross-complaint against Vest Lowrey, as an individual, alleging ownership of the truck by the cross-complainant and that plaintiff, on April 1, 1942, wrongfully took possession of the vehicle and deprived him of the use thereof to his damage in the sum of \$25 per day from April 1, 1942, to June 10, 1942, aggregating the sum of \$1,750. To the cross-complaint the plaintiff individually and as executor of said estate filed an answer denying the material allegations thereof except as to the allegations and admissions which are contained in paragraphs III, IV, V, VI and VII of the amended complaint.

The cause was tried with a jury which returned a verdict in favor of the plaintiff in the sum of \$600 and against the defendant and cross-complainant. The court adopted the verdict of the jury and rendered judgment against the defendant and cross-complainant for the sum of \$600. From that judgment the defendant and cross-complainant has appealed.

The appellant contends that the verdict and judgment are not supported by the evidence; that there is a fatal variance between the allegations of the pleadings and the proof thereof since the loan was made

by Vest Lowrey individually and not by the estate of which he was executor; that the action was commenced prematurely before the note was due; that the court erred in striking out some of defendant's evidence of damages resulting from having been deprived of the use of his truck, and that the court erred in its instructions to the jury.

[1,2] The verdict and judgment are adequately supported by the evidence. There is not a fatal variance between the allegations of the amended complaint and the proof thereof to the effect that the \$600 which was loaned to the defendant was the property of the estate of Bedford Lowrey, deceased. The suit was instituted in the name of Vest Lowrey, as executor of that estate. It is alleged that the money belongs to the estate, that it was loaned by the estate and that the loan was procured by fraud and deceit. The check for that sum was drawn on a bank for the funds of the estate and signed by Vest Lowrey as executor. The defendant knew that the money belonged to the estate. This is not a suit on a promissory note. On the contrary, it is primarily a suit for money had and procured by means of fraud which rendered the note invalid. The proof supports those allegations. The loan was made in good faith without a previous order of the court for the purpose of preserving the estate. The executor was the sole devisee of the estate. There is no evidence that there are creditors of the estate who would be harmed by the loss of the money.

[3] It is the executor's duty to "collect all debts due * * * to the estate." Sec. 571, Probate Code. Actions for the recovery of real or personal property "may be maintained by * * * executors." Sec. 573, Probate Code. It is the duty of an executor to collect all assets belonging to the estate. 11b Cal.Jur. 232, sec. 828; 2 Bancroft's Prob. Pr., 663, sec. 348. In the case of Robertson v. Burrell, 110 Cal. 568, at page 574, 42 P. 1086, at page 1087, it is said:

"The administrator, also, is a trustee, with well-defined duties, among the first of which is that of collecting the assets of the estate, and paying its just debts."

The evidence warranted the jury in assuming that the defendant fraudulently obtained the loan from the estate with the intention of abandoning his lease and the farm, which he did immediately after pro-

curing the loan and purchasing the truck. He took possession of the truck.

[4] An action for money had and received will lie to recover money obtained by one person from another by false and fraudulent representations. *Minor v. Baldridge*, 123 Cal. 187, 55 P. 783; *Halberstadt v. Nielsen*, 113 Cal.App. 313, 298 P. 37; 17 Cal.Jur. 616, sec. 12.

[5-7] Since this suit is primarily based on an action in assumpsit to recover money obtained by fraud, and not one on a promissory note, it is immaterial that the purported note was payable to Vest Lowrey, and not to the estate. It is also immaterial that the note may not be deemed to have become matured at the time of the filing of the complaint. Since the suit is based on fraud, the action was not premature merely because the note, which was dated April 1, 1942, provided that "This money is to draw interest at the rate of 7% annually until paid and \$200.00 on principal until paid."

[8,9] It is also immaterial that the amended complaint alleged notice of rescission of "the contract entered into" with relation to the loan and the purchase of the truck. *Barbour v. Flick*, 126 Cal. 628, 59 P. 122; 37 C.J.S., *Fraud*, p. 373, § 79. In the authority last cited it is said:

"Where the complaint states a good cause of action for fraud and deceit, allegations relating to a rescission of the contract may be disregarded. Likewise, the fact that a prayer for alternative relief asks to have the parties placed in statu quo will not make the action one for rescission if the facts stated in the complaint make out a cause of action in deceit; nor will the fact that plaintiffs ask that a note and mortgage given by them be canceled as part of their recovery of damages."

In the case of *Barbour v. Flick*, supra, which was a suit for damages on account of alleged fraud exercised in an exchange of real properties, with regard to allegations in the pleadings concerning a rescission of the contract, the syllabus properly announces the determination of the court as follows:

"In an action for damages for deceit in respect to an exchange of property, the rules as to rescission are not applicable; and the plaintiff may be allowed, as part of his damages, the cancellation of a note and mortgage."

CAL.REP.149-150 P.2d-21

[10,11] In the present case, since the defendant was found to have procured the loan of \$600 by means of fraud, he is not injured by a cancellation of the note or agreement. It is conceded he owns the truck which was purchased with that money. The request for cancellation is merely incident to the suit for fraud. If he is required to repay the loan, he is benefited by a cancellation of his note. The judgment does not decree cancellation of either the agreement to loan the money or the note. The prayer for cancellation is therefore immaterial and may be disregarded.

For the foregoing reasons the defendant's motion for a nonsuit was properly denied.

[12,13] The court did not err in sustaining certain questions propounded to defendant's witnesses regarding the measure of damages sustained by reason of plaintiff's depriving defendant of its use. Both Mr. Miller and Mr. Hurlbut testified that the rental value of the truck was \$2.50 to \$3 per hour. Mr. Burns testified that the rental value of the truck was \$10 per day. That evidence was not stricken from the record. Mr. Hurlbut did qualify his answer by later stating that "*Our rate*" for a ton and a half truck was three dollars an hour." He finally testified that when the renter furnished the driver of a vehicle "I wouldn't give you over two dollars an hour." Plaintiff's attorney did ask "that all of this testimony go out." But that motion was not granted. After several questions were subsequently answered by Hurlbut indicating that his measure of damages was based on the use of the truck for a particular business, such as hauling fruit and grain, the Court said, "You are basing your answer to these questions on your knowledge of that kind of work?" To that question the defendant replied, "Yes." Thereupon the court said, "*The answer may go out.*" The court also extended that ruling to "the Court's questions" involving that qualified use of the truck. To the former unqualified answer to the question, "Was there a going rate for a ton and a half truck, flat rack truck?" the defendant replied, "Yes." When he was asked, "What was that?" he replied, "*Our rate* for a ton and a half truck was three dollars an hour". That answer was not stricken from the record. Since the witness' answer was based on his own charges for renting a truck, and not on his knowledge of the general local market value of

such use of a truck, the evidence might have been properly stricken out, but it remains in the record. That ruling did not constitute error.

[14] The appellant contends that the court erred in giving to the jury and refusing to give certain specified instructions. We have examined the entire charge to the jury and find therein no reversible error. The jury was fully and fairly instructed upon all material issues presented by the pleadings. There was an issue as to whether the plaintiff bought the truck and subsequently sold it to the defendant on a conditional sales contract, reserving the right to its custody and possession. The defendant contends he bought the truck and merely procured the certificate of ownership to be issued to the plaintiff as security for payment of the purchase price. It is immaterial which theory of ownership of the truck was correct. The jury was properly instructed on both theories regarding the measure of damages to which the defendant would be entitled for the period of time he claimed to have been deprived of its use. The court properly instructed the jury that if it found that the defendant owned the truck, and the plaintiff deprived him of its use during any period of time, the defendant was entitled to damages "during the time it was detained." The jury was properly instructed that, under such circumstances, the measure of damages would be the reasonable value of the use of the vehicle during the period of detention. *Stanley W. Smith, Inc., v. Pilgrim*, 117 Cal.App. 244, 3 P.2d 573; *Mutch v. Long Beach Imp. Co.*, 47 Cal.App. 267, 190 P. 638; 2 Cal.Jur. Ten Year Supp. 90, sec. 55. In the court's instruction number four, the jury was told in part:

"If you should find that the defendant was the owner of the truck * * * and that the plaintiff for any period unlawfully withheld the possession of the truck from the defendant for any period of time,

"Then you shall by your verdict compensate the defendant for the loss of the use of the truck during that period of time.

"This compensation or damages is the equivalent to the reasonable value of such use during the time he was wrongfully deprived thereof."

In instruction number seven, the jury was further charged in that regard:

"In determining the market value of the use of personal property, such market value is the net usable value thereof, less the expense of the upkeeping of the property."

[15] The court did not err in instructing the jury that:

"A contract or agreement which is otherwise valid and which is entered into by an executor of the estate of a deceased person without the consent of Court, while not binding on the estate, is nevertheless binding on the maker in his individual capacity."

[16] In 11b California Jurisprudence 286, section 871, it is said: "Unauthorized or individual loans are at the representative's own risk." It is also said in 11b California Jurisprudence 264, section 854, that: "Where, however, the representative reports such a loan and the amount is allowed in his account, this is conclusive." But regardless of whether the executor who, in good faith, loans money belonging to the estate, without first procuring an order therefor, may receive credit for the amount in his subsequent account with the estate, if the contract or loan is made in his individual name, he may become personally responsible therefor. In the present case the defendant is not interested in any possible loss to the estate.

[17] The court did not err in instructing the jury regarding the principles of rescission or accord and satisfaction. The question of rescission was merely incident to the suit for damages based on fraud as we have previously stated. There is evidence of a subsequent settlement between the plaintiff and the defendant of the conflicting claims of ownership of the truck and defendant's claim of damages for withholding the truck for a short period of time. The defendant was then paid a specified sum of money which the plaintiff claimed was in full satisfaction of defendant's demand on that account. That question was submitted to the jury under proper instructions, and decided against the defendant.

[18] The appellant is mistaken in asserting that the court improperly instructed the jury that: "The allegations of the complaint state the plaintiff * * * is also suing here *in his individual capacity*." That statement was made in a colloquy between counsel before the case was argued and before the instructions were given to

the jury. The instructions contain no such statement. The attention of the court was not called to that inadvertent statement. It does not appear that the defendant was prejudiced thereby. It was harmless, and it does not constitute reversible error.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.



64 Cal.App.2d 820

GARRISON v. CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION et al.

Civ. 14159.

District Court of Appeal, Second District,
Division 1, California.

June 13, 1944.

Rehearing Denied June 29, 1944.

Hearing Denied Aug. 10, 1944.

1. Master and servant ⇨78

The relationship contemplated by the California Unemployment Insurance Act is that of employer and employee, and it was not the intent of the Legislature to include any independent contractor. Gen. Laws 1937, Act 8780d, § 6.5.

2. Master and servant ⇨5

A generally conclusive factor in distinguishing between status of "independent contractor" and "employee" is the right of the employer to exercise complete and authoritative control of the manner in which the work is done, and the existence of such right of control and not the extent of its exercise constitutes the relationship of employer and employee.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

3. Master and servant ⇨78

An insurance agent, who maintains his own office and pays his own expenses, whose compensation is solely from commissions, who controls his own time, is agent for several different companies, and sells several different kinds of insurance, is an "independent contractor" and not an "em-

ployee" within provision of California Unemployment Insurance Act. Gen.Laws 1937, Act 8780d, § 6.5.

4. Master and servant ⇨78

An insurance agent who works for one company only, the company furnishing his office and paying all cost of its operation, controlling his time in its entirety, with right to direct manner of performance of work and to discharge him, is an "employee" within provision of California Unemployment Insurance Act. Gen.Laws 1937, Act 8780d, § 6.5.

5. Master and servant ⇨78

In the absence of any evidence of conduct of the parties to the contrary, a recital in a contract that nothing therein contained shall be construed as creating relationship of employer and employee is prima facie proof of the relationship of independent contractor and principal.

6. Master and servant ⇨78

Where contract between insurance company and district agent gave agent the right to exercise his own judgment in soliciting insurance and provided that the contract should not be construed as creating relation of employer and employee, provision that company had right to prescribe rules relative to conduct of the business did not make the agent an "employee", and in absence of evidence of conduct to the contrary the relationship was that of "independent contractor" and principal and not that of employer and employee within meaning of California Unemployment Insurance Act. Gen.Laws 1937, Act 8780d, § 6.5.

7. Master and servant ⇨78

General agent of insurance company who, after 1938, worked under contract giving agent right to exercise his own judgment as to soliciting insurance and further provided that the contract should not be construed as creating the relation of employer and employee, was an "independent contractor" after 1938 and not an "employee" under California Unemployment Insurance Act. Gen.Laws 1937, Act 8780d, § 6.5.

8. Insurance ⇨80

In insurance parlance, a "debit agent" is one who collects weekly or monthly premiums from a number of policyholders, generally small policies and industrial insur-

ance, the accounts of which policyholders are debited to the agent.

See Words and Phrases, Permanent Edition, for all other definitions of "Debit Agent".

9. Master and servant ⇐78

A debit agent, who was required by a contract with insurance company to devote his entire time to the business of the company and whose duties were defined, was at least prima facie an "employee" within meaning of California Unemployment Insurance Act, which was sufficient to support finding that he was an employee. Gen.Laws 1937, Act 8780d, § 6.5.

10. Master and servant ⇐78

Rewrite agent, employed by insurance company to interview policyholders for purpose of inducing them to change their policies under insurance commissioner's directive, working under direction of a supervising representative and who was told where to go and whom to interview, was an "employee" under California Unemployment Insurance Act, notwithstanding his compensation was solely from commissions and that he provided his own transportation and expenses. Gen.Laws 1937, Act 8780d, § 6.5.

11. Master and servant ⇐78

Where Unemployment Commission passed rule exempting all types of insurance agents from Unemployment Insurance Act, commission was estopped to take the position that it had no power to pass such rule so as to collect taxes for certain agents during period rule was in effect. Gen. Laws 1937, Act 8780d, § 6.5.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Maynard Garrison, substituted for A. Caminetti, Jr., Insurance Commissioner of the State of California, as conservator of National Guaranty Life Company, against California Employment Stabilization Commission, substituted for the State of California, Unemployment Reserves Commission, and others to determine whether certain classes of agents of plaintiff insurance company come within the provisions of the California Unemployment Insurance Act. From an adverse judgment, plaintiff appeals.

Reversed and remanded with instructions.

Morton L. Barker, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles (Robert F. Schwarz, of Los Angeles, of counsel), for amici curiae.

Robert W. Kenny, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen. (Forrest M. Hill and Doris H. Maier, both of Sacramento, of counsel), for respondents.

DRAPEAU, Justice pro tem.

The Insurance Commissioner is named as plaintiff in this case, but inasmuch as he is conservator for a California insurance company, reference to the plaintiff hereafter will mean the insurance company. The defendant is the California Employment Stabilization Commission. And the problem to be determined is whether or not certain classes of agents of the insurance company come within the provisions of the California Unemployment Insurance Act. These are district agents, general agents, debit agents, and re-write agents.

While the briefs contain argument and discussion as to the status under the California Unemployment Insurance Act of one inclusive class comprising all insurance agents, a determination of that particular question, if it were possible, is not necessary to a decision in this case. All that is required is to fix the status of the several classes of agents above named and to say whether or not as to them the Commission is entitled to enforce penalties and contributions to the unemployment insurance fund, as against the plaintiff.

Cases from other states construing similar statutes with reference to insurance agents are not of much help, because of material differences in definitions of the relationship in the laws of each state when compared with each other and with our own California Unemployment Insurance Act, Deering's Gen.Laws, Act 8780d.

The federal statute, after which our California law is modeled, expressly exempts insurance agents of all classes, whose compensation is wholly derived from commissions. The California law does not contain this provision.

Cases defining the relationship of master and servant, employer and employee, and independent contractor, in tort and in contract actions and in actions involving workmen's compensation, become helpful in the

application of the California Unemployment Insurance Act to the classes of agents here under consideration.

The definition of employment in the statute is in Sec. 6.5, as follows:

"'Employment,' subject to the other provisions of this act, means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied."

This definition may be shortened to read: "Service performed for wages or under any contract of hire."

The meaning of each of these ten words is well established and understood, except possibly that of the word "hire." In a bankruptcy case in the Federal Court, *First National Bank of Wilkes-Barre v. Barnum*, D.C., 160 F. 245, 248, there is an interesting discussion of the statutory meaning of this word: "The word 'hire' is rather associated with the act of employment than the reward for services done; and in the latter connection is more on the plane of wages than salary, although in a sense it comprehends both; and is also applied to engaging the use of property. We hire a coachman, a gardener, or a cook; or a carriage to take a ride. And may also be said to hire a superintendent, a bookkeeper, or a clerk, although it would seem more correct, in the latter instances, to say engage or employ. In some communities, a farm hand is called a hireling, without intending any reflection, although in general speech the term is one of reproach. As further defining its use, a laborer, according to *Sacred Writ*, is said to be worthy of his hire. And coming up from the people, as the word thus does, it is sometimes applied, out of place, to the securing of professional services, as where one is said to hire a lawyer, a doctor, or a person of that class."

In the California case of *Mono County v. Industrial Accident Commission*, 175 Cal. 752, 753, 167 P. 377, 378, construing the meaning of the word "employee" as used in the workmen's compensation act, our Supreme Court observes: "The essential condition of the relation of employer and employee is 'service under any appointment or contract of hire or apprenticeship.'"

[1] Therefore it is clear enough that the relationship contemplated by the California Insurance Act is that of employer and employee, and that it was not the intent or the purpose of the Legislature to include any independent contractor.

149 P.2d—45½

[2] In *Baugh v. Rogers*, Cal.Sup., 148 P.2d 633, 637, the factors to be used in determining whether one is an employee or an independent contractor are recapitulated: "The distinction between the status of independent contractor and that of employee has often been considered by this court, and it is well established that a material and generally conclusive factor is the right of the employer to exercise complete and authoritative control of the manner in which the work is done. The existence of such right of control and not the extent of its exercise constitutes the relationship that of employer-employee. *S. A. Gerrard Co. v. Industrial Acc. Comm.*, 1941, 17 Cal. 2d 411, 413, 414, 110 P.2d 377; *Burlingham v. Gray*, 1943, supra, 22 Cal.2d 87, 95, 99, 137 P.2d 9; *Riskin v. Industrial Acc. Comm.*, 1943, 23 Cal.2d 248, 253, 144 P.2d 16. 'Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so.' *Press Pub. Co. v. Industrial Acc. Comm.*, 1922, 190 Cal. 114, 120, 210 P. 820, 823; *Hillen v. Industrial Acc. Comm.*, 1926, 199 Cal. 577, 582, 250 P. 570; *Chapman v. Edwards*, 1933, 133 Cal.App. 72, 77, 24 P.2d 211. 'An employee may quit, but an independent contractor is legally obligated to complete his contract.' *Los Flores S. Dist. v. Industrial Acc. Comm.*, 1936, 13 Cal.App. 2d 180, 183, 56 P.2d 581, 583."

[3] Coming then to the application of the California Unemployment Insurance Act to the insurance business, it becomes apparent that an insurance agent who maintains his own office and pays his own expenses, whose compensation is solely from commissions, who controls his own time, who is agent for several different companies, and who sells several different forms of insurance—such as life, health, accident, and fire—is an independent contractor, and may not be included within the provisions of the act.

[4] On the other hand, in California, an agent who works for one company only, the company furnishing his office and paying all of the cost of its operation, controlling his time in its entirety, with the right to direct the manner of performance of his work and to discharge him for any cause sufficient to the employer, is undoubtedly an employee coming within the provisions of the act, even though all of his compensation may be from commissions.

With these preliminary observations we will now discuss the several classes of agents here involved.

Subsequent to 1938 the status of the district agent was set forth in a written contract with the company, in which the following appears:

"(1) The Company hereby appoints the Agent for the purpose of procuring applications for life insurance, delivering policies, collecting and paying over to the Company the initial premiums on the insurance so effected.

"(2) The Agent is hereby vested with the authority and powers and is subject to the terms, conditions, and limitations herein particularly set forth. *Nothing herein contained shall be construed to create the relation of employer and employee between the parties. The Agent shall be free to exercise his own judgment as to the persons from whom he will solicit insurance and the time and place of solicitation*, but the Company may from time to time prescribe rules and regulations respecting the conduct of the business covered hereby, not interfering with such freedom of action of the Agent, which rules and regulations shall be observed and conformed to by the Agent." (Emphasis added.)

[5,6] While language of this kind in a contract does not conclusively establish the fact, in the absence of any evidence of conduct of the parties to the contrary, such a recital is prima facie proof of the relationship of independent contractor and principal. *Burlingham v. Gray*, 22 Cal.2d 87, 137 P.2d 9. And without proof that the true relationship of the parties was that of employer-employee such recital in an insurance agent's contract compels only one conclusion to be drawn, to-wit: That the agent is an independent contractor. *Baugh v. Rogers*, supra, 148 P.2d at page 637.

A careful review of the bill of exceptions discloses no testimony before the trial court which would negative the language quoted from the contract. Respondent argues that the provision giving the insurance company the right to prescribe rules and regulations relative to the conduct of the business makes the agent an employee. Such a covenant is necessary for the proper conduct of the insurance business, and does not in itself establish the relationship of the agent as being an employee or independent contractor. Therefore the district agents of the company subsequent to

1938 were not employees within the meaning of the California Unemployment Insurance Act.

Prior to 1938 this portion of the district agent's contract read as follows: "Witnesseth; The Company hereby appoints the Agent for the purpose of procuring applications for life insurance, delivering policies, collecting and paying over to the Company the initial premiums on the insurance so effected, and performing such other duties as may be required by the Company, all in accordance with the Company's rules and rates in force at the time, and such specific instructions as the Company may give from time to time."

This provision in the contract brings the district agent within the rule set forth in *Robinson v. George*, 16 Cal.2d 238, at page 242, 105 P.2d 914, at page 916, where the following appears: "The rule, as stated by plaintiff, is that the fact that one is performing work and labor for another is prima facie evidence of employment and such person is presumed to be a servant in the absence of evidence to the contrary. *Hillen v. Industrial Acc. Comm.*, 199 Cal. 577, 250 P. 570; 13 Cal.Jur. 1041, and cases cited."

[7] The general agent solicited insurance as a district agent, and in addition had a number of district agents under his supervision. From the business which these subordinate district agents produced, the general agent was paid an over-riding commission. The contracts with this type of agent were the same as the contracts with the district agents. Therefore our conclusions as to the general agents are the same as with reference to the district agents, and for the same reasons. Prior to 1938, they were employees; subsequent to that date they were not.

[8] At one time in the history of this insurance company most of its contact with its policy holders was through a number of employees called debit agents. In insurance parlance a debit agent is one who collects weekly or monthly premiums from a number of policy holders, generally small policies, and generally industrial insurance. The accounts of these policy holders are debited to the agent; hence the appellation debit agent. Before the commencement of this action the company discontinued using debit agents and substituted district and general agents. As to these debit agents the Commission demanded payment from

the company of \$2700 upon the ground that they were employees within the act. The company paid the \$2700.00 under protest and commenced action. The Commission filed an answer and counterclaim, and demanded additional payments because of the district and general agents heretofore discussed, and because of re-write agents hereafter to be discussed.

[9] The debit agent was required by the contract between him and the company to devote his entire time to the business of the company, and his duties were defined. Therefore there is in the record at least prima facie evidence which will support the finding that he was an employee.

[10] Re-write agents were employed to interview as many of the company's policy holders as possible for the purpose of inducing them to change their policies. This was made necessary because of a directive by the Insurance Commissioner requiring the insurance company to revise its insurance structure and to change certain of its business practices.

Re-write agents were appointed by a letter to them by the company, stating a compensation which the company would pay them on premiums on exchanged and additional insurance secured by them from policy holders. One of defendant's witnesses testified that he was a re-write agent, that he was furnished cards by the company, with the names of policy holders he was to interview, that he worked under the direction of a supervising representative of the company, to whom he made daily reports, that the witness was told where to go and whom to interview. Despite the fact that his compensation was solely from commissions and that he provided his own transportation and expenses, this testimony is sufficient to support the finding that the re-write agent was an employee.

But there is another rule which must be applied before a proper judgment may be rendered in this case. Before reading the briefs and hearing the argument this court was aware of the social and humanitarian objectives of the law-making power of this State embodied in the California Unemployment Insurance Act. Everyone should join in extolling the desirability of insurance against the evils of unemployment. But, worthiness of legislation for any particular group of people should never be a pretext for conduct on the part of the state which would do injustice to some other group.

An insurance company is nothing more nor less than an aggregation of persons who have voluntarily pooled their resources to protect each other from the hazards to themselves as individuals of casualties incident to the vicissitudes of human life—casualties which may and often are as serious as unemployment. Unemployment insurance is simply an aggregation of employees who are compelled by law to build up for themselves a fund to insure against unemployment. And, by law, employers and employees are both required to contribute to the fund, the measure used being the wages paid. In the event the employer fails to collect the employee's portion of the contribution, the law prescribes a penalty whereby the employer must then himself pay to the fund the amount not collected. In the last analysis, these two groups of people are the real parties in interest in this case. And as between them it is the obvious duty of our courts to endeavor to hold the scales of justice exactly even.

From January 1, 1936, until March 19, 1937 (stipulated for the purposes of this case to be April 1, 1937), the defendant promulgated a rule which in part reads as follows:

"Rule 8.17. Employees—Insurance Agents, Solicitors, and Brokers Exempt. General and Branch Officers Nonexempt.—Agents and solicitors of insurance of every kind or nature whose principal remuneration arises from commissions are deemed contractors and no contributions are payable on their compensation."

This rule was in effect during a part of the time employees considered in this case were in the service of the plaintiff. It is conceded that the principal remuneration of all of them came from commissions, and that all of them were insurance agents. As stated, the employer was required to deduct a percentage of the compensation of every employee covered by the act, to be applied to the unemployment insurance fund administered by the defendant, and if the employer failed to make the deduction, he was liable therefor. With this rule promulgated by the commission and in effect no deductions were made from the pay of these employees by the insurance company. And obviously, after it was abrogated, collection of the employees' percentage during the time the rule was in effect was for all practical purposes difficult and expensive if not impossible. With the lapse of time involved and periodical allocation of costs

to policy holders, it would be unfair now to require the insurance company to pay its contribution for these employees.

[11] Defendant admits these facts, but asserts that the Commission was without power to promulgate the rule in the first place, and that the rule was therefore void and not binding upon it.

It is unnecessary to pass upon the power to make the rule, because the Commission is estopped to take such a position. The doctrine of equitable estoppel of governmental agencies where justice and right require it has but recently been reaffirmed and approved by our Supreme Court in *Farrell v. County of Placer*, 145 P.2d 570, 572. And in that case is repeated the exceedingly apt observation from 48 *Harvard Law Review*, 1299: "If we say with Mr. Justice Holmes, 'Men must turn square corners when they deal with the Government', It is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens."

Therefore, the defendant may not now collect from the insurance company for these employee agents during the period that rule 8.17 was in effect.

The judgment is reversed and the cause remanded to the trial court with instructions to enter judgment in accordance with the views hereunder expressed.

YORK, P. J., and WHITE, J., concur.



BURGESS et al. v. CAHILL et al. *
Civ. 7043.

District Court of Appeal, Third District,
California.

June 8, 1944.

Rehearing Denied June 30, 1944.

Hearing Granted Aug. 3, 1944.

1. Automobiles ⇐193(11)

Where employer's automobile was being driven by employee's wife in presence of employee and under his direction, wife's negligence might be imputed to employer if employee had implied permission to use the automobile for his private purposes. *Vehicle Code*, § 402, St.1937, p. 2353.

* Subsequent opinion 154 P.2d 395.

2. Automobiles ⇐193(10)

Permission for employee to operate employer's automobile for employee's benefit may be inferred only when employer has knowledge or has reason to believe that it will be so used. *Vehicle Code*, § 402, St.1937, p. 2353.

3. Evidence ⇐53, 595

A "presumption" is created by statute, while an "inference" is a conclusion founded on a fact legally proved from which a reasonable deduction may be drawn. *Code Civ.Proc.* §§ 1959, 1960.

See Words and Phrases, Permanent Edition, for all other definitions of "Inference" and "Presumption"

4. Evidence ⇐53, 87

A presumption created by law may be considered by jury as evidence and may outweigh convincing testimony to the contrary. *Code Civ.Proc.* §§ 1959, 1960.

5. Evidence ⇐89

An inference may be overcome as matter of law by clear, positive and uncontradicted evidence. *Code Civ.Proc.* §§ 1959, 1960.

6. Trial ⇐139(1)

A verdict may be directed when there is no substantial evidence to support the material issues.

7. Trial ⇐178

In passing on motion for directed verdict, court must give full credit to all evidence favorable to party against whom it is sought, together with all inferences which may be reasonably drawn therefrom, and should disregard all evidence in conflict therewith.

8. Automobiles ⇐245(28)

In action for injuries in collision with employer's automobile driven by employee's wife under employee's direction while on employee's private mission, evidence that employee was furnished the automobile for his convenience in going to and from work, that employer had no knowledge of employee's prior use of automobile for his own purposes, and that employee knew that employer's rules prohibited use of automobile for employee's purposes, was insufficient for jury on issue of employer's implied permission to use the automobile on employee's private mission so as to impute wife's negligence to employer. *Vehicle Code*, § 402, St.1937, p. 2353; *Code Civ. Proc.* §§ 1959, 1960.

9. Automobiles ¶243(12)

In action for injuries in collision with employer's automobile driven by employee's wife under employee's direction while on employee's private mission, questions propounded to employee and employer's representative which sought to prove that in conversation between employee and representative after the accident employee was not criticized and that he was not discharged were incompetent. Vehicle Code, § 402, St.1937, p. 2353.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Billy Burgess, a minor, by and through his guardian ad litem, Grace Evans, and others against Samuel A. Cahill and others to recover for injuries sustained in an automobile collision. From an adverse judgment, plaintiffs appeal.

Affirmed.

Gumpert & Mazzer and Charles A. Zeller, all of Stockton, for appellants.

Neumiller & Ditz and C. H. Hogan, all of Stockton, for respondent.

THOMPSON, Justice.

The plaintiffs have appealed from a judgment rendered pursuant to a directed verdict in favor of the defendant, H. P. Garin Company, the owner of an automobile which was involved in a highway collision, as a result of which two persons were killed and others were seriously injured. No appeal was taken from the separate judgments which were rendered against the other defendants.

The plaintiffs seek a reversal of the directed judgment on the ground that the record contains substantial evidence of implied permission for Samuel A. Cahill, the employee, to operate the company machine at the time of the accident, and that the court therefore erred in taking that issue from the jury. It is also contended the court erred in unduly restricting plaintiffs' examination of witnesses for the purpose of eliciting evidence of permissive use of the vehicle.

The appeal is presented on a settled statement of facts. It appears without conflict that the defendant, H. P. Garin Company, a corporation, was engaged in a farming enterprise on Bouldin Island situated about eight miles northwest from

Stockton, and elsewhere in that vicinity. The company employed Cahill in 1942, as a mechanic to keep its farming machinery in repair. Mr. and Mrs. Cahill, and their infant son, then resided at Lodi. The company provided Mr. Cahill with a Ford pickup automobile which he kept in the driveway at his home. Cahill also owned a machine of his own which he kept in a one-car garage on the same premises. The company furnished him with oil and gas for the Ford pickup machine. Printed stickers were placed by the company in its cars with the exception of the one in the possession of Cahill, prohibiting the use of the machines for private purposes. Mr. Cahill knew that fact. He repeatedly stated that he knew he had no right to use the company car for private purposes.

Sunday, January 17, 1943, at 7 o'clock P. M., Mr. and Mrs. Cahill and their son were riding in the Ford pickup on a private mission to take some plants and shrubs to the property some distance from their home to which they intended to move. On the return trip, while Mrs. Cahill was driving the machine, and her husband and child sat by her side, a collision with plaintiffs' machine occurred on the highway about one-half mile from Stockton. Two occupants of plaintiffs' automobile were killed, and others, including both Mr. and Mrs. Cahill, were injured. A suit for damages was instituted against the defendants, including the H. P. Garin Company, the owner of the machine. The cause was tried with a jury. At the close of the evidence the court instructed the jury to return a verdict in favor of the company on the ground that there was no substantial evidence showing that the Ford pickup was being operated at the time of the accident with the permission of the owner of the vehicle. The jury returned a verdict in compliance with that instruction. A judgment was rendered accordingly. From that judgment this appeal was perfected. We are not concerned with the judgments which were separately rendered against the other defendants.

The chief issue on this appeal is the question as to whether the record contains substantial evidence that the automobile of the Garin Company was being operated by Mrs. Cahill under the direction of her husband at the time of the accident, with the implied permission of the owner, so as to render it liable for imputed negligence of the driver under the provisions of Section

402 of the Vehicle Code, St.1937, p. 2353. That section reads in part:

"Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, *in the business of such owner or otherwise*, by any person using or operating the same *with the permission, express or implied, of such owner* and the negligence of such person shall be imputed to the owner for all purposes of civil damages." (Italics added.)

[1] It was stipulated at the trial that the Ford pickup was not being operated at the time of the accident on any business in which the Garin Company was interested. Since the above-quoted section clearly imposes liability for imputed negligence against the owner of the vehicle whether it was being actually used at the time of the accident in its business "or otherwise" provided it was then operated with the owner's "express or implied" permission, it becomes necessary to determine whether there is any evidence, or reasonable inferences to be drawn therefrom, that the machine was being operated with the *implied* permission of the owner. We must assume that, since the machine was being driven by Mrs. Cahill in the presence of her husband and under his direction, her negligence may be imputed to the owner, provided Mr. Cahill had implied permission to use it for his private purposes.

[2-5] It is not contended that the vehicle was then operated with the *express* permission of the owner. The only question to be determined is whether the conduct or declarations of the owner with respect to the use of the automobile by Samuel A. Cahill constituted implied permission for him to operate the machine for his own benefit. Permission for an employee to operate, for his own benefit, the vehicle belonging to his employer, may be inferred only when the owner has knowledge, or at least reason to believe, that it will be so used. An owner of a machine may not be deemed to have consented to the private use of his vehicle unless he has knowledge or at least reason to believe that it will be used in that manner. One may not *permit* an act to be performed of which he has no knowledge or information. Bradford v. Sargent, 135 Cal.App. 324, 332, 27 P.2d 93; Engstrom v. Auburn Automobile Sales Corp., 11 Cal.2d 64, 77 P.2d 1059; Howland v. Doyle, 6 Cal.App.2d 311, 44 P.2d

453. There is a clear distinction between a presumption and an inference. A presumption is created by statute. Sec. 1959, Code Civ.Proc. An inference is a conclusion founded "on a fact legally proved", from which a reasonable deduction may be drawn. Sec. 1960, Code Civ.Proc.; Engstrom v. Auburn Automobile Sales Corp., supra. It has been held that a presumption created by law may be considered by the jury as evidence and may outweigh strong and convincing testimony to the contrary. Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529; People v. Chamberlain, 7 Cal.2d 257, 60 P.2d 299. An inference, however, may be dispelled and overcome *as a matter of law* by clear, positive and uncontradicted evidence. Maupin v. Solomon, 41 Cal.App. 323, 183 P. 198; Engstrom v. Auburn Automobile Sales Corp., supra, 11 Cal.2d at page 70, 77 P.2d at page 1063.

[6,7] A directed verdict may properly be granted when there is no substantial evidence to support the material issues. In passing on a motion for a directed verdict the court must give full credit to all evidence favorable to the party against whom it is sought, together with all inferences which may be reasonably drawn therefrom, and should disregard all evidence in conflict therewith. Walters v. Bank of America, 9 Cal.2d 46, 69 P.2d 839, 110 A.L.R. 1259; Howland v. Doyle, supra; Engstrom v. Auburn Automobile Sales Corp., supra; 24 Cal.Jur. 912, secs. 162-165.

[8] We have critically examined the record in this case and are convinced there is no substantial evidence of permissive use of the automobile at the time of the accident by the employee or his wife, and that the court was justified in directing the jury to return a verdict to that effect in favor of the respondent.

Samuel A. Cahill was furnished the automobile in question, together with necessary oil and gas, by H. P. Garin Company, his employer, with the privilege of keeping the machine at his home for his convenience in going to and coming from his work. It is true that he did use the machine on several occasions to drive to a local store for his groceries, paying for gasoline for the car on one occasion. He also used the machine for a fishing excursion on one occasion. The evidence is uncontradicted that the company had no knowledge of that personal use of the ma-

chine. Adolph Boltzen, Superintendent of Equipment for the Garin Company, testified that when he delivered the automobile to Cahill in November, 1942, he told him "that the car was to be used only on company business." He also testified that Cahill had never requested the use of the machine for his private purpose; that he had never seen him driving the car except upon company business, and that he had never heard of his using the machine for private purposes. Walter G. Norris, the District Superintendent of the respondent company, also testified to the same facts, except as to the oral instructions given to Cahill at the time of the delivery of the machine. Mr. Cahill did not contradict those facts. When he was asked, "Did you receive any instructions [regarding the use of the car for your private purposes], oral or written?" he merely replied, "Not that I remember." When Cahill was asked if Mr. Boltzen or Mr. Norris, who supervised his work, knew that he used the car for his private purposes, he said "I don't know whether they knew or not." Mr. Cahill did not claim he had been expressly authorized to use the car for private purposes. His only excuse for using the machine for his own benefit was thus expressed:

"I had used my own car for H. P. Garin Company's business. I thought that it would be all right to use their car occasionally in my personal business."

That answer does not infer permissive use of the vehicle, either express or implied. It merely declares Cahill's opinion that it would be fair for him to have the use of his employer's machine occasionally because he had sometimes used his own automobile for the benefit of the company. That is a mere expression of what Cahill thought would be just, and we are of the opinion it virtually refutes the idea of permission having been granted to use the machine for private purposes, in view of his positive assertions that he knew he had no right to use the vehicle for his private purposes.

Mr. Cahill admitted that he knew it was the general rule of the company to forbid employees to use the company cars in their possession for private use. He knew that printed stickers were placed by the company in their cars prohibiting their use for private purposes. Regarding his knowledge of that rule and of the fact that most of the company cars contained such printed stickers, Mr. Cahill said:

"A. There were notices in other cars to that effect, but I was never notified, either in writing or verbally, not to use the car for my own use.

"Q. * * * You say that there were notices in some of the other cars. Is that right? A. Most of the other cars, yes.

"Q. But there were some cars that had no such notices in them. Is that correct? A. I can't say that there were any others.
* * *

"Q. And do you know who put those notices in the other cars, if you know? A. The orders were given by Walter G. Norris."

This shows his knowledge of the general orders of the company prohibiting private use of the machines. His statement that "I was never notified, either in writing or verbally not to use the car for my own use," merely contradicts Mr. Boltzen's assertion that he had orally instructed Cahill to that effect. We may assume he was not *personally* informed of the rule, but, nevertheless, he repeatedly acknowledged in his written statement and in his oral testimony that he knew he had no right to use the machine for his personal purposes. There is absolutely no evidence in the record in conflict with Cahill's acknowledgment that he knew he had no right to use the car for his own benefit. That being true, it may not be said there is any evidence to support an implied inference that he was granted permission to use the machine for his own purposes.

The evidence appears to be clear and conclusive of the fact that Mr. Cahill was not granted permission, either express or implied, to use the automobile for his own private purposes. The written statements of both Mr. and Mrs. Cahill, and their testimony at the trial leaves no doubt that they knew they were not permitted to use the Ford pickup for their own private benefit. At the trial Mr. Cahill was critically examined with relation to each material declaration of his written statement, and he confirmed them seriatim.

Each of these witnesses signed two separate statements which were received in evidence. In two of them they unequivocally declared that the Ford pickup was delivered to Mr. Cahill to be used by him "only for company business." One of those statements was written in the handwriting of Samuel A. Cahill, and signed by him March 3rd, nearly six weeks after the

accident occurred. It is not contended the statements were procured by fraud or other unfair means. In one of his statements Mr. Cahill said:

"They furnished me with a 1940 Ford Pickup which I was to use on company business only. I knew that I was not to use this car for my personal use. * * * I had never asked any of my supervisors if I could use the car for my personal use on any previous occasion as I knew that such a request was against company rules."

With respect to Mr. Cahill's knowledge of the fact that he did not have permission, express or implied, to use the car for his personal benefit, he was sworn as a witness at the trial and specifically confirmed all such statements. The following colloquy occurred regarding the written statement of Mr. Cahill marked exhibit "C":

"Q. * * * You wrote that in your own handwriting, didn't you? A. Yes. * * *

"Q. And at that time you told Mr. Lee the truth concerning your right to use this car, didn't you? A. I did.

"Q. And the things in this statement are true and correct, aren't they? A. I believe they are. * * * [Reading to the witness from the statement] 'They furnished me with a 1940 Ford pickup which I was to use on company business only.' That is true? A. Yes. 'I knew that I was not to use this car for my personal use.' That true? A. Yes. 'I also knew that I had no business in allowing my wife to drive this car at any time.' That is true? A. Yes."

Not only is there no evidence contradicting the respondent's positive testimony that Mr. Cahill was not given permission, express or implied, to operate the automobile for his own personal use, but the written statements and testimony of Mr. and Mrs. Cahill confirm and corroborate the fact that not only was permission not given to Mr. Cahill, but he knew that the rules of the company absolutely prohibited him from using the machine for his own personal benefit. The court therefore did not err in instructing the jury to return a verdict in favor of the company on that issue.

In the case of *Blank v. Coffin*, 20 Cal.2d 457, 126 P.2d 868, upon which the appellant relies, a directed verdict in favor of the defendant, Mercantile Acceptance Corporation, was reversed. That case is readily distinguishable from the present suit.

In that case the court properly decided that there was substantial evidence to show that Ian Coffin, the employee of the automobile financing corporation, who was driving his employer's car at the time of the casualty, was doing so with permission of the owner of the machine. At the time of the accident Coffin was taking two young women in the machine to a social function. He was not engaged in the performance of duties for which he was employed. The printed instructions from the corporation, with which he was supplied when he was hired, merely declared that "Company owned cars must not be used by the employees *on their vacations*." The evidence was undisputed that Coffin was not using the machine *on his vacation*. The Supreme Court emphasized that fact. It held that it was the sole province of the jury to determine, under the circumstances of that case and the limited instructions which were given, whether implied permission had been granted to Mr. Coffin to use the car for his own pleasure, so long as he did not so use it on vacation expeditions. In giving its reasons for holding there was evidence of implied permission sufficient to entitle the cause to be submitted to the jury, the court said:

"The manual of instructions that he received forbade the use of the car *on vacations, but did not forbid its use for [other] personal matters*; the company could determine that Coffin was habitually using the car for his personal business by checking his mileage reports against his gasoline reports; Coffin was not discharged after discovery of his use of the car on a week-end trip and was allowed to resume possession of it after a short lay-off. The fact that Coffin was accompanied by a friend in violation of the rules of the company could not establish that he did not have permission to drive the car." (Italics added.)

In the present case there is absolutely no evidence that the Garin Company knew Cahill was using its automobile for his personal benefit. Moreover, contrary to the facts of the *Blank* case, *supra*, Cahill knew the employer's rules prohibited him from operating the car for his own personal use. There is no evidence to the contrary. Cahill repeatedly admitted that fact. Those circumstances clearly distinguish the present suit from the foregoing *Blank* case. It is not authority for holding that the trial court erred in granting the motion for a directed verdict in this action.

In the case of *Hicks v. Reis*, 21 Cal.2d 654, 134 P.2d 788, upon which the appellants also rely, a judgment which was rendered against the owner of an automobile, on the theory of imputed negligence of the owner, based on implied permission for another person to operate the machine, was affirmed. That case may likewise be distinguished from the present action. Quite a different rule applies to that case. It was not a jury trial. No directed verdict was involved. Having determined on its merits that the owner of the automobile granted implied permission to his employee to operate the car, every intendment is in favor of the judgment which was accordingly rendered. The appellant, Fred W. Gray, was a dealer in second-hand automobiles. Frank Hume was his salesmanager. The defendant, John Reis, was employed as a salesman. On the occasion of the accident Reis took his employer's automobile from the sales lot where it was parked and drove it on a birthday pleasure expedition. On that trip a collision occurred and the plaintiffs were injured. Suit was brought against the appellant Gray, together with other defendants, for damages incurred as a result of negligence imputed to the owner of the car, growing out of implied permission for the employee to operate the machine for his own benefit. Judgment was recovered against all the defendants. The owner of the machine, Fred W. Gray, appealed. The judgment was affirmed. The Supreme Court said that the evidence showed that John Reis had been working for Mr. Gray three weeks before the accident occurred, and on prior occasions; that at no time had he been instructed by the appellant, by his salesmanager, Mr. Hume, or by anyone else, not to take the machines from the sales lot for his own use; that he had never been informed of any such rule; that he had no knowledge of the existence of such a rule; that he frequently took the cars from the sales lot with the knowledge of Mr. Hume, without asking permission from anyone to do so, and that he also often took the cars to drive to his lunch; "that Hume knew he took the cars for these purposes," and never objected to that use of them.

It is true that much of the foregoing evidence in the *Hicks* case was contradicted at the trial. But the weight and sufficiency of the evidence and the credibility of the witnesses were solely for the determination of the trial judge. With that province

a reviewing court may not interfere. The lack of knowledge on the part of the employee that he was not permitted to take the machines from the sales lot without the consent of the owner or his salesmanager, and the fact that the employee, John Reis, had frequently taken them with the knowledge of Mr. Hume justified the court in assuming that they were taken with the implied permission of the owner, and that imputed negligence would therefore render the owner liable for damages to the limited extent provided by Section 402 of the Vehicle Code.

No such absence of knowledge of the employer's rule against permissive use of the machine by an employee, or evidence of knowledge on the part of the owner that the machines were so customarily used by the employee appears in the present case. The *Hicks* case is therefore clearly distinguishable from the facts of this suit. We find nothing in the foregoing cases or in any of the other cases relied upon by appellants in conflict with what we have said regarding the legality of or justification for the order directing the jury to return a verdict in favor of the respondent.

Likewise, in the case of *Lufkin v. Patten-Blinn Lumber Co.*, 15 Cal.App.2d 259, 59 P.2d 414, upon which the appellant also relies, judgment against the Lumber Company on the theory of imputed negligence growing out of implied permission to use its automobile for private purposes was affirmed. In that case there was no evidence to refute plaintiff's testimony that his use of the car was not limited by any instructions, and it does not appear the Lumber Company lacked knowledge of the fact that plaintiff was using the machine for private purposes. The Appellate Court affirmed that judgment apparently for the reason announced in *Dahl v. Spotts*, 128 Cal.App. 133, 16 P.2d 774, 776, that when the appellant "has it in his power to produce evidence which from its very nature must overthrow the case made against him if it is not founded on fact, and he refused to produce such evidence, the presumption arises that the evidence, if produced, would operate to his prejudice, and support the case of his adversary."

The *Lufkin* case, therefore, is clearly distinguishable from the facts of this cause. It is not authority for holding that the trial court erred in granting the judgment in the present case.

The judgment which was rendered pursuant to the directed verdict in this case is valid and should be affirmed.

[9] The court did not err in sustaining objections to plaintiffs' interrogatories on examination of Samuel A. Cahill or on cross-examination of Walter G. Norris. The questions to which objections were sustained were incompetent. They do not tend to show permissive use of the car for private purposes. They merely sought to prove that, in a conversation between Cahill and Norris *after the accident occurred*, Cahill was not criticised because he had used the machine for his own private purposes and that he was not discharged, but continued to work for the Garin Company for several months thereafter. Neither Cahill nor Norris was asked, nor did the plaintiffs' attorney offer to prove, that the Garin Company had knowledge *before the accident occurred* that the employee had previously used the car for his own benefit. If Cahill had been criticised by Mr. Norris after the accident had occurred, or had been thereafter promptly discharged, those acts would not tend to prove that the Garin Company previously knew he had been violating instructions by using the car for his own benefit. That being true, the appellants may not complain of the rulings of the court.

In support of their contention that the court committed error in sustaining objections to that testimony, the appellants rely on Hicks v. Reis, *supra*, and Blank v. Coffin, *supra*. In both of those cases there was evidence that the owners of the machines had knowledge *before the accidents occurred* of the fact that their employees were, contrary to instructions, using their machines for their own private benefit. Under such circumstances the reviewing courts properly said that the failure to discharge the employees, or to criticise them for violating their rules, before the accidents occurred, was some evidence tending to show implied permission to use them for their own purposes.

In the present case no such previous knowledge on the part of the respondent appears in evidence. Nor was the excluded evidence offered for that purpose.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

64 Cal.App.2d 842

BOND v. FARMERS & MERCHANTS NAT. BANK, LOS ANGELES, et al.

Civ. 14465.

District Court of Appeal, Second District,
Division 2, California.

June 14, 1944.

1. Judgment ☞815

A judgment entered in another state upon a negotiable instrument containing a warrant of attorney to confess judgment without service of process is entitled to "full faith and credit". U.S.C.A.Const. art. 4, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Full Faith and Credit".

2. Set-off and counterclaim ☞40

The code section pertaining to counterclaims does not indicate legislative intent that counterclaim must have existed at time of commencement of action in order to be asserted. Code Civ.Proc. § 438, as amended by St.1927, p. 1620.

3. Set-off and counterclaim ☞3

The Legislature, in rewriting code section pertaining to counterclaims, indicated legislative intent to formulate a plan complete in itself without reference to original provision and to substitute a new law for that which formerly existed, and any content of old section not repeated must be considered as repealed even though there are no inconsistencies between the two sections. Code Civ.Proc. § 438, as amended by St.1927, p. 1620.

4. Set-off and counterclaim ☞23, 34(1), 41

The sole requisites of a "counterclaim" are that it must tend to defeat or diminish plaintiff's demand, and that demands must be reciprocal, and connection between cause alleged by plaintiff and that which forms basis of counterclaim is unnecessary. Code Civ.Proc. § 438, as amended by St. 1927, p. 1620.

See Words and Phrases, Permanent Edition, for all other definitions of "Counterclaim".

5. Set-off and counterclaim ☞1

The code section pertaining to counterclaims manifests legislative intent to avoid a multiplicity of suits and to settle con-

flicting claims in a single action. Code Civ. Proc. § 438, as amended by St.1927, p. 1620.

6. Set-off and counterclaim ⇨53

In action against a bank individually for declaration of plaintiff's right to money held by bank in trust for plaintiff, where bank held a judgment against plaintiff for benefit of an estate of which bank was executor and to which estate plaintiff's debt was originally owed, action of bank, in causing plaintiff's debt to be reduced to judgment by residuary legatee and taking an assignment thereof to the bank individually and pleading it as a counterclaim against plaintiff's demand, was proper. Code Civ.Proc. § 438, as amended by St. 1927, p. 1620; Probate Code, § 300.

7. Pleading ⇨238(4), 353

Where supplemental answer was filed pursuant to an order which was entered after notice to plaintiff, the striking of supplemental answer without service upon defendants of notice of intended action of court was error.

8. Judgment ⇨388

A court is without power to vacate an order involving judicial action regularly made and in its place enter another and different order without notice to adverse party.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by John G. Bond, by his attorney in fact, George M. Bond, against Farmers & Merchants National Bank, Los Angeles, and Doris Bond Sherman for declaratory relief, wherein defendant bank counterclaimed. From a judgment for plaintiff, defendants appeal.

Reversed with instructions.

George I. Devor, of Los Angeles, for appellants.

Boyd C. Barrington, of Santa Monica, and Frank L. Simons, of Los Angeles, for respondent.

MOORE, Presiding Justice.

The question for decision is whether a bank as executor of an estate may cause a debtor's obligation to the estate to be reduced to judgment by the residuary legatee and assigned to the bank individually and thereafter be pleaded as a counterclaim to the action of the debtor against the bank

individually for money which the bank as trustee had held for the debtor during the lifetime of the testator.

Plaintiff filed his action for declaratory relief alleging that he was the beneficiary of a trust established by his niece, defendant Doris Bond Sherman, December 31, 1935. The basic instrument provided that in the event that Seth Bond, the father of Doris, should predecease her the bank as trustee should at Seth's demise pay to plaintiff the sum of \$1,000. Seth Bond deceased June 16, 1940, whereupon defendant bank qualified as the executor of his will. Plaintiff had no beneficial interest in decedent's estate but he was indebted thereto in the sum of \$3,500 on three promissory notes executed to his brother in 1929 and which had been appraised at \$1,000. Upon discovering the indebtedness of plaintiff to the Bond estate the bank insisted that the \$1,000 due plaintiff be applied pro tanto to the extinction of his debt, leaving plaintiff still indebted to the estate in the sum of \$2,500. Following the bank's refusal to pay him the \$1,000 plaintiff instituted this action August 4, 1942, alleging the controversy, and as consequent relief demanded judgment for the \$1,000.

By her answer filed September 9, 1942, Doris alleges the establishment of the trust, admits its provision of \$1,000 for plaintiff and alleges that at the time the trust was created she was unaware of his debt to her father in the sum of \$3,500. By its answer filed September 29, 1942, the bank alleges the subsisting indebtedness of plaintiff to the Bond estate and that as executor it has applied the \$1,000 due plaintiff upon his \$3,500 debt.

Subsequent to the filing of its answer the bank as such executor without order of court assigned the three promissory notes to Doris, who was the residuary legatee under the will of her father. In turn she caused suit to be instituted in Ohio, the domiciliary state of plaintiff, in order to obtain judgment upon the debt. Pursuant to cognovit clauses in the three notes, without personal service judgment was obtained against the debtor in the aggregate sum of \$5,101.10. Subsequently Doris assigned the Ohio judgment to the bank individually and on November 19, 1942, the court below authorized the filing of a supplemental answer. The supplement alleged as a counterclaim the judgment against plaintiff and demanded that it be set off against the \$1,000 due plaintiff. Such pleading was never strick-

en and its allegations were found to be true.

[1] Inasmuch as no point is made by respondent as to the validity of the Ohio judgment, it is unnecessary to extend the discussion on that point. Suffice it to say that a judgment entered in another state upon a negotiable instrument containing a warrant of attorney to confess judgment without service of process is entitled to full faith and credit under the Federal Constitution, Art. 4, § 1. 31 Am.Jur. 168. The notes were not barred by any statute of limitation in Ohio. Page's Ohio General Code, Sec. 11221.

[2,3] It appears that the primary basis of the court's rejection of the counterclaim arose out of the court's interpretation of section 438, Code of Civil Procedure. Prior to 1927 that section provided that in order to prevail a counterclaim must have existed at the commencement of the action. In that year the section was amended to read as follows: "The counterclaim mentioned in section 437 must tend to diminish or defeat plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action; * * *." 1 There is nothing contained in this section to indicate that the legislature intended that the counterclaim must have existed at the time of the commencement of the action. The existing statute was the evident attempt on the part of the lawmakers to establish a new law for the regulation of the pleading of counterclaims. Inasmuch as it is a complete statute in itself without reference to the superseded section, a reasonable interpretation is that the legislature undertook to formulate a plan complete in itself without reference to the original provision upon that subject. It appearing that the legislature's intention was to revise the entire subject matter of section 438, it must be presumed that they intended to substitute a new law for that which had formerly existed, and that any content of the old statute not repeated should be considered as

repealed by the new even though there be no inconsistencies between the two. Mack v. Jastro, 126 Cal. 130, 132, 58 P. 372; Stockburger v. Jordan, 10 Cal.2d 636, 646, 76 P.2d 671; Jewett v. City Transfer & Storage Co., 128 Cal.App. 556, 561, 18 P.2d 351. The enactment of the new statute will not be considered as repealing by implication but rather is it to be understood that the later legislative attempt is a revision of the entire subject matter embodied in the successive legislative enactments and that the latest was designed as a substitute for all preceding acts. Whatever of the old is excluded from the new must be ignored. All the limitations upon the right to counterclaim not found in section 438 as amended must be deemed to have been abolished by the new section. Buckman v. Tucker, 9 Cal.2d 403, 408, 71 P.2d 69; Todhunter v. Smith, 219 Cal. 690, 693, 28 P.2d 916; Terry Trading Corp. v. Barsky, 210 Cal. 428, 435, 292 P. 474.

[4,5] From a reasonable construction of the section and the cited cases it appears that the sole requisites of the counterclaim are (1) that it must tend to defeat or diminish plaintiff's demand; and (2) the demands must be reciprocal. Harrison v. Adams, 20 Cal.2d 646, 649, 128 P.2d 9. The intention of the legislature to avoid a multiplicity of suits and to settle conflicting claims in a single action was clearly manifested. Terry Trading Corp. v. Barsky, supra. Connection between the cause alleged by plaintiff and that which forms the basis of the counterclaim is unnecessary. Buckman v. Tucker, supra.

[6] The demands of the parties are not lacking in mutuality. The bank is sued in its individual capacity. Proof that it appeared in any other character would have been inadmissible. It filed its counterclaim in the same capacity. The fact that the \$1,000 originated in a trust carried by the bank was immaterial. The bank conceded its obligation to pay the \$1,000. The transfer of plaintiff's debt by mesne assignments from the creditor estate to the bank is also

1 Prior to 1927, it read as follows: "Section 438. When counterclaim may be set up. The counterclaim mentioned in the last section (section four hundred and thirty-seven) must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

"1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action;

"2. In an action arising upon contract; any other cause of action arising also upon contract and existing at the commencement of the action."

of no consequence. The paramount facts are that plaintiff owed the judgment and the bank as assignee thereof pleaded it as a set-off. As executor of the Bond estate the bank was justified in diligently pursuing such legal course as would conserve the estate for the legatees. In the execution of its office as executor the bank properly assigned to Doris the notes in order to obtain judgment upon them and thereby to conserve the assets of the estate. McCully v. Cooper, 114 Cal. 258, 262, 46 P. 82, 35 L.R.A. 492, 55 Am.St.Rep. 66. The assignments of the notes were absolute. They had been assets of the Bond estate in the custody of the court solely for the purposes of administration. Since Mrs. Sherman was the residuary legatee, the notes of plaintiff would have been distributable to her at the close of the administration. Sec. 300, Probate Code. But despite her actual as well as titular ownership of the notes, after recovering judgment thereon she assigned it to the bank. Thereby she saved herself from loss while enabling the bank to report a partial collection on the notes which had been deemed of no greater value than the amount recoverable as a set-off.

That the bank individually held title to the judgment for the benefit of the estate was of no concern to the plaintiff. Lewis v. Adams, 70 Cal. 403, 11 P. 833, 59 Am. Rep. 423. While it had held the notes as executor of the estate, yet as between the bank and plaintiff the bank might assert the judgment as a counterclaim as though it owned the judgment in fee. Dambmann v. White, 48 Cal. 439. Plaintiff was in no position to object to the bank's strategy. So long as its performance as executor satisfies the residuary legatee in accounting for all of the residuum of the estate its total obligation in the premises will have been discharged. See Bond v. City of Pasadena, 6 Cal.2d 139, 142, 56 P.2d 946. Any failure in that respect would be a matter solely for the bank to settle with the residuary legatee.

[7,8] Finally, the judgment is contrary to the supplemental answer and the findings thereon. That pleading was filed pursuant to an order which was granted after notice to the plaintiff. While there is no formal order striking it, the court's decision suggests that it should be stricken. Conceding, arguendo, that the court's "conclusion" was an order striking the supplemental pleading, such an order would have been erroneous for the reason that no no-

tice of the intended action of the court was served upon the defendants. A court is without power to vacate an order involving judicial action regularly made and in its place enter another and different order without notice to the adverse party. Harth v. Ten Eyck, 16 Cal.2d 829, 834, 108 P.2d 675; Stevens v. Superior Court, 7 Cal.2d 110, 59 P.2d 988; McMahan v. Baringer, 49 Cal.App.2d 431, 122 P.2d 63. Due notice to the party to be affected by a judgment is indispensable to a fair and orderly administration of justice.

The judgment is reversed with instructions to the trial court to enter judgment for defendants as prayed in the supplemental answer.

W. J. WOOD and McCOMB, JJ., concur.



65 Cal.App.2d 65

STREETER v. MARTINELLI et al.

Civ. 12599.

District Court of Appeal, First District,
Division 1, California.

June 26, 1944.

Rehearing Denied July 26, 1944.

Hearing Denied Aug. 24, 1944.

1. Witnesses 133

Statute rendering incompetent as witness parties to action against executor on claim or demand against estate does not apply when action is not on a claim or demand against the estate. Code Civ.Proc. § 1880, subd. 3.

2. Witnesses 133

Suits based on claims to property adverse to estate of decedent are not within statute rendering incompetent as witness parties to action against executor on claim or demand against estate. Code Civ.Proc. § 1880, subd. 3.

3. Witnesses 133

Suits to recover property or establish title thereto against estate of a decedent do not come within statute rendering incompetent as witness parties to action against executor on claim or demand against estate and plaintiff may testify in his own behalf. Code Civ.Proc. § 1880, subd. 3.

4. Witnesses ⇨133

An action to quiet title against an estate of a decedent is not within statute rendering incompetent as witness parties to action against executor on claim or demand against estate, and plaintiff may testify in his own behalf. Code Civ.Proc. § 1880, subd. 3.

5. Witnesses ⇨133

Where third cause of action was one to quiet title to property and business based on four party joint adventure agreement which was made part of complaint, plaintiff joint adventurer was competent witness to testify in his own behalf in support of the cause of action, notwithstanding representative of a deceased joint adventurer was party to action. Code Civ. Proc. § 1880, subd. 3.

6. Witnesses ⇨133

Where purposes of first and second causes of action were to obtain decree cancelling two deeds of trust and notes secured thereby on grounds of actual and constructive fraud of deceased joint adventurer and to secure accounting of business carried on under four party joint adventure agreement, plaintiff was competent to testify in his own behalf in support of such causes of action under statute prohibiting testimony by party on claim or demand against estate. Code Civ.Proc. § 1880, subd. 3.

7. Witnesses ⇨133

Where under none of causes of action pleaded in complaint could money judgment have been rendered against deceased's estate, the fact that complaint contained allegation that plaintiff had presented claim against deceased's estate and that claim had been rejected did not show that plaintiff was not competent to testify in his own behalf under statute prohibiting testimony by party on claim or demand against estate. Code Civ.Proc. § 1880, subd. 3.

to rink property and business. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Harry A. Houser and Owen D. Richardson, both of San Jose, for appellant.

Elliott, Atkinson & Sitton and Henry & Bedeau, all of Sacramento, and Edward M. Fellows, of San Jose, for respondents.

KNIGHT, Justice.

The plaintiff, Richard S. Streeter, appeals from a judgment of nonsuit in an action arising out of a joint venture carried on under the name of Ice Bowl, Inc., in pursuance of which an ice skating rink was constructed and operated in San Jose, and toward the construction and operation of which plaintiff was induced to advance \$31,000.

The complaint sets forth three causes of action, and according to the prayer the relief sought was to permanently enjoin a trustees' sale of the rink property, and to cancel two deeds of trust and the notes secured thereby; to obtain an accounting of the business venture; and to secure a decree quieting title to the rink property and the business, adjudging that plaintiff was the owner of a one-fourth interest in both, as provided in the written agreement entered into by the four parties to the venture.

Subsequent to the giving of the notice of the trustees' sale and prior to the commencement of his action one of the parties to the venture, George J. Hollenbeck, died, and at the trial of the action, after plaintiff had introduced the testimony of several witnesses, the trial court refused to permit plaintiff to testify as a witness in the case upon the ground that he was barred from doing so by the provisions of subdivision 3 of section 1880 of the Code of Civil Procedure. We are of the opinion that such refusal constituted prejudicial error, which calls for a reversal of the judgment.

Construing the evidence most strongly in plaintiff's favor, the essential facts of the case may be stated as follows: Ice Bowl, Inc., was incorporated on March 6, 1940, by Chas. S. Mabrey and two others named Johnson and Hann, all residents of Sacramento. They constituted the board of directors, and Mabrey was the active head of the corporation. On March 12, 1940, the corporation leased, with an option to buy, a piece of property in San Jose upon

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Action by Richard S. Streeter against George A. Martinelli and others to permanently enjoin a trustees' sale of ice skating rink property, to cancel two deeds of trust and two notes secured thereby, to obtain an accounting of joint venture business, and to secure a decree quieting title

which to build the rink, and immediately thereafter let a contract for its construction. All of this was done before any stock was sold. At the end of March a permit was obtained from the Corporation Commissioner authorizing the sale for a limited time of a number of shares of stock under certain conditions, among which required the depositing in escrow of the money received from stock subscriptions. The stock selling campaign was not successful and this led to financial difficulties. Hollenbeck lived in or near Sacramento, and was associated with Mabrey in operating an ice skating rink in Sacramento, which had paid large profits; and through Mabrey he became interested in the San Jose enterprise. When Hollenbeck entered the venture Johnson and Hann stepped out and were succeeded on the board of directors by Hollenbeck and Richard H. Schwab. The latter is an attorney with whom Hollenbeck had transacted considerable business. He did not put any money into the venture, but at Hollenbeck's request accepted a place on the board of directors. To help finance the enterprise Hollenbeck obtained \$36,750 on personal obligations from a Sacramento bank, and about a year later he was called upon to pay the same. In October, 1940, or thereabouts, it became evident that the permit to sell stock was about to be revoked for failure to comply with the escrow conditions; and the corporation needed more money to complete the rink. Streeter was a prune grower in Santa Clara valley, and a distant relative of Mabrey, and his financial aid was solicited by Mabrey, Hollenbeck and a stock salesman named Fuller; and up to November 7, 1940, he was induced to advance sums amounting to \$9,000, taking the corporation's notes therefor. On that date, November 7, 1940, the stock selling permit was revoked, but prior thereto and anticipating the revocation of the permit Hollenbeck and Mabrey conceived the plan of completing and operating the rink as individuals under the corporate name, Ice Bowl, Inc., but they needed much more money to do so. Finally Streeter was induced by Hollenbeck, Mabrey and Fuller to make additional advances which eventually amounted to \$22,000 on Hollenbeck's promise that he would see to it that Streeter would never lose any of his money. Positive testimony to this effect was given by Mabrey, Schwab, Fuller, and the superintendent of construction named Libby. In consummation of the new plan and on

November 9, 1940, which it will be noted was two days after the revocation of the permit, Schwab drew an agreement whereby Hollenbeck, Streeter, Mabrey and Schwab agreed to take over the completion of the rink and operate the same. The essential provisions of the agreement were as follows:

"Whereas, it has now developed that it is for the best interest of all of the parties hereto that in place of selling said stock to the public to finance the erection and construction of said ice rink themselves, and

"Whereas, the respective parties hereto have heretofore contributed to the cost of the erection and construction of said ice rink, and

"Whereas, it is the desire of the parties hereto to carry on said business in the name of Ice Bowl, Inc., and

"Whereas, it is the desire of the parties hereto to define their respective interests in said ice rink,

"Now, Therefore, in consideration of the mutual promises of the respective parties hereto and other valuable consideration, it is hereby agreed by and between said respective parties that each of the parties above named shall own an undivided one-fourth interest in said Ice Rink and business.

"It Is Further Understood and Agreed that each of the parties hereto shall be reimbursed for any and all advances made for the erection and construction of said Rink out of fifty per cent (50%) of the net income of said business.

"It Is Further Understood and Agreed that the parties hereto will mutually agree upon salaries to be paid out of said project for the services of the respective parties which shall be paid out of the remaining fifty per cent (50%) of the net income of said business, and that any remaining portion of said last mentioned fifty per cent (50%) shall be set aside as an operating fund."

The rink was completed and opened for business on December 23, 1940, and with the exception of two months during the summer of 1941 was operated by the parties to the agreement up to April, 1942. However, during the five months following the opening, creditors were threatening suit, and some suits had been filed. Early in May, 1941, Wm. A. Sitton, an attorney in Sacramento, arranged with a client

named Melick to lend the enterprise \$30,000 on a trust deed and on certain conditions, among them being that Hollenbeck and Streeter would each advance an additional \$5,000, and Mabrey \$2,500; but this arrangement was terminated by the sudden death of Melick from a heart attack. Thereupon, Sitton arranged with Hollenbeck to furnish the \$30,000 on the same conditions, and on May 27 and May 29 Sitton wrote two letters to Mabrey stating the conditions under which the money would be furnished. In the concluding sentence of each letter it was stated that a copy thereof was enclosed for Streeter; but Mabrey testified that he did not turn over a copy of either letter to Streeter, nor at any time inform him of the contents of either letter; nor is there any evidence showing that Streeter was aware of the conditions stated in Sitton's letters. However, the evidence shows that Streeter knew that Hollenbeck was going to furnish the \$30,000, and that a trust deed was to be given covering the rink property, and he put up his additional \$5,000, which with the \$30,000 furnished by Hollenbeck was deposited in escrow. But as shown by the allegations of the complaint he claimed that the purpose of placing the trust deed on the property was to protect the interests of all the promoters of the enterprise against judicial seizure of the property by creditors.

\$10,000 of the total amount thus advanced was used to buy the property on which the rink had been built, and the balance to satisfy claims of creditors. After the money was so deposited in escrow and on June 10, 1941, the following transactions took place: The rink property was deeded by the owner through a title company to George A. Martinelli, title thereto admittedly being taken by him in trust for the corporation; Martinelli then gave Elwood Addison, Hollenbeck's son-in-law, a promissory note payable to Addison for the sum of \$30,000, and to secure the payment thereof he executed a deed of trust covering the rink property, naming Sitton and D. M. McKee as trustees, and Addison as beneficiary; a deed was then executed by Martinelli conveying the rink property to the corporation, Ice Bowl, Inc.; but the deed was withheld from record until December, 1941; because of a question of title Sitton insisted that a second deed of trust covering the rink property be given by the four parties to the agreement of November 9, 1940, which according to

its terms was given to secure the payment of a promissory note for \$30,000 executed in favor of Addison by the four trustees. Admittedly, however, Addison did not pay over any money in any of these transactions. He was merely acting for Hollenbeck.

In August, 1941, the articles of incorporation of Ice Bowl, Inc., were amended so as to increase the number of directors to five, and the two additional places on the board were filled by Hollenbeck's wife, his son or Addison. So far as the record shows Streeter was never made a director. Meetings were held frequently in Sacramento by the members of the board throughout this period, but it does not appear that Streeter ever attended any of them.

As stated, the rink was closed in April, 1942; and that following July the trustees gave notice that at the expiration of three months the rink property would be sold under the terms of the trust deed given by Martinelli. Subsequent to the giving of the notice of trustees' sale and prior to September 8, 1942, the exact date not appearing, Hollenbeck died. No part of the \$31,000 advanced by Streeter was ever repaid to him from any source; and on November 10, 1942, he filed the present action.

Named and served as parties defendant were Martinelli, Sitton and McKee as trustees, Addison, Mrs. Hollenbeck and her son as legal representatives of the Hollenbeck estate, Mabrey and his wife, Schwab and his wife, and Ice Bowl, Inc., the corporation. All appeared in the action except the corporation, Ice Bowl, Inc., and at the opening of the trial plaintiff asked that its default be entered; and during the trial plaintiff moved to dismiss as to the Mabreys and the Schwabs.

After plaintiff had introduced the testimony of five witnesses he was sworn as a witness and sought to testify in his own behalf, but counsel for defendants objected to his giving any testimony upon the ground that he was barred from so doing by the provisions of subdivision 3 of section 1880 of the Code of Civil Procedure. The trial court first overruled the objection but immediately afterwards defendant's counsel argued in support of the objection and thereupon the trial court ruled that plaintiff was barred from testifying. Plaintiff's counsel then, for the purposes of the record, started to make a statement of the facts he

intended to establish by plaintiff's testimony, but on objection of defendants he was not permitted to do so. Defendants then moved for a nonsuit as to the first two causes of action, and the court, after first giving its reasons therefor, stated "* * * the motion for nonsuit is granted"; whereupon counsel for plaintiff inquired, "On the first two causes of action?" and the court replied "On all causes of action."

"Mr. Richardson [counsel for plaintiff]: The motion was only directed to two of them."

"Mr. Bedeau [representing the defendants]: We move to amend the motion for nonsuit heretofore made by including therein and adding thereto the third cause of action [to quiet title to the property and the business]."

"The Court: Motion to amend is granted."

[1-4] Subdivision 3 of section 1880 of the Code of Civil Procedure upon which the trial court based its ruling barring plaintiff from testifying is as follows: "The following persons cannot be witnesses: * * * 3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person." But as stated in California Jurisprudence (vol. 11A, pp. 888-9): "The statute applies its inhibitions to parties or assignors of parties to an 'action or proceeding' * * * against an executor or administrator, * * * upon a claim or demand against the estate of a deceased person,' and does not apply when the action is not upon a claim or demand against the estate. The statute is not extended by construction to apply to cases not within its terms, or to apply to all actions brought against an executor or administrator, although the reason for the rule might be as applicable to other cases as to the case of a money claim against the estate. It does not disqualify the defendant party." And in applying the foregoing doctrine it is held that suits based on claims to property adverse to the estate of a decedent are not within the statute, because, if the property belongs to the claimant, the recovery does not diminish the estate to which the judgment might decide it did not belong. 11A Cal.Jur. p. 149 P.2d—46½

890. As also pointed out in California Jurisprudence (vol. 11A, p. 893): "Suits to recover property or establish title thereto against the estate do not aim to take from the estate or diminish it and are not claims against it, and the plaintiff may testify in his own behalf. Hence, neither an action to have deeds absolute declared mortgages and for reconveyances upon payment of the amount adjudged due, nor a suit to declare a partnership in property and for an accounting of the proceeds of its sale is one upon a claim against the estate. So also a suit to set aside a deed to the decedent for fraud in procuring it is not a claim against the estate, but is brought to establish the fact that the land never became a part of his estate." Moreover, it is well settled that an action to quiet title as against an estate is not a controversy involving a claim or demand against the estate within the meaning of subdivision 3 of section 1880. 11A Cal.Jur. p. 893; Hector v. Superior Court, 15 Cal.App.2d 552, 59 P.2d 591; In re Hill, 13 Cal.App.2d 326, 57 P.2d 155.

[5,6] In the present case the third cause of action set forth in the complaint is admittedly one to quiet title to the rink property and the business, based on the four party agreement which is made part of the complaint; and clearly under the cases above cited plaintiff was a competent witness to testify in his own behalf in support of such cause of action. As to the first and second causes of action, it may be conceded that they were not pleaded as clearly as might be desired, but it is apparent from the allegations thereof and the prayer of the complaint that the purposes of those causes of action were to obtain a decree cancelling the two deeds of trust and the notes secured thereby upon the grounds of actual and constructive fraud on the part of Hollenbeck, and to secure an accounting of the business carried on under the four party agreement. With respect to the charges of fraud it was alleged in substance that the four party agreement was obtained through fraudulent promises made by Hollenbeck that if plaintiff would furnish financial aid to complete the construction of the rink and to carry on the business he, Hollenbeck, would not cause a sale of the property to be made, and would save plaintiff harmless from the loss of any money so advanced by him; that the only purpose of the execution of the two trust deeds and the notes in favor of Ad-

dison was to protect all of the promoters of the enterprise, and to secure to them, out of the net income of the business, the repayment to them of the moneys they had advanced; that there was no other consideration for the trust deeds or the notes; that Addison was "a merely nominal payee and beneficiary" acting for the protection of all of the promoters. It was further alleged, on information and belief, that fifty per cent of the net income from the business exceeded \$100,000, which "was and is ample to have reimbursed this plaintiff for the said amount of money so advanced by him." It may be that if plaintiff had been permitted to testify, his testimony would not have been legally sufficient to justify a finding of fraud or to warrant the cancellation of the trust deeds and notes; but in the present state of the record it cannot so be held as a matter of law, because his counsel was denied the right to state the facts he intended to establish by plaintiff's testimony.

[7] The first cause of action is made up of twelve separate paragraphs, the first of which embodies allegations to the effect that plaintiff presented a claim against the Hollenbeck estate for \$31,000 based on the four party agreement, and that the claim was rejected; and defendants seem to take the position that because of the presence of those allegations the first cause of action must be construed as one to recover a money judgment against the Hollenbeck estate on the rejected claim. But no such relief was sought by the action, and at the opening of the trial counsel for plaintiff stated that such was not the purpose of the action, and that the presentation of the claim was in fact wholly unnecessary. In this respect Mr. Richardson, one of plaintiff's attorneys, stated in part: "We think we are entitled to have these deeds of trust cancelled and our title quieted to one-fourth of the property, both real and personal, on those premises; that the Ice Bowl is by all pleadings declared to be a trustee for the benefit not only of our client, but of the other promoters; that the estate of George J. Hollenbeck, deceased, and Messrs. Mabrey, Schwab, and Elwood Addison, the beneficiary named, be declared to be just nominal owners and not having any interest in the deeds of trust or net profits of the corporation or anything else." Later on, during the course of the trial, the following took place.

"The Court: * * * As I understand, Mr. Houser [plaintiff's other counsel], you

are not making a claim against the Estate of Hollenbeck?"

"Mr. Houser: No; this is on the fraud * * * and for the interest in the real estate.

"The Court: Not against the estate?"

"Mr. Houser: That's correct."

At an earlier stage of the trial Mr. Richardson in response to an inquiry made by Mr. Sitton concerning the third cause of action stated in effect that he believed plaintiff was "entitled" to his money against the Hollenbeck estate; and immediately following the discussion between the court and Mr. Houser, above quoted, Mr. Richardson stated that plaintiff was "asking a money judgment on the ground of fraud and for damages sustained by reason of it," irrespective, however, of the statements of counsel, it is obvious that under none of the causes of action pleaded in the complaint in this action could a money judgment of any kind have been rendered against the Hollenbeck estate. Moreover, as indicated by the remarks of the trial court in granting the nonsuit, it treated the action as being one for the cancellation of the trust deeds and notes upon the ground of fraud; and that the basis of its decision in granting the nonsuit as to all three causes of action was that no evidence had been offered "to show that any of the defendants took undue advantage or exercised any fraud against Mr. Streeter." It must be borne in mind, however, that this conclusion was reached without affording plaintiff the right to testify in support of his case.

The cases cited by defendants in support of the trial court's ruling barring plaintiff from testifying are not in point. In *George v. McManus*, 27 Cal.App. 414, 150 P. 73, the action was one to recover a money judgment for damages against the estate of the decedent on account of the negligent destruction of plaintiff's automobile. The other cases involved actions for the recovery of money judgments against the estates of deceased persons, either on rejected claims or for services rendered the deceased.

The judgment is reversed.

PETERS, P. J., and WARD, J., concur.

Rehearing denied; PETERS, P. J., not participating.

64 Cal.App.2d 814

UPTON et ux. v. GOULD.

Civ. 12677.

District Court of Appeal, First District,
Division 1, California.

June 12, 1944.

1. Appeal and error Ⓒ878(6)

Plaintiffs who took no appeal were not entitled to attack decree on defendant's appeal.

2. Interest Ⓒ45

Generally, where contract makes no provision for payment of interest, no interest can be charged or collected prior to time that payment falls due.

3. Vendor and purchaser Ⓒ172

Where sales contract providing that purchase price should be paid in monthly installments, was silent as to interest, vendor was not entitled to recover interest on unpaid balance where installments were regularly paid when due.

4. Usury Ⓒ13

"Forbearance" within meaning of usury law is act by which creditor waits for payment of debt due him by debtor after it becomes due. Usury Law, § 1, Gen.Laws 1937, Act 3757.

See Words and Phrases, Permanent Edition, for all other definitions of "Forbearance".

5. Vendor and purchaser Ⓒ172

The sale of property to be paid for in installments or in lump sum at agreed future date is not "forbearance" of money within meaning of the usury law fixing 7 per cent. interest on a loan or "forbearance" of money. Usury Law, § 1, Gen. Laws 1937, Act 3757.

6. Specific performance Ⓒ97(3)

Where purchasers in their complaint for specific performance of contract offered to pay any balance found due and installments paid on purchase price had reduced balance of agreed purchase price below amount due on existing deed of trust which purchasers were to assume, and at time complaint was filed purchasers' note given as part payment was not due, purchasers made sufficient tender notwithstanding failure to tender amount of taxes and insurance where there was no showing that

vendor advised purchasers of amount advanced by him for insurance and taxes.

7. Specific performance Ⓒ30

Where times and terms of payment and amount of purchase price with respect to realty and that purchasers should assume deed of trust were clearly set forth, contract was not indefinite so as to defeat remedy of specific performance, notwithstanding provision that purchasers should pay transfer charges.

8. Specific performance Ⓒ28(1)

All terms and conditions of proposed agreement need not be set forth in contract to warrant specific performance since usual and reasonable terms found in such contracts are, in contemplation of parties, part of such contract.

9. Specific performance Ⓒ130

Where purchasers were required to pay cost of assumption agreement with regard to loan covered by deed of trust on realty, specific performance was granted on condition that purchasers pay cost of revenue stamps required to be affixed to deed from vendor and either prepare deed themselves or pay vendor reasonable and necessary cost of preparing it.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Robinson W. Upton and his wife against W. A. Gould for specific performance of contract of sale of realty wherein defendant filed a cross-complaint. From a decree granting specific performance, defendant appeals.

Modified, and as modified, affirmed.

Crist & Beene, of Palo Alto, for appellant.

Douglas A. Nye, of San Francisco, for respondent.

DOOLING, Justice pro tem.

The defendant appeals from a decree of specific performance of a contract for the sale of real property. On January 22, 1942 the parties executed a written contract of purchase and sale whereby defendant agreed to sell and convey to plaintiffs the real property in question for the sum of \$4,550 "plus transfer charges such as assumption agreement, deed and revenue stamps. The above amount is to be paid as follows:

"Buyers agree to pay the sum of \$75 on or before the first day of February, 1942, and a like sum of \$75 on the first of each and every month thereafter until such time as the amount owing by the buyers has been reduced to conform in dollars and cents to an F. H. A. loan which is now existing on the property and which amount as of this date is approximately \$3,800 and when their application for a loan has been accepted by the Federal Housing Administration. At the time the buyers may assume the F. H. A. insured loan and the seller will give to the buyers a deed to the property * * *."

On the date of the execution of this agreement plaintiffs had no money to make a down payment and plaintiffs contemporaneously signed and delivered to defendant an agreement "to sign over our right, title and interest in our automobile * * * to be held as security in lieu of a down payment * * *."

There was an outstanding chattel mortgage on the automobile upon which \$318.21 was then owing which defendant was to pay off, and plaintiffs by this supplemental agreement promised to repay this sum plus any additional interest and insurance, after completing the payments on the property, at the rate of \$25 per month.

Subsequently on March 14, 1942 the plaintiffs executed a note for \$346.83 payable on September 14, 1943 in one installment. This promissory note was secured by a chattel mortgage on the automobile.

Plaintiffs made fourteen monthly payments of \$75 each pursuant to their contract. A dispute arose between plaintiffs and defendant as to whether a portion of these payments should be applied as interest at 6% on the unpaid principal. The evidence was in conflict as to the discussions between the parties concerning interest, but that most favorable to plaintiffs is that nothing was said to them about interest nor was the fact that defendant was claiming the right to interest brought to their attention until about September 11, 1942 when defendant sent plaintiffs a letter showing the application of a considerable portion of the monthly payments theretofore made to the payment of interest. Plaintiffs continued to pay \$75 monthly thereafter until February 26, 1943 when \$1,050 had been paid. The February 26th payment was for the March installment. On March 31, 1943 plaintiffs filed their complaint for specific performance.

Defendant answered setting up his claim to interest and by cross-complaint claimed a default in the payment of the March 1, 1943 installment and each and every month thereafter, asked the court to quiet his title to the real property and also sought to foreclose the chattel mortgage on the automobile.

At the trial, which was had on November 12, 1943, the parties stipulated to the payment of the fourteen installments of \$75 each by plaintiffs, that the defendant was entitled to credit for fire insurance premiums paid on the property in the sum of \$56.64 and taxes paid in the sum of \$73.19 and a balance due on the chattel mortgage, including charges and interest, of \$354.72. They further stipulated that the amount owing on the existing deed of trust as of November 1, 1943 was \$3,628.63.

By its decree the trial court ordered defendant to execute and deliver a deed to the property to plaintiffs, to execute and deliver a release and satisfaction of the chattel mortgage and to transfer the title of the automobile to plaintiffs, and to execute such written consent or other documents as may be necessary to enable the plaintiffs to assume the indebtedness under the existing deed of trust, the amount to be assumed as of November 12, 1943 being \$3,628.63; and further decreeing that on the tender of performance of these terms defendant is entitled to receive from plaintiffs the sum of \$484.55.

[1] We notice a claim of plaintiffs that the decree failed to allow them a credit of \$128.63 to which they were entitled, only to point out that having taken no appeal they are not in a position to attack the decree in any particular. 2 Cal.Jur. 839.

[2, 3] The primary dispute between the parties in the trial court was on the matter of the right of defendant to charge interest on the unpaid balance. It is the generally well-settled rule that where a contract makes no provision for the payment of interest no interest can be charged or collected prior to the time that payment falls due. *Nesbit v. MacDonald*, 203 Cal. 219, 222, 263 P. 1007; *Puppo v. Larosa*, 194 Cal. 717, 720, 230 P. 439; *Safeway Stores v. King Lumber Co.*, 45 Cal.App.2d 17, 23, 113 P.2d 483; *Dugan v. Forster*, 104 Cal. App. 117, 122, 285 P. 384; *Gibbs v. Mendoza*, 103 Cal.App. 183, 186, 187, 284 P. 250; *Gero v. Richey*, 38 Cal.App. 21, 24, 175 P. 91. The contract here is silent on

the subject of interest and the \$75 monthly installments were regularly paid when due.

[4, 5] Defendant points to section 1 of the Usury Law, Deering's Gen.Laws, Act 3757, which provides: "The rate of interest upon the loan or forbearance of any money * * * shall be seven dollars upon the one hundred dollars for one year * * *", and claims that the contract for payment in installments constitutes a forbearance of money within the meaning of this act. The cases construing the words "forbearance of any money" in the usury law are to the contrary. "'Forbearance' is 'the act by which a creditor waits for the payment of a debt due him by the debtor after it has become due.'" *Murphy v. Agen*, 92 Cal.App. 468, 469, 268 P. 480, 481; *O. A. Graybeal Co. v. Cook*, 111 Cal. App. 518, 528, 295 P. 1088. The sale of property to be paid for in installments or in a lump sum at an agreed future date is not under these decisions a forbearance of money.

[6] Defendant argues that there was no sufficient performance or tender of performance by plaintiffs. In their complaint plaintiffs offered to pay any balance found due by the court. The payment of \$1,050 in installments had reduced the balance of the agreed purchase price below the amount due on the existing deed of trust which plaintiffs were to assume. They could not assume the debt secured by the deed of trust before the real property was conveyed to them. At the time their complaint was filed the note secured by chattel mortgage was not yet due and did not fall due until many months later. There is no showing that they were advised by defendant of the amount advanced by him for insurance and taxes. Defendant by reason of his claim for interest was claiming a considerable balance which plaintiffs were not in fact bound to pay. Under the circumstances plaintiffs did all in their power to tender performance when they offered in their complaint to pay what amount the trial court should find to be owing to defendant. 58 Cor.Jur. 1085; *Ray Thomas, Inc., v. Cowan*, 99 Cal.App. 140, 146, 277 P. 1086; *Boro v. Ruzich*, 58 Cal.App.2d 535, 541, 137 P.2d 51.

Appellant seems to argue that the original agreement to pay off the indebtedness of \$318.21 arising from defendant's advancing that amount to clear title to the automobile remained in force, and plain-

tiffs were bound to pay \$25 per month under its terms. It is too clear for argument that this agreement was superseded by the promissory note and chattel mortgage of March 14, 1942, which was payable by its terms in one lump sum of \$346.83 on September 14, 1943. A simple calculation shows that this sum of \$346.83 represents the principal of \$318.21 with interest thereon at 6% from March 14, 1942 to September 14, 1943, the date of maturity. As already pointed out when suit was commenced in March 1943 this note was not due and did not fall due until shortly before the trial of this action.

[7, 8] Appellant urges that the contract was too indefinite to support a decree for specific performance. The times and terms of payment and the amount of the purchase price were clearly set forth. The agreement to assume the existing deed of trust is equally clear. *Boro v. Ruzich*, supra, 58 Cal.App.2d 535, 541, 137 P.2d 51. The agreement to pay "transfer charges such as assumption agreement, deed and revenue stamps" falls within the rule announced in *Janssen v. Davis*, 219 Cal. 783, 788, 29 P.2d 196, 198: "There is no principle of equity requiring all the terms and conditions of the proposed agreement to be set forth in the contract. The usual and reasonable terms found in such contracts are, in contemplation of the parties, a part of such contract."

[9] No proof was made of any transfer charges other than those specifically mentioned in the agreement. The decree, probably through inadvertence, was silent as to the payment by plaintiffs of such charges. The cost of the assumption agreement will in any event fall on plaintiffs since the burden is on them under the decree to assume the obligation of the existing loan. The trial court is directed to amend the decree to require plaintiffs to pay the cost of the revenue stamps required to be affixed to the deed from defendant and either to prepare the deed themselves or to pay the defendant the reasonable and necessary cost of preparing the same, and to pay the notary fee for its acknowledgment.

With such modification the decree is affirmed, respondents to recover their costs on appeal.

PETERS, P. J., and KNIGHT, J., concur.

FULFER v. SHERRY'S LIQUOR STORES

et al.

Civ. 3141.

District Court of Appeal, Fourth District,
California.

June 23, 1944.

Hearing Granted Aug. 21, 1944.

1. Negligence Ⓒ59

A defendant cannot be held liable where acts resulting in plaintiff's injury would not have been foreseen by reasonably prudent person.

2. Negligence Ⓒ59

Where plaintiff, while a patron in defendants' liquor store, was injured as result of an assault by several youths who were having an altercation with defendant's manager when plaintiff moved toward telephone at manager's request to call the police, and it appeared that assault immediately followed plaintiff's movement toward telephone, so that there was no opportunity for any warning and that manager immediately went to plaintiff's assistance, the unlawful assault was not a foreseeable result, so as to render defendant liable for plaintiff's injuries, notwithstanding that youths had made a prior assault on the manager of which plaintiff was unaware.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by John Fulfer against Sherry's Liquor Stores and another for injuries sustained by plaintiff while a patron in defendants' store. From a judgment for defendants, the plaintiff appeals.

Affirmed.

Clafin & Chain, of Bakersfield, for appellant.

Borton, Petrini, Conron & Borton, of Bakersfield, for respondents.

MARKS, Justice.

This is an appeal from a judgment entered after defendants' motion for nonsuit had been granted at the close of plaintiff's case.

In his opening brief plaintiff makes the following statement of facts:

"On August 12, 1943, defendant Sherry's Liquor Store was the owner, and defendant

Earl Padgett was the employee manager, of a branch of said stores located at 904 Baker Street in East Bakersfield, California, and on the night of August 12, 1943, defendant Padgett was solely in charge of said store; sometime during the night of said day three men who were together came into the store to make a purchase. An argument ensued between these men and Padgett over the sale because of the questionable age of the man who desired to make the purchase. Padgett tried to phone the police but was intimidated and desisted and then was severely beaten by two of these three men who then left the premises. Shortly after they had gone plaintiff came in with a friend to make a purchase and was standing by the wall at the rear of the store with his friend and Padgett making his selection when the three men who had been in there originally and who had beaten Padgett and threatened him regarding the telephone returned reinforced by two other men. Plaintiff had no knowledge of what had gone on before, nor was what had gone on before imparted to him by Padgett. One of the three original men commenced to argue with Padgett about the dollar he paid him (Padgett) and demanded the dollar back. When Padgett refused to give it back, he stated 'You will give me that dollar back or I will take it out of your hide.' Padgett, mindful of what had happened to him prior to this time and of the threat made relative to using the telephone for the purpose of calling the police, looked in plaintiff's direction and directed him to call the police. Plaintiff, being unaware of any obvious danger to him in so doing, took two or three steps in the general direction of the telephone still undecided as to whether he would phone or not, at which time two or three of the men who had previously been in the store set upon him, beat him about the head and face with their fists, knocked him to the floor, kicked him while he was on the floor, breaking his jaw, injuring his throat, and generally bruising him."

We should add to this statement that when the youths demanded their dollar back, Padgett told them they had broken some liquor bottles and he was not returning any money; that the young men told Padgett they would take it out of his hide—would stamp him into the cement floor unless he returned the dollar; that their attitude was threatening and their voices loud and angry; that this was apparent to

plaintiff and his friend who had accompanied him; that when plaintiff moved toward the telephone one of the men said that no one was going to phone the police and then attacked him immediately; that in going to the attack "they ran more than walked * * *. All three came at practically the same time"; that Padgett helped resist the attack of the ruffians; that the entire altercation lasted between three and five minutes.

Counsel for plaintiff admit that they have been able to find no California case involving an action for damages decided under a factual situation similar to that appearing here. They cite several authorities on the circumstances under which a court may grant a motion for nonsuit, on the duty of a property owner to keep his premises reasonably safe for use by an invitee and on his duty to warn the invitee of any known danger. These principles are so well known that a citation of authorities and discussion of them should be unnecessary. Counsel cite decisions from other jurisdictions which they maintain support their argument to the effect that the evidence shows that Padgett breached a duty which he owed to plaintiff, an invitee on the premises of Sherry's Liquor Stores, by failing to warn him of a danger known to Padgett but unknown to plaintiff and which was a proximate cause of his injuries. We will consider those cases.

Plaintiff relies on the case of *Molloy v. Coletti*, 114 Misc. 177, 186 N.Y.S. 730, as supporting his argument. In that case a motion by defendant for judgment on the pleadings was granted and judgment was entered for defendant which was reversed on appeal. From the few facts stated in the brief opinion it would seem that plaintiff was a guest in a restaurant operated by defendant. Another guest had been guilty of boisterous, offensive and unlawful conduct of which defendant had notice. This patron threw a heavy water glass which struck plaintiff and injured him. The court seemed to be of the opinion that as defendant had notice of the condition of the boisterous patron he should have made some effort to protect the plaintiff from injury at his hands. The only case cited in support of this conclusion is *Rommel v. Schambacher*, 120 Pa. 579, 11 A. 779, 6 Am.St. Rep. 732.

In the *Rommel* case it appears that the plaintiff entered the tavern of defendant

and met Edward Flanagan. Both became intoxicated on liquor furnished them by defendant. While Rommel was standing outside the bar talking to defendant, Flanagan pinned a piece of paper on Rommel's back and lighted it causing serious burns. This was done in full view of defendant who neither warned Rommel nor attempted to interfere to protect him. It was held that if defendant saw Flanagan setting fire to plaintiff it was his duty to interfere or if he was guilty of making Flanagan drunk, or permitted him to remain in his tavern knowing he was drunk, defendant owed a duty to his other customers to protect them from injury at Flanagan's hands.

Curran v. Olson, 88 Minn. 307, 92 N.W. 1124, 60 L.R.A. 733, 97 Am.St.Rep. 517, is also cited. Plaintiff had been a guest in defendant's saloon and having spent all of his money there went to sleep in a chair. A cook in a restaurant in the rear of the saloon entered and procured some alcohol from the barkeeper employed by defendant. He poured this over the foot of plaintiff and set fire to it causing the injuries complained of. On two prior occasions on the same night the cook had obtained alcohol from the barkeeper which he used in the same manner on two other sleepers. The judgment in favor of plaintiff was affirmed because the barkeeper, having knowledge of the use to which the alcohol was put on the prior occasions still delivered the alcohol to the cook a third time which was held to be a violation of the duty "to use reasonable care to protect their guests and patrons from injury at the hands of vicious or lawless persons whom they knowingly permitted to be in and about their saloon."

The decision in *Rommel v. Schambacher*, supra, is considered at length in the case of *Rahmel v. Lehndorff*, 142 Cal. 681, 76 P. 659, 661, 65 L.R.A. 88, 100 Am.St.Rep. 154, where our Supreme Court said:

"The proprietor was held liable for a tort in which he was personally a participant, and what else was said, so far as it may seem to apply to a malicious assault by a servant, wholly unauthorized and unobserved by the master, may be regarded as dictum. An innkeeper is, no doubt, guilty of negligence if he admits to his hotel, or permits to remain there, whether as guest or servant, a person of known violent and disorderly propensities, who will probably assault or otherwise maltreat his guests,

and for the consequence of such negligence he may be liable in damages. But the plain ground of his liability in such case would be his negligence in harboring persons dangerous to the peace and comfort of those for whose comfort he is bound to provide. And if, as in the Philadelphia case, he stands by while a guest is exposed to the violence of a person who has been made dangerous by his fault, and sees an injury inflicted without any effort to prevent it, he may be regarded as *particeps criminis*."

The final comment of our Supreme Court on *Rommel v. Schambacher* is particularly applicable here. It said:

"We do not regard it as a case strictly in point, but one resting upon grounds peculiar to itself, and sufficient to sustain the conclusion of the court without reference to the proposition to which it has been cited here."

The foregoing should sufficiently distinguish the factual situations presented in the *Rommel* case and in *Molloy v. Colletti*, *supra*, and *Curran v. Olson*, *supra*, from those of the instant case so that they need not be considered controlling here. In the instant case the attack on plaintiff was almost instantaneous with the apparent enmity of the ruffians towards him. Padgett had no sufficient opportunity to warn plaintiff of his danger which must have been as apparent to plaintiff as to Padgett. The further fact that Padgett immediately went to his assistance and engaged in the fight to protect him also distinguishes the cases.

Rahmel v. Lehndorff, *supra*, has been cited with approval and followed. See *Clancy v. Barker*, 8 Cir., 131 F. 161, 69 L.R.A. 653; *Yates v. Taft Lodge*, 6 Cal.App.2d 389, 44 P.2d 409; *Davison v. Diamond Match Co.*, 10 Cal.App.2d 218, 51 P.2d 452. It has also been cited and distinguished. See, *Ruppe v. City of Los Angeles*, 186 Cal. 400, 199 P. 496; *McInerney v. United Railroads*, 50 Cal.App. 538, 195 P. 958; *Stansell v. Safeway Stores, Inc.*, 44 Cal.App.2d 822, 113 P.2d 264. While some question may be raised by later cases as to the ultimate decision in the *Rahmel* case the rules of law we have quoted from it are still generally applied.

Plaintiff also relies upon *Sinn v. Farmers Deposit Savings Bank*, 300 Pa. 85, 150 A. 163, where the plaintiff, a customer, was injured by an explosion caused by a man who was attempting to rob the defendant bank. The judgment in favor of plaintiff

was affirmed on appeal because between ten and twenty minutes elapsed between the time the danger became known to the employees of the bank and the explosion during which time the customer might have been warned of his danger. This lapse of time alone distinguishes that case from the instant case. The Court of Appeals of New York in a carefully considered opinion (*Laidlaw v. Sage*, 158 N. Y. 73, 52 N.E. 679, 44 L.R.A. 216) reached a conclusion opposite to that of the Pennsylvania court in the *Sinn* case.

Plaintiff also cites *Johnson v. Monson*, 183 Cal. 149, 190 P. 635; *Hiroshima v. Pac. Gas & Elec. Co.*, 18 Cal.App.2d 24, 63 P.2d 340, and *Stansell v. Safeway Stores, Inc.*, *supra*. In each of those cases the assaults were committed by an employee and the cases turned on the question of whether or not the acts complained of fell within the scope of employment. In the instant case the assault was made by others than the employee, and the employee attempted to protect the plaintiff.

For the purpose of this opinion we may assume, as argued by plaintiff, without holding, that Padgett owed a duty to plaintiff to warn him of the danger of an assault, if as a reasonably prudent person he should have anticipated such an assault, and if he had an opportunity of doing so in time to prevent injury.

When the assault was made on Padgett, plaintiff was not present. The enmity of the assailants was directed towards Padgett and no one else. When they returned their enmity was still directed against Padgett and they threatened him and no one else. There was nothing to indicate that they would assault an innocent bystander until plaintiff started to move towards the telephone. The assault followed this movement immediately so there was no opportunity for any warning. Padgett did all he could by engaging in physical combat to protect plaintiff. He had no time for words so went into action.

[1,2] Further, there is nothing to indicate that the assault on plaintiff was a foreseeable result to be expected from the conduct of the assailants. A defendant cannot be held liable where the acts resulting in the injury of a plaintiff would not have been foreseen by a reasonably prudent person. *Reithardt v. Board of Education*, 43 Cal.App.2d 629, 111 P.2d 440; *Katz v. Helbing*, 205 Cal. 629, 271 P. 1062, 62

A.L.R. 825. We fail to see how a reasonably prudent person could have anticipated or foreseen the unwarranted and unlawful attack on plaintiff because of the prior assault on Padgett and the threats to do him bodily harm.

• The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



65 Cal.App.2d 60

In re NIELSEN'S ESTATE.

VEITCH et al. v. ERICKSEN et al.

Civ. 12663.

District Court of Appeal, First District,
Division 1, California.

June 24, 1944.

1. Appeal and error ⇨770(1)

Where appellants' opening brief was on file but respondents did not file a reply brief within time prescribed by court rules, the case was submitted pursuant to court rule. Rules of the Supreme Court and District Courts of Appeal, Rule 17(b).

2. Husband and wife ⇨274(1)

Under statute relating to succession of community property, when decedent died intestate without issue or surviving spouse, property which came to him as a surviving joint tenant with predeceased spouse and which was originally acquired with community funds went to children of predeceased spouse rather than to sisters and nephews of decedent. Probate Code, § 228.

3. Executors and administrators ⇨314(13)

Where attorney represented both administrator and decedent's sisters and nephews on hearing of petition for distribution and sisters and nephews did not contest right of children of decedent's predeceased spouse to his property after decision of similar cases upholding children's legal position, costs on children's successful appeal from order dividing property between them and decedent's sisters and nephews should be paid by estate and not

assessed against sisters and nephews. Probate Code, § 1232.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Mainert Nielsen, also known as Dietrich Christian Mainert Nielsen, also known as Meinert Nielsen, deceased. From an order settling final account and decreeing distribution, Myrtle Veitch and others appeal, opposed by Regina Ericksen and others.

Order reversed.

John Langer and Howard Magee, both of San Francisco, for appellants.

A. E. Levinson, of San Francisco, for respondents.

WARD, Justice.

This appeal is taken from the decree of distribution in the estate of Mainert Nielsen, deceased, distributing one-half of the estate to appellants, children of Nielsen's predeceased spouse, Sarah, and one-half to respondents, sisters and nephews of Nielsen.

[1] Appellants' opening brief is on file. Respondents have failed to file a reply brief within the time prescribed by the Rules on Appeal, and, pursuant to rule 17 (b) of those rules, the case has been submitted. Zeigler v. Bonnell, 52 Cal.App. 2d 217, 126 P.2d 118; Ramacciotti v. Galiano, 59 Cal.App.2d 8, 137 P.2d 722.

Appellants contend that under section 228 of the Probate Code they should receive distribution of the entire estate, not one-half as decided by the trial court.

The facts are not in dispute. Appellants, Myrtle Veitch, Conrad von Rappard and Edward von Rappard are the children of Sarah Nielsen and her first husband, von Rappard. After von Rappard's death, Sarah married Mainert Nielsen and the two acquired community property which they used to purchase a piece of real property. They held this real property in joint tenancy. Sarah Nielsen died intestate on October 26, 1938, and her interest in the real property was thereby terminated. Mainert Nielsen died intestate on December 30, 1941. He did not leave a widow or children.

A dispute has arisen between the children of Sarah Nielsen (appellants) and

the sisters and nephews of Mainert Nielsen (respondents) as to who is entitled to take the property which Mainert and Sarah Nielsen had held in joint tenancy. The trial court decreed that appellants take half of the property and that respondents take half.

This case is governed by section 228 of the Probate Code, as amended in 1939, St.1939, p. 2992: "If the decedent leaves *neither spouse nor issue*, and the estate, or any portion thereof was community property of the decedent and a previously deceased spouse, *and belonged or went to the decedent by virtue of its community character on the death of such spouse, or came to the decedent from said spouse by gift, descent, devise or bequest, or became vested in the decedent on the death of such spouse by right of survivorship in a homestead, or in a joint tenancy between such spouse and the decedent or was set aside as a probate homestead*, such property goes in equal shares to the children of the deceased spouse and their descendants by right of representation. * * *" (The italicized part of the section was added in 1939.)

[2] The 1939 amendment compels the conclusion that appellants, children of the deceased spouse, are entitled to the entire estate. It was so held in *Estate of Taitmeyer*, 60 Cal.App.2d 699, 141 P.2d 504. See *Estate of Perkins*, 21 Cal.2d 561, 134 P.2d 231.

[3] On the hearing of the petition for distribution the attorney for the administrator represented both the administrator and "two sisters and three nephews of Mainert Nielsen, the decedent." Appellants suggest that the individual respondents should bear the costs of appeal. See *Estate of Schaetzel*, 44 Cal.App.2d 320, 112 P.2d 324; *Estate of Murphey*, 7 Cal.2d 712, 62 P.2d 374; *Estate of Pierce*, 28 Cal. App.2d 8, 81 P.2d 1037. The hearing took place prior to the decisions in *Estate of Taitmeyer*, *supra*, and *Estate of Perkins*, *supra*. Probate Code, sec. 1232, provides: "When not otherwise prescribed by this code, either the superior court or the court on appeal, may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require." In view of all the circumstances surrounding the hearing before the probate court and the subsequent appeal, and of the fact that after the Perkins and Taitmeyer decisions

respondents did not contest appellants' legal position, we conclude that the costs herein should not be assessed against respondents.

The order settling final account and decreeing distribution is reversed, costs to be paid by the estate. Sec. 1232, *supra*.

PETERS, P. J., and KNIGHT, J., concur.



65 Cal.App.2d 15

PEOPLE v. SIMPSON.

Cr. 3819.

District Court of Appeal, Second District,
Division 3, California.

June 21, 1944.

Criminal law $\S$ 1084

Where grounds urged for reversal of conviction presented debatable questions requiring extended consideration, and appeal was taken in good faith, defendant was entitled to stay of execution pending determination on appeal. Pen.Code, $\S$ 1243.

On petition by Jean Simpson to stay execution of judgment of conviction pending determination of appeal.

Petition granted.

John S. Cooper, of Los Angeles, for defendant and appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for plaintiff and respondent.

PER CURIAM.

Defendant and appellant has made application for a stay of execution of a judgment of conviction pending the determination of her appeal following the refusal of the trial court to order a stay of execution pending the appeal pursuant to section 1243 of the Penal Code.

We have examined the record on appeal and have concluded that the grounds urged for a reversal of the judgment present debatable questions meriting extended consideration by the court and that the appeal has been taken in good faith and is not

frivolous. Under these circumstances, a stay of execution should be and is granted pending the final determination of the case on appeal. *People v. Burnette*, 1939, 34 Cal.App.2d 663, 94 P.2d 399; *In re Albori*, 1928, 95 Cal.App. 42, 272 P. 321; *People v. Biescar*, 1928, 95 Cal.App. 70, 272 P. 328; *In re Brahm*, 1929, 98 Cal.App. 731, 277 P. 895.

DESMOND, P. J., and SHINN and PARKER WOOD, JJ., concur.



65 Cal.App.2d 45

PEOPLE v. MADDOX.
Cr. 3755.

District Court of Appeal, Second District,
Division 3, California.

June 22, 1944.

Hearing Denied July 20, 1944.

1. Criminal law ⇨260(11)

In trial before court without a jury, credibility of witnesses is for court.

2. Gaming ⇨98(3)

Evidence sustained conviction of unlawfully keeping and occupying an apartment with paraphernalia for purpose of recording bets on horse races. Pen.Code, § 337a, subd. 2.

3. Criminal law ⇨614(1)

Where defendant, over several months, had a series of continuances and on day set for trial defendant's counsel was engaged in another trial, denial of motion of law partner of defendant's counsel for a one-day continuance to study case and bringing case to trial an hour and a half later was not an abuse of discretion.

4. Criminal law ⇨586

The granting of a continuance is within discretion of trial court.

5. Constitutional law ⇨250

Gaming ⇨63(1)

The statutes legalizing betting on horse races at licensed tracks and making it a crime to do the same thing away from a licensed track do not deny equal protection of law to defendant convicted of unlaw-

fully occupying an apartment with paraphernalia for purposes of recording bets on horse races. Pen.Code, § 337a, subd 2; U.S.C.A.Const. Amend. 14, § 1.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Ralph Maddox was convicted of unlawfully occupying an apartment with paraphernalia for the purpose of recording bets upon horse races, and he appeals.

Affirmed.

Geo. D. Blair, of North Hollywood, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was accused of the crime of violation of section 337a, subdivision 2, of the Penal Code, a felony, in that he unlawfully kept and occupied an apartment in Los Angeles with books, papers and paraphernalia for the purpose of recording bets upon the result of "contest, of skill, speed and power of endurance between beasts, to wit, horses." He was also accused of violation of subdivision 4 of said section, in that he did unlawfully record a bet or bets upon the result of such a contest. Trial by jury was waived. Defendant was convicted of the charge as to subdivision 2, and was acquitted of the charge as to subdivision 4. He was sentenced to imprisonment in the county jail for six months.

Appellant's first contention is that the evidence was not sufficient to support the judgment of conviction. A police officer testified that when he and four other officers entered room 241 of a hotel in Los Angeles on October 21, 1942, about 1 p. m., a lady was standing beside a table in the room upon which table there were two stacks of horse-race betting markers with pencil writing upon them, a filing cabinet in which there were betting markers, two scratch sheets, two telephones, two California Turf Digests, blank paper pads, many pencils, and crayons; that as they entered the room, the lady who was the only person therein, said, "Ralph," and stepped back from the table with a pencil in her hand; that a racing form sheet dated October 21, 1942, was on a bureau in the room, and about 30 copies of racing

form sheets of various dates were in the closet; that after they had been in the room about five minutes, the defendant Ralph Maddox entered the room with a leather folder in his hands, which folder (it was later ascertained) contained documents including a scratch sheet bearing the date of October 21, 1942; that the testifying officer "was busy answering phones" when defendant entered, and he did not see any one bring the defendant in, and did not know whether defendant "walked in voluntarily" or whether some one brought him in, but "they might have" brought him in; that after defendant entered the room the witness and another officer went into the hall with defendant, took him to the hotel manager and asked her who rented the room, and she said "that is the man [indicating the defendant] who rented the apartment"; that defendant then said he had rented the room but he didn't live there; that they stayed in room 241 about one hour and the "phones rang continuously until they were disconnected"; that defendant "stood around the room" while the witness and another officer answered telephones; that the witness made notations of some "of those telephone calls"; that the "phone rang and people would say, 'Hello,' and then they would hang up"; that one person said, "'Hello. This is Mac. I want two across the board on 152,' and hung up"; that another person said, "'Hello. Ralph? This is W. H. I want the fifth at New York—Jamaica—Alsab, ten and five; fifth at Laurel, Enterprise, one and one; 504, two to win; 156 one and one; 154, six and two,' and then he hung up"; that another person said, "'Hello. This is Ann. This one is for Ruth. I want five to win on 811. Then I want a parlay, 887 to 906, one to win and one to place; and 887, one to win.'"; that another person said, "'Hello, Ralph? This is Stearns. Give me Hi Gold in the fourth at Sportsman, one to win and one to place'"; that another person said, "'Hello. Have you the results of the fourth at Laurel? This is S. T. * * * I want Enterprise, the fifth at Laurel, one to win and one to show; The Raider, the first at Bay Meadows, parlayed to Flying Back, the sixth at Bay Meadows, one to win.'" It was stipulated that said witness was "qualified to testify as an expert on book-making matters as conducted" in Los Angeles County. The witness testified further that the articles which were on the table and on the bureau when the officers en-

tered the room (received in evidence) were "racing paraphernalia" that "a bookmaker would use in recording bets" on horse races; that the white slips of paper in the cabinet were betting markers, and "all [the numbers on the markers] were contained in the scratch sheet for" October 21, 1942; that the names of the horses mentioned in the telephone calls which he received were on the scratch sheet for October 21, 1942. He testified further that defendant said he had rented that room in May, that he didn't know "how the phones got in that room [room 241—one telephone was registered to room 242 and the other to room 240]," that the bathrobe and slippers [which were in the closet] were his, that sometimes he slept in that room, and that "he had been arrested by practically every vice squad in the city."

The lady who was in the room when the officers entered was Barbara Ames, and she was accused jointly with defendant in the information herein. She pleaded guilty to the charge of violation of said subdivision 2 of section 337a of the Penal Code; and the charge concerning said subdivision 4 was dismissed as to her.

It was stipulated that defendant had written his name on a certain document which was received in evidence. A police officer, who according to a stipulation of the parties was qualified to testify as a handwriting expert, testified that some of the numerals on the betting markers which were in the cabinet, and some of the numerals on the betting markers which were in the two stacks of betting markers on the table, were made by the same person who had written on the document in evidence.

Defendant pleaded guilty on January 22, 1943, to the said charge of violation of said subdivision 2 of section 337a of the Penal Code. On March 4, 1943, defendant's plea of guilty was set aside and his plea of not guilty was reinstated. Defendant testified that he entered the plea of guilty because his former attorney had told him that he thought it was the best thing to do. He testified further, in explanation of the change of plea, that when he wrote the facts of the case in his application for probation he wrote that he was not guilty, and the probation officer said he would recommend that the case be tried.

Defendant testified that he was arrested in the hallway of the hotel, while he "was

going up there to see a gentleman about some furs"; that the arresting officer took him into room 240, and then into room 241; that when the officer told him in room 241 that he wanted the defendant "to try these shoes on [referring to the slippers in that room]," defendant said, "It is unnecessary, I go with a girl that lives here"; that the girl's name was Dorothy Ward and he visited her about two or three times a week; that the leather folder he had with him (when he entered) contained "paraphernalia pertaining" to his fox and mink farm at Big Bear; that he "never did occupy" room 241, "did not register for it or anything" and was not "making book there"; that he did not say to any one that he was "occupying—making book in that room"; that he "never recorded any bets over those phones" in his life; that he did not know what a betting marker was; that when the officers asked the manager of the hotel whether defendant rented the room, she said, "I don't know who rented the room"; that he did not "remember of writing any numerals on any sheets there"; that he probably did "some figuring" on some slips of paper on three or four occasions when he was visiting the girl in the evenings in that room; that every evening he "had some daily business to take care of" and he would make various figures on pieces of papers to "keep track" of the breeding of foxes and minks at the farm, which figures were the distinguishing marks on the ears of foxes and minks and on the pens where the foxes and minks were kept; that he might have written the figures if he "was checking on some particular pelts" that he had brought in, but the figures were not for his records and he would not take them home and file them.

Barbara Ames, who was in the room when the officers entered, testified that she was with Dorothy Ward when Dorothy rented that room; that an officer brought the defendant into the room; that she (witness) had gone to the room to visit Dorothy, and Dorothy had requested her to "answer the phone" and "make notations" while Dorothy went across the street to "get a coke."

[1,2] Defendant argues that the testimony of the police officer should be disbelieved for the reason, among others, that the officer testified on direct examination that defendant entered the room and was arrested therein, and testified on cross-examination that he did not know whether

defendant walked in voluntarily or whether some one brought him in but "they might have" brought him in. The credibility of the witnesses was a matter for the determination of the trial court. The evidence was sufficient legally to support the judgment of conviction.

[3,4] Defendant's second contention is that the court erred in refusing to grant defendant's motion for a continuance of one day. Defendant's counsel of record (at the time of trial) was not present when the case was called for trial. An attorney, who was a partner of defendant's then counsel of record, appeared in court when the case was called for trial on May 19, 1943, and stated that the attorney of record was engaged in a jury trial of an action for damages in another department of the court, that he (the partner) was unfamiliar with the present case, and that he moved for a continuance. The court said, "This is one of those kinds of cases that you do not have to be very familiar with, this type of case." The attorney then said, "I can understand that, but Mr. Fainer * * * has some defense, the nature of which I am not aware of." The trial judge reviewed the record of the proceedings. The arrest was on October 21, 1942. Trial was set for December 16, 1942, and the case was later continued at the request of defendant to January 22, 1943, at which time the defendant pleaded guilty and the matters of probation and sentence were set for February 18th. On February 18th, on motion of defendant, said matters were continued to March 4th. On March 4th the plea of guilty was set aside, and the trial was set for April 26th. On April 14th, on motion of defendant, the trial was continued to May 19, 1943. When the court denied the motion for a continuance, the attorney then asked the court to "put it over until tomorrow, to give me a chance to study it." The court denied that request, and stated that it would be about an hour before a case then on trial would be finished. The trial in the present case was commenced about 1½ hours after the motion for continuance was denied. Whether the case should have been continued was a matter within the discretion of the trial court. *People v. Russell*, 1909, 156 Cal. 450, 456, 105 P. 416. It was not an abuse of discretion to deny the motion for a continuance.

[5] The last contention of defendant is that the judgment is in violation of Section

1 of Amendment XIV of the Constitution of the United States. He argues that "to grant the right to those at a licensed track to legally bet on horse races, and to make it a crime to do the same thing away from a licensed track, would seem to violate" the said portion of the Constitution which guarantees equal protection of the law to all of the people. Said contention is not sustained. *People v. Sullivan*, 1943, 60 Cal.App.2d 539, 141 P.2d 230.

The judgment of conviction and the order denying the motion for a new trial are affirmed.

DESMOND, P. J., and SHINN, J., concur.



65 Cal.App.2d 5

PEOPLE v. MASON et al.
Cr. 626.

District Court of Appeal, Fourth District,
California.

June 20, 1944.

1. Larceny ☞55

Evidence was sufficient to sustain conviction for theft. Pen.Code, § 484.

2. Criminal law ☞1169(1)

In prosecution for theft, permitting introduction of testimony containing an inference of prostitution on part of one of the defendants was not prejudicial error.

3. Criminal law ☞349

In prosecution for theft, testimony of officer that he found a blackjack in a defendant's automobile when defendants were taken into custody was admissible as circumstance surrounding the arrest.

4. Criminal law ☞349

In prosecution for theft, where victim when found in automobile of a defendant showed evidence of having been drugged, evidence that bottles containing a drug were found in automobile less than three hours afterwards was admissible.

5. Criminal law ☞783(1)

In prosecution for theft, where victim when found in automobile of a defendant

showed evidence of having been drugged and bottles containing a drug were found in automobile less than three hours afterwards, action of court in giving an instruction leaving weight and effect of such evidence to jury and in refusing more specific instructions in regard thereto was not error.

6. Criminal law ☞412(2)

In prosecution for theft, evidence of conversation between officers and defendants immediately after and shortly after they were arrested was admissible.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

O. K. Jim Mason and Cleo Jones were convicted of theft, and they appeal.

Affirmed.

Joseph Seymour, of Riverside, for appellants.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendants were charged with theft in taking a sum of money from the person of John Parks in violation of section 484 of the Penal Code. A jury found them guilty and each has appealed from the judgment.

The defendants were living in a house at Coachella, where Mason's mother had formerly resided. They spent considerable time in the evenings at a place of entertainment in Indio known as "Brownie's Cafe." Parks was a sergeant in the army and stationed at Camp Young. On September 2, 1943, he spent most of the evening in this cafe. He had just received two months' pay and had on his person sixteen new \$10 bills with a little other money. During the evening he drank some beer. About 10 o'clock he was ready to return to camp. When he went outside he saw the defendant seated in a car. He talked to Mason, who agreed to take him out to the camp for \$1. At that time he had \$161.50 in his pockets, \$160 in new \$10 bills. He entered the front seat of the car with Mason, and Mrs. Jones was in the rear seat. Almost immediately he went to sleep or became unconscious.

Instead of going to Camp Young, Mason drove to Coachella and stopped the car in

a dark place beside a park. About 11 P. M. a deputy sheriff and two military policemen came along in a car. The military police asked to see the soldier's pass. They had to rouse him and take him out of the car. They at first thought he was drunk but decided he was not. Their testimony as to his condition strongly indicates that he had been drugged. He finally produced his pass which was in good order. The deputy sheriff asked the defendants what they were doing there and Mason replied that he was taking the other two to their homes. Mrs. Jones told one of the officers that Mason was her husband and told another that Parks was her husband. The officers demanded some identification from Mrs. Jones and she offered to produce it if they desired to go to her home which was near by. The officers and the two defendants then proceeded to the house where the two defendants lived.

Shortly after the others left, Parks walked a couple of blocks to a lighted portion of Coachella. He then discovered that all of his money was gone. He reported his loss to the officers who immediately began to try to locate the defendants. In the meantime the defendants had again gone to Indio, stopping at one or two other places.

An officer was sent to watch the house where the defendants lived. About 2 o'clock A. M. the defendants returned to their home with another soldier in the car. In looking through the defendants' car the deputy sheriff found three bottles of wine. Mason said the wine belonged to the soldier and the soldier said it did not. A little later, the sheriff found a blackjack in the car. The defendants were taken to the sheriff's office in Indio. Mason denied that he had taken any money from Parks or knew anything about it. The officers then searched Mason and found \$160 loose in his left hip pocket, consisting of fifteen new \$10 bills and two worn \$5 bills. They also found \$22 in bills and some change in his front pants pocket. Mason first said he had acquired this money by working for the Southern Pacific. A little later he was asked if he had taken this money from Parks and he said that he had not "but that Cleo Jones had taken the money and given it to him to keep." One of the officers wrote up a statement to this effect and Mason signed it. A few minutes later this officer had a conversation with the defendant Jones in which she said she had not

taken any money from Parks, but when asked if she had seen any money taken from Parks she refused to give any information concerning anything that had taken place during that evening. A little later, she told the officers that Mason had taken the money from Parks.

The deputy in charge of the sheriff's office at Indio had a conversation with Mason the next afternoon. Mason first denied that either he or Mrs. Jones had taken any money from Parks. He admitted that he had had the bottles of liquor in his car and said he had purchased one of the bottles at Brownie's Cafe. Also, that he had the blackjack under the front seat of the car. He stated that he had been working for the Southern Pacific and had just cashed a check for \$92 and that the rest of the money found in his possession belonged to him and to his mother. Later he said that the \$150 found in his hip pocket had been given to him by Mrs. Jones and that she had taken it from Parks; that she took it from Parks on the road between Indio and Coachella; that she handed him the roll and he put it in his hip pocket; that this was "the quickest place he could seem to get it as about that time we saw the officers come." He also stated that he had exchanged a \$10 bill for two fives at Brownie's Cafe in Indio.

This same afternoon this officer had a conversation with Mrs. Jones. She said that after they picked up Parks they went to the Black Cat Cafe on the road between Indio and Coachella, that they then went back to Brownie's Cafe in Indio where she got some wine, and that they then went to Coachella and got stalled near the park where the officers first found them. She said that after she showed her identification to the officers she and Mason went back to Brownie's Cafe in Indio and after stopping at another place or two went back to Coachella where the officers picked them up. She first said that neither she nor Mason had taken any money from Parks "that she knew of". She then said that when they stopped at the Black Cat Cafe Mason drove down the road with Parks in the car and returned in about fifteen minutes, and that he then had the \$150 which he told her he had gotten from Parks.

The contents of the three wine bottles were analyzed and were found to contain chloral hydrate, a strong narcotic, which is commonly known as "knockout drops."

The defendants took the stand and each denied taking any money from Parks or knowing anything about it. Mrs. Jones denied that she had told the officers that Mason had told her he had taken the money from Parks. Mason admitted having told the officers that Mrs. Jones had taken the money from Parks and handed it to him, but said that this was not the truth. He then testified that when the officers first questioned him in the sheriff's office at Indio the officers hit him with a blackjack and he made the admissions in question in order to escape further abuse. He first said the officers hit him with a blackjack once or twice but as he went on he had the blows coming so fast he could not count them and, finally, he said the officers beat him over the head and face with a blackjack over a period of an hour. In explaining where he got the money found in his possession, he added a statement that he had won \$40 or \$50 in a crap game shortly before the officers picked him up at 2 A. M. There were a number of other inconsistencies and conflicts in his testimony. Evidence was introduced that the blackjack belonged to a man in Los Angeles and that it was inadvertently left in Mason's car. Mason's mother testified that she had given him \$90 to keep for her but she was unable to be at all definite about the date when she gave it to him.

[1] There is no merit in appellants' contention that the evidence is insufficient to sustain the verdicts and judgment. Mason's story about being beaten up by the officers was obviously overdone and was thoroughly and completely discredited by the testimony of a number of witnesses. The testimony given by the appellants themselves is such that it is easy to see why the jury did not accept it as true. The evidence, although many conflicts appear, amply sustains the verdicts and fully justifies the inference that the appellants were both actively engaged in the theft which occurred.

[2] Several assignments of error are made in connection with the admission of evidence. It is first urged that prejudicial error appears in that the court permitted testimony containing an inference of prostitution on the part of Mrs. Jones. This came out incidentally and, in fact, was first mentioned by Mrs. Jones. When she was being questioned on the afternoon of September 3, the officer asked her why

she got out of the car at the Black Cat Cafe, about which she had been telling, and her answer indicates that it was for the purpose of prostitution. While she was on the stand she was asked on cross-examination whether she had not told the deputy district attorney that she had obtained certain money from a soldier. She denied this. Later, a matron in the county jail testified that she heard Mrs. Jones tell this attorney that she had procured this money from a soldier. No objection was made at any time this matter was mentioned. Conceding that it would have been better if the last two references thereto had been omitted no prejudicial error appears.

[3-5] It is next urged that it was error to permit the officer to testify that he found a blackjack in Mason's car when the appellants were taken into custody. It was one of the circumstances surrounding the arrest and was admissible as such. No contention was made that the blackjack had been used in connection with taking the money from Parks. Apparently, the presence of the blackjack was relied upon by Mason in claiming that he was beaten with such an instrument. It was further argued that the court erred in allowing the admission into evidence of the three bottles of wine found in Mason's car. It is claimed that the car was searched when the officers first found the car parked near the park in Coachella at 11 o'clock P. M., that the wine was not then found, and that having been placed in the car after that time it could have had nothing to do with this case. The officers involved testified that no search of the car was made at that time. Parks at that time showed evidence of having been drugged and the fact that these bottles, containing such a drug, were found in the car in question less than three hours afterward was admissible under the general circumstances appearing. The further contention that the court erred in giving an instruction leaving the weight and effect of this evidence to the jury, and in refusing a more specific instruction in this regard which was asked for by the appellants, is without merit.

[6] The only other point raised is that the court erred in receiving in evidence "the alleged confessions and/or admissions of the defendants." The statement signed by Mason was not offered in evidence. The conversations between the officers and the

appellants immediately after and shortly after they were arrested were clearly admissible.

No prejudicial error appears and a reading of the entire record neither indicates nor suggests that a miscarriage of justice has occurred.

The judgment, as it relates to each appellant, is affirmed.

MARKS and GRIFFIN, JJ., concur.



**INDUSTRIAL INDEMNITY EXCHANGE v.
INDUSTRIAL ACCIDENT COMMISSION et al. ***
Civ. 14460.

District Court of Appeal, Second District,
Division 1, California.

June 24, 1944.

Hearing Granted Aug. 21, 1944.

1. Workmen's compensation ⇨208

Injured employee must have been subject to direction and control of alleged special employer before liability for compensation can attach to one as a "special employer".

See Words and Phrases, Permanent Edition, for all other definitions of "Special Employer".

2. Workmen's compensation ⇨208

To constitute status of "special employer" so as to be liable for an award of compensation to an injured employee, there must be a showing that there was exercise of the right of directing injured employee by alleged special employer as to manner and method of doing the work, based upon alleged special employer's right to control not only the work to be done but person engaged in the doing of the work.

3. Workmen's compensation ⇨208

Where one person is performing work in which another is beneficially interested, the latter may exercise over the former a certain measure of control for a definite and restricted purpose, without incurring

responsibilities or acquiring the immunity of a master with respect to person's control.

4. Workmen's compensation ⇨208

To establish legal relation of "special employer" and "special employee", it must appear that, either by terms of contract or during course of its performance, employee of alleged independent contractor came under control of other party to contract, and suffered injury as result of such direction and control.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Employee".

5. Workmen's compensation ⇨1432

Evidence was insufficient to support finding that injured employee, who was in general employ of truck owner as a truck driver, was a special employee of the general contractor on a construction job who had entered into contract with truck owner for hauling of sand and gravel, so as to render general contractor on construction job liable for compensation for employee's injuries. St.1937, p. 267, § 3353.

Proceeding by the Industrial Indemnity Exchange, an inter-insurance exchange, against the Industrial Accident Commission of the State of California and others, to review an order of the Commission awarding compensation to respondent John Campellone against the petitioner.

Award annulled.

Herlihy & Herlihy, of Los Angeles, for petitioner.

Everett A. Corten and Fred G. Goldsworthy, both of San Francisco, for respondents.

WHITE, Justice.

Petitioner, the Workmen's Compensation Insurance carrier for J. S. Metzger and Son, seeks by this proceeding to annul an award made by respondent Industrial Accident Commission in favor of respondent John Campellone and against petitioner.

The Commission found that said John Campellone, while employed as a truck driver, on November 29, 1942, at Palm Springs, California, by respondent Gagnon Company, Inc., a corporation, as general employer, and by J. S. Metzger and Son, a corporation, as special employer, sus-

tained injury arising out of and occurring in the course of his employment. The Commission also found that on the date of the injury, The Gagnon Company was uninsured against Workmen's Compensation liability.

An award of compensation was made by the Commission in favor of John Campellone, the injured employee, against the general employer and petitioner herein, the insurance carrier for the special employer, jointly and severally. No question is here involved as to the award against the general employer, and the legality of the award against petitioner herein, as insurance carrier for the special employer, is the sole issue presented in this proceeding.

The transcript of the testimony which was given before the referee of the respondent Commission discloses that the following facts form the evidentiary basis for the award which is here sought to be annulled:

J. S. Metzger and Son, Inc., was the general contractor on a construction job at Indio, California. The Gagnon Company owned a truck. Ernest E. Gagnon, president of the corporation, ascertained from respondent John A. Fox, in a telephone conversation, that hauling work was available in Palm Springs. Respondent Fox was engaged in an independent calling as a truck broker at the time of the transaction here in question, and possessed a truck broker's license. In addition to his services for J. S. Metzger and Son, Fox was supplying trucks for two other jobs in the vicinity at the same time. We feel that it may be fairly stated from the record that J. S. Metzger and Son orally agreed with respondent Fox to obtain trucks for the Metzger job and for this service the latter agreed to pay Fox a percentage on every ton hauled, as an override. There can be no question but what the injured employee, John Campellone, was hired by The Gagnon Company to drive and to repair the truck which was owned and furnished by Gagnon to Fox. For his services as such driver Campellone was to receive \$1 per hour for the time he worked. At the instigation of the president of The Gagnon Company, Campellone reported to Fox about November 24, 1942, and was informed by the latter that there were three jobs running, one of which was the construction job upon which Metzger and Son, Inc., was the general contractor. Fox gave Campellone his choice to work upon

any one of them. The latter chose to drive The Gagnon truck in connection with the Metzger job. At the hearing before respondent Commission, the injured employee, himself, testified that he never received orders from any one connected with or representing J. S. Metzger and Son; that upon only one occasion did an employee of the latter offer any suggestion or direction and that upon that occasion such employee merely stated that no more sand was needed on the Metzger job, but that rock was. The evidence is without contradiction that the injured employee was hired and paid by The Gagnon Company to drive the truck and also to make any necessary repairs thereon. All expenses in the operation of the truck were paid by The Gagnon Company. The employee was injured November 29, 1942. At the time of his injury he was on the public highway repairing the truck driven by him as an employee of The Gagnon Company. He was injured when the hoist gave way and the truck fell onto him. At the time of his injury he was not hauling a load on the Metzger job, and in fact there was no load in the truck. As we view the evidence the injured employee was repairing the truck in compliance with directions and instructions given him by his employer, requiring that he keep the truck in repair. It is noteworthy that the application for adjustment of claim in this proceeding was not filed by the injured employee, but by the president of The Gagnon Company, and its filing was without the consent of the injured employee and against his wishes.

While petitioner challenges the legality of the award made against it upon several grounds, we shall give consideration only to the contention that the record is barren of any substantial evidence to support the finding of respondent Commission that John Campellone was employed by petitioner's assured, J. S. Metzger and Son, as a special employer, and that he sustained injury arising out of and in the course of such employment. This we do because we are persuaded that petitioner's claim in this regard is well taken and determinative of this proceeding.

[1-5] Before liability can attach to one as a special employer, it is necessary that at the time of the accident, the injured employee must have been subject to the direction and control of such special employer. The status of special employer arises from this right to control and direct

the activities of the employee. Independence Indemnity Co. v. Industrial Accident Commission, 203 Cal. 51, 55, 262 P. 757. We fail to find in the record any evidence, substantial or otherwise, that any representative of J. S. Metzger and Son had the right to direct the employee in the work he was doing, either in hauling sand and gravel or in repairing the truck. And certainly there is not a scintilla of evidence that petitioner's assured could have discharged the injured employee, because the latter was employed by, paid by, and subject to the direction and control of The Gagnon Company. So far as we can discern from the record, the only directions given to the truck driver on the Metzger job by the latter or its representatives were as to where the loads were to be hauled. In weighing the control allegedly exercised care must be taken to distinguish between authoritative control and mere suggestion as to detail. To constitute the status of special employer there must be a showing that there was exercise of the right of directing the employee by the alleged special employer as to the manner and method of doing the work, based upon the latter's right to control not only the work to be done but the person engaged in the doing of the work. As was said in *Western Indemnity Company v. Pillsbury* 172 Cal. 807, 811, 159 P. 721, 723: "The test of 'control,' however, means 'complete control.' * * * 'It is well settled that, where one person is performing work in which another is beneficially interested, the latter may exercise over the former a certain measure of control for a definite and restricted purpose, without incurring the responsibilities, or acquiring the immunities, of a master, with respect to the person controlled.'" (Emphasis added.) And the case of *Stacey Brothers Gas Construction Co. v. Industrial Accident Commission*, 197 Cal. 164, 169, 239 P. 1072, 1074, is authority for the statement that in order "to establish the legal relation of special employer and special employee it must appear that either by the terms of the contract or during the course of its performance the employee of the alleged independent contractor came under the control and direction of the other party to the contract, and suffered injury as the result of such direction and control". It seems clear to us from the record in this case that the relation between J. S. Metzger and Son, Inc., and The Gagnon Company was that of independent contractors, Sec. 3353,

Labor Code, St.1937, p. 267; and it appears equally clear therefore that the relationship between Metzger and Son, Inc., and the injured employee was that of general contractor and the employee of an independent sub-contractor. The record herein shows that J. S. Metzger and Son was not interested in the slightest degree in the means by which the truck hauling should be done by The Gagnon Company, or in the details of its accomplishment, but was interested only in the final result which was to be attained. And the result was the delivery of sand and rock upon the job, in the construction of which Metzger and Son, Inc., was the general contractor. In the case of *Winther v. Industrial Accident Commission*, 16 Cal.App.2d 131, 60 P.2d 342, the alleged employer therein exercised considerably more control over the injured employee than is shown in the instant proceeding, yet it was held under the above stated rules that the relationship of employer and employee did not exist, and an award made by the Commission was annulled.

The only semblance of any "control" exercised by Metzger and Son over the injured employee is contained in the testimony of respondent Fox, who testified that he directed the employee John Campellone where to take the truck on the job "on the instructions of the superintendent of Metzger Company", and that similar instructions were given to the truck driver by Metzger and Sons superintendent who, according to the witness Fox, said "take this truck—take this load to the Whittier Ranch, where he previously had instructions to dump it at the Bell Ranch. And I heard him say 'Go to Cabazon, get the load, and dump it here'". But this testimony falls short of establishing that "complete control" which is essential to fasten liability upon J. S. Metzger and Son as a special employer. It in no sense "reaches into the details of performance and reserves to the employer the right to direct the manner in which these details are to be carried out". *Winther v. Industrial Accident Commission*, supra, at page 136, 60 P.2d at page 345. These "directions" indicate only an interest upon the part of Metzger and Son in the result to be accomplished, and indicate no interest in, or right to direct, the manner and method of doing the work in question.

As we view the evidence in this case, it admits of but one conclusion, and that is

that petitioner's assured was the general contractor on a job; respondent John A. Fox was an independent contractor who arranged for trucks with drivers to haul loads on the job, and for which he was to be paid an override on each load so hauled; while the injured employee, John Campellone, was hired by The Gagnon Company, paid by it, and sustained his injury while repairing the truck in conformity with directions given him by his employer, The Gagnon Company, which corporation alone employed him, could alone discharge him, and which alone paid him for his services. Therefore, the conclusion is inescapable that all of the evidence bearing upon the relationship which existed between J. S. Metzger and Son and the injured employee is insufficient to sustain the finding of respondent Commission that petitioner's assured was the special employer of John Campellone, the injured employee.

The foregoing conclusion at which we have arrived renders it unnecessary to consider or decide other questions raised in this proceeding.

The award is annulled.

YORK, P. J., and DORAN, J., concur.



64 Cal.App.2d 885

JACKSON et al. v. UTICA LIGHT & POWER CO. et al.

Civ. 12518.

District Court of Appeal, First District,
Division 2, California.

June 15, 1944.

1. Negligence Ⓒ2, 56(1)

In order to constitute "actionable negligence", it is necessary to show a legal duty to use due care, a breach of such duty, and that such breach is proximate cause of resulting injury.

See Words and Phrases, Permanent Edition, for all other definitions of "Actionable Negligence".

2. Electricity Ⓒ14(1)

One who owns, maintains, and operates high-voltage power lines is under general

legal duty to use due care in construction, maintenance, and operation of such lines so as to avoid injury to persons and property.

3. Electricity Ⓒ19(5)

Evidence that defendant maintained a pole carrying defendant's high-voltage power line and a farmer's telephone line, which pole was so deteriorated that it was weaker than tensile strength of wire, was sufficient to charge defendant with a breach of duty to use due care in construction, maintenance and operation of power line.

4. Negligence Ⓒ136(25)

Whether negligence of a defendant should be held to be proximate cause of injury is ordinarily a question of fact for jury.

5. Negligence Ⓒ59

A defendant's breach of a legal duty may be considered proximate cause of an injury and impose liability upon defendant even though defendant might not have foreseen particular injury which did happen.

6. Electricity Ⓒ19(6)

In action against power company for death by electrocution, when power shovel which decedent was operating came in contact with a charged telephone wire, whether defendant's negligence in maintaining a deteriorated pole which broke and allowed power lines to contact telephone wire was proximate cause of death was for jury, in view of prior notice to defendant of proposed highway construction. St.1937, p. 2560, § 680.

7. Electricity Ⓒ19(12)

Whether plaintiffs' decedent was guilty of contributory negligence in permitting his power shovel to come in contact with telephone wire strung on same poles as defendant's power lines which telephone wire became charged when a pole broke, was for jury.

8. Death Ⓒ58(1)

In determination of question whether plaintiffs' decedent was guilty of contributory negligence, plaintiffs were entitled to benefit of presumption that decedent had used due care for his own safety and had not been guilty of negligence.

9. Electricity Ⓒ15(2)

A power shovel operator, who was electrocuted when shovel came in contact with a telephone wire charged with electric-

ity from defendant's power line, could not be classed as a trespasser against defendant, even if he was a trespasser in his relation to owners of land on which pole was located or as to owners of telephone line.

10. Electricity ⇨15(1)

Power company is not relieved of duty of exercising due care in maintenance of power line even as to a trespasser.

11. Appeal and error ⇨1056(1)

In death action, where decedent's alleged violation of safety order of Industrial Accident Commission relating to operation of power equipment under power lines could not have had any causal connection with decedent's electrocution when power shovel contacted a telephone line across which defendants' power line had fallen when a defective pole broke, refusal to admit safety order in evidence was not prejudicial error.

12. Death ⇨104(2)

In death action in absence of anything in evidence adduced by plaintiffs wholly irreconcilable with exercise of due care on part of decedent, court properly instructed on presumption of due care of a decedent.

13. Trial ⇨260(8)

Where jury was fully and fairly instructed on subjects of negligence and contributory negligence, defendants could not complain of the giving and refusing of various instructions on such subject.

14. Appeal and error ⇨1067

Where refusal to admit safety order of Industrial Accident Commission was not prejudicially erroneous, there was no prejudicial error in refusal to instruct jury with respect to such order.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Ruby Jackson and Harold Jackson, Jr., a minor, by his guardian ad litem, Ruby Jackson, against Utica Light & Power Company, a joint venture association, and Hobart Estate Company, to recover for the wrongful death of Harold Jackson, deceased. From a judgment for plaintiffs and from an order denying defendants' motion for judgment notwithstanding the verdict, defendants appeal.

Affirmed.

Charles V. Barfield, of San Francisco, for appellants.

Blewett & Blewett, of Stockton, and Robert G. Partridge, of San Francisco, for respondents.

SPENCE, Justice.

Plaintiffs, as the surviving wife and minor child of Harold Jackson, deceased, brought this action to recover damages for the death of said deceased. After a trial by jury, judgment was entered upon the verdict in favor of plaintiffs and against defendants in the sum of \$20,000. Defendants appeal from said judgment and from the order of denying their motion for judgment notwithstanding the verdict.

Deceased was employed by a construction company as a power shovel operator on a project involving the realignment of portions of the state highway in Calaveras County between Angels Camp and San Andreas. On June 19, 1941, he met his death from electrocution while engaged in this employment when his power shovel came in contact with a farmer's telephone wire which was strung upon the same poles as were the high voltage power lines of defendants. There were no eye witnesses to the accident, the deceased having been found dead on the ground near the power shovel shortly after the accident. The sheave at the end of the boom on the power shovel was still in contact with the telephone wire. One of the power poles, owned and maintained by defendants, had broken at the point where the telephone wire cross-arm had been bolted to the pole thereby permitting defendants' high voltage power lines to fall upon the telephone wires. The power pole which had broken was not a pole immediately adjacent to the scene of the accident but was the second pole easterly from the scene. The two power poles immediately adjacent to the scene and the power lines between them remained intact. The power poles were spaced approximately 200 feet apart.

Defendants phrase their main contentions in various ways which may be summarized by stating that the defendants contend that the evidence was insufficient to show actionable negligence on the part of defendants and that the uncontradicted evidence showed that deceased was chargeable with contributory negligence as a matter of law.

[1-3] The essential elements of actionable negligence are set forth in Monroe

v. San Joaquin Light & Power Corp., 42 Cal.App.2d 641, at page 647, 109 P.2d 720, at page 723, as follows: "In order to constitute actionable negligence, it is necessary that the following three elements be present: (1) The legal duty to use due care; (2) a breach of that legal duty; and (3) that such breach is the proximate or legal cause of the resulting injury." There can be no question but that defendants, who admittedly owned, maintained and operated the power lines in question, were under the general legal duty to use due care in the construction, maintenance and operation of said lines so as to avoid injury to persons and property. That legal duty has been defined in numerous authorities. *Irelan-Yuba Gold Quartz Min. Co. v. Pacific Gas & Elec. Co.*, 18 Cal.2d 557, 116 P.2d 511; *Stasulat v. Pacific Gas & Elec. Co.*, 8 Cal.2d 631, 67 P.2d 678; *Anstead v. Pacific Gas & Elec. Co.*, 203 Cal. 634, 265 P. 487; *Dow v. Sunset Tel. & Tel. Co.*, 157 Cal. 182, 106 P. 587; *Monroe v. San Joaquin L. & P. Corp.*, 42 Cal.App.2d 641, 109 P.2d 720; *Roberts v. Pacific Gas & Electric Co.*, 102 Cal.App. 422, 283 P. 353. Nor can there be any question concerning the sufficiency of the evidence in the present case to show that defendants were chargeable with a breach of that duty.

Plaintiffs alleged in their complaint that: "Said poles and each of them at the said time and place supporting said wires were deteriorated and rotted and weakened and by reason thereof the same and each of them were unsafe * * *." There was an abundance of evidence both oral and by way of photographs to support these allegations with respect to the broken pole. Said pole had been in use for several years in excess of the average life of a wooden pole and it did not appear that it had been inspected in any manner since 1937. It further appeared that such prior inspections as had been made of the poles had been infrequent and casual. The broken pole was described as "riddled with woodpecker holes and dry rot" and "practically nothing remained"; as "deteriorated to where it has no strength in it"; as "one hundred per cent cull, nothing but dry rot"; as "rotted off completely, clear through, and only the stub was holding the pole up"; as "unsafe for many years"; as "so badly attacked by fungi or rot that it had no strength left"; as "very much deteriorated with dry rot and termite holes". A witness for defendants testified

that in his opinion, the woodpecker holes "caused the failure of the pole" and he further testified that if prior inspection had disclosed the condition of the pole, it would have been replaced. There was also ample evidence to show that the badly deteriorated condition of the pole could have been seen upon an inspection made from the ground. An electrical expert, called by plaintiffs, testified that proper installation and maintenance of a power line requires that the poles should be stronger than the tensile strength of the wire in order that the pole should be able to withstand the breaking of the wire; and that a pole which is maintained according to common standard practice would not be broken by a pull placed upon a twelve-gauge galvanized iron wire such as was used in the farmers' telephone line which was suspended beneath defendants' high power wires.

In arguing the question of the sufficiency of the evidence defendants lay great stress upon the question of proximate cause. They give their version of how the accident happened, claiming that the pole was broken by reason of the strain placed upon the telephone wire by the power shovel. They then claim that the act of the deceased in permitting the power shovel to come in contact with the telephone wire was the proximate cause of his death and that defendants' negligence was not the proximate cause but was merely "a prior and remote cause which did no more than furnish the condition" which made the injury possible through the intervening act of the deceased. There is no direct evidence as to the exact time or cause of the breaking of the pole. It appears from the evidence that the pole was in such a badly deteriorated condition that it might have broken at any time without the application of any force other than the strain of the wires suspended therefrom; and it further appears that it might have broken at any time from the application of any slight strain placed upon the pole or wires through the application of any external force, animate or inanimate. We will assume, for the purpose of this discussion, that the immediate cause of the breaking of this deteriorated pole was a strain placed upon said pole through the contact of the power shovel with the telephone wire as claimed by defendants. This assumption, however, does not necessarily mean that the negligence of defendants was not

the proximate or legal cause of the death of the deceased.

[4,5] The doctrine of "proximate cause" or "causal relation necessary to the existence of liability" is one which has presented some difficulty in its application to cases grounded upon negligence in which an act of the plaintiff or another has intervened in such manner that the intervening act may be said to be immediate cause of the resulting injury. There are many authorities holding that the intervention of such act does not necessarily prevent the negligence of the defendant from being the proximate cause of the resulting injury. *Anstead v. Pacific Gas & Elec. Co.*, 203 Cal. 634, 265 P. 487; *Emery v. Pacific T. & T. Co.*, 43 Cal.App.2d 402, 116 P.2d 1079; *Monroe v. San Joaquin L. & P. Corp.*, 42 Cal.App.2d 641, 109 P. 2d 720; *Langazo v. San Joaquin L. & P. Corp.*, 32 Cal.App.2d 678, 90 P.2d 825; *McCormick v. Great Western Power Co.*, 134 Cal.App. 705, 26 P.2d 322; *Lim Ben v. Pacific Gas & Elec. Co.*, 101 Cal.App. 174, 281 P. 634; *Howell v. San Joaquin L. & P. Co.*, 87 Cal.App. 44, 261 P. 1107; *Carroll v. Central Counties Gas Co.*, 74 Cal.App. 303, 240 P. 53; *Pezzalia v. San Joaquin L. & P. Co.*, 60 Cal.App. 786, 214 P. 285; *Royal Indemnity Co. v. Public Service Corp.*, 42 Cal.App. 628, 183 P. 960. While the question of whether the negligence of a defendant may be held to be the proximate cause of the injury despite such intervening act is a question of law for the determination of the court (*Stasulat v. Pacific Gas & Elec. Co.*, 8 Cal.2d 631, 67 P.2d 678; *Stackpole v. Pacific Gas & Elec. Co.*, 181 Cal. 700, 186 P. 354; *Hayden v. Paramount Productions, Inc.*, 33 Cal.App.2d 287, 91 P.2d 231), the foregoing authorities clearly indicate the question of whether the negligence of a defendant should be held to be the proximate cause of the injury is ordinarily a question of fact for the determination of the jury. In discussing the question of proximate cause, the courts frequently employ the expressions "foreseeability", "foreseeableness", "reason to anticipate", "reasonably to be anticipated", "realizable likelihood" and other similar expressions, but it is not always clear whether the reference is to the foreseeability of the type of resulting injury or the foreseeability of the type of act which is the immediate cause of the resulting injury. In the Restatement of the Law of Torts, Sec. 430 et seq., the

necessary "causal relation" is said to be determined on the basis of whether defendants' negligence was a "substantial factor in bringing about the harm" (sec. 431; see also sec. 433); and that: "If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable" (sec. 435). It is there said that if the question of whether defendants' negligence is a "substantial factor" is "open to a reasonable difference of opinion", the question is one for the jury (sec. 434). And even in this state where the test seems to be based generally upon foreseeability, it has been said that a defendant may be liable even though "it might not have foreseen the particular injury which did happen" (*Lim Ben v. Pacific Gas & Elec. Co.*, 101 Cal. App. 174, 281 P. 634, 636; *Carroll v. Central Counties Gas Co.*, 74 Cal.App. 303, 307, 240 P. 53), and that it is not necessary that defendant should have been able to anticipate the "precise form of the consequential injury" (*Rocca v. Tuolumne County Elec. Power & Light Co.*, 76 Cal. App. 569, 583, 245 P. 468, 473) or the "precise accident". *Royal Indemnity Corp. v. Public Service Corp.*, 42 Cal.App. 628, 635, 183 P. 960.

[6] The discussion of the question of proximate cause in the present case requires the statement of further facts. The pole line at the scene of the accident did not follow the curve of the original highway but cut across a field in approximately a straight line along the new right of way which had been acquired to straighten the highway at that point. The poles in the vicinity of the scene of the accident were approximately 50 feet distant from the original highway. These poles varied in height from 25 to 35 feet. The upper cross-arms of the poles carried defendants' high voltage power lines while the lower cross-arms, which were several feet below, carried the telephone wires. These telephone wires sagged between the poles and were about 12 feet below the power lines and about the same distance above the ground at the scene of the accident. The telephone wires were not dangerous to human life and could be safely touched with bare hands.

Defendants stress the fact that the poles at this point were removed some distance

from the original highway and were "far from any danger of collision from traffic on the highway". They further stress the fact that no evidence was introduced to show that the ground immediately under the power line at this point "was ever used by vehicles or agricultural implements or machinery". They therefore contend that defendants "could not reasonably be required to anticipate" that the poles would be subjected to a strain such as they claim was caused by the contact of the power shovel with the telephone wire. It appears unnecessary to discuss the question of what defendants could have reasonably been required to anticipate prior to the time that they received notice on January 11, 1941, that construction work was about to be started on the highway project. That notice was received over five months before the date of the accident, which was June 19, 1941. The letter from the Division of Highways of the Department of Public Works of the State of California called attention to the proposed project, enclosed copies of other letters and stated: "We are forwarding to you under separate cover a set of layout plans showing poles belonging to your company that will have to be moved in order to clear our right of way * * *. As this project will be under construction at an early date, we would appreciate having you proceed to move your facilities at once." At the conclusion of the letter, it was stated: "As we expect to have this road under construction at an early date, your attention to this matter will be appreciated." The highway project had been contemplated for several years, some of the rights of way having been acquired as early as 1936, but the contract for the work was not let until the latter part of May 1941 and the work was not actually commenced until June 8, 1941. Despite the notice contained in the above mentioned letter of January 11, 1941, there is no evidence to show that defendants inspected their poles or removed them or that they did anything in response to said notice until a few days prior to the accident when they started the removal of some of the poles. At that time, the employees of defendants saw the deceased operating the power shovel along the new right of way in the general vicinity of the accident and along the line of the power poles.

Defendants state that there is no evidence that defendants were notified to move the pole line "within a specified time" as

provided by section 680 of the Streets and Highways Code, St.1937, p. 2560. It may be conceded that the above quoted letter did not fix a specified time for removal of the poles but we are not dealing with the sufficiency of the letter as a notice requiring removal under said code section. The letter was obviously sufficient to put defendants upon notice that construction work would be commenced at an early date and that road building equipment would be used in this work along the new right of way. From the time of receiving that letter, it was as foreseeable that the poles and wires along the new right of way might be subjected to strains from vehicles and other equipment as it was foreseeable that poles and wires along the original highway or in fields where agricultural implements were customarily used might be subjected to such strains. We are therefore of the opinion that, under the authorities cited above, the question of whether the negligence of the defendants was the proximate cause of the death of the deceased was a question of fact and that the trial court properly left that question to the determination of the jury.

Defendants cite and rely upon *Stasulat v. Pacific Gas & Elec. Co.*, 8 Cal.2d 631, 67 P.2d 678; *Stackpole v. Pacific Gas & Elec. Co.*, 181 Cal. 700, 186 P. 354, and *Hayden v. Paramount Productions, Inc.*, 33 Cal. App.2d 287, 91 P.2d 231, in all of which cases the question of proximate cause was held to be one of law rather than of fact. We believe these cases are all distinguishable upon their facts and that the basis of these decisions is explained in the reasoning found on pages 636 to 638 of 8 Cal.2d, 67 P.2d on pages 681, 682, of the *Stasulat* case. It was there recognized on page 638 of 8 Cal.2d, 67 P.2d on page 682, that "as a general rule, the question whether the original negligence is a proximate cause of the injury is one of fact for the jury" but it was held that there was no evidence to show that the intervening act "was an act which should reasonably have been foreseen and anticipated."

[7,8] We find no merit in defendants' contention that deceased was chargeable with contributory negligence as a matter of law. We may still assume, as claimed by defendants, that the immediate cause of the breaking of the deteriorated pole was a strain placed thereon through contact of the power shovel with the telephone wire. The evidence showed, however,

that this apparently harmless telephone wire was suspended approximately 12 feet from the ground at the scene of the accident and that the power shovel was working over rolling, uneven ground in that vicinity. It is true, as stated by defendants, that the evidence showed that the power shovel, while being operated by deceased, had come in contact with the telephone wire on two previous occasions on the same day, on which occasions another employee of the construction company had lifted the telephone wire over the boom. We are of the opinion, however, that the question of whether deceased was chargeable with negligence in bringing the power shovel in contact with the telephone wire was a question of fact for the jury and that in the determination of this question, plaintiffs were entitled to the benefit of the presumption that the deceased had used due care for his own safety and had not been guilty of negligence. *Westberg v. Wille*, 14 Cal.2d 360, 94 P.2d 590; *Eastman v. Atchison, T. & S. F. R. Co.*, 51 Cal.App.2d 653, 125 P.2d 564; *Gregg v. Manufacturers' Bldg. Corp.*, 134 Cal.App. 147, 25 P.2d 1014.

[9, 10] In the discussion of the question of actionable negligence, defendants contend that deceased was a trespasser upon defendants' power line and that defendants were therefore under no legal duty to exercise due care with respect to deceased as such trespasser. It is a sufficient answer to this contention to state that if deceased could be classed as a trespasser in his relationship to the owners of the land or in his relationship to the owners of the telephone line, he was not a trespasser upon defendants' power line and could not therefore be classed as a trespasser in his relationship to defendants. Even assuming that deceased could be classed as a trespasser in his relationship to others, defendants were not thereby relieved of the duty of exercising due care toward him in the maintenance of their power line. *Roberts v. Pacific Gas & Elec. Co.*, 102 Cal.App. 422, 283 P. 353; *Langazo v. San Joaquin L. & P. Co.*, 32 Cal.App.2d 678, 90 P.2d 825.

[11] Defendants further contend that the trial court erred in refusing to admit in evidence a safety order of the Industrial Accident Commission, which order pro-

hibited the operation of equipment under high voltage lines when it was possible to bring such equipment within six feet of such high voltage wires. We are of the opinion that there was no prejudicial error in the ruling of the trial court. There was no evidence to show that the power shovel, or any part thereof, was ever brought within six feet of the high voltage lines and the mere fact that it could have been brought within that distance, although it was not, could not have had any causal connection with the happening of the accident.

[12-14] Defendants further contend that the trial court erred in giving and refusing of various instructions. Defendants first claim that it was error to give any instructions on the presumption of due care on the part of the deceased. They cite *Engstrom v. Auburn Auto. Sales Corp.*, 11 Cal.2d 64, 77 P.2d 1059, and claim that any such presumption was dispelled by the evidence adduced by plaintiffs. We find nothing in that testimony, however, which is "wholly irreconcilable" with the exercise of due care on the part of the deceased and therefore find no error in the giving of said instructions. Defendant also complains of an instruction to the effect that deceased was not a trespasser. We have heretofore discussed the subject of the status of deceased in his relationship to defendants and do not believe that any claim of error may be predicated upon the giving of the challenged instruction. Defendants also complain of the giving and refusing of various instructions on negligence and contributory negligence but a reading of the instructions as a whole shows that the jury was fully and fairly instructed on these subjects. Defendants also complain of the refusal to give an instruction based upon the above mentioned safety order of the Industrial Accident Commission. As we have heretofore expressed the view that there was no prejudicial error in refusing to admit said safety order in evidence, it follows that there was no prejudicial error in the refusal to instruct the jury with respect thereto.

The judgment and order denying defendants' motion for judgment notwithstanding the verdict are affirmed.

NOURSE, P. J., and STURTEVANT, J.
concur.

65 Cal.App.2d 75

**SMITH et al. v. SLEEPY HOLLOW
INV. CO.**

No. 12630.

District Court of Appeal, First District,
Division 1, California.

June 26, 1944.

1. Specific performance $\hookrightarrow$ 121(4)

In purchasers' action for specific performance of contract to sell realty, evidence supported finding that contract had never been entered into.

2. Appeal and error $\hookrightarrow$ 1011(1)

Conflict in testimony was to be resolved by the trial court.

3. Attorney and client $\hookrightarrow$ 72
Corporations $\hookrightarrow$ 432(8)

In action against corporation for specific performance of contract to sell realty, evidence supported findings that corporation's attorney and director, authorized to make original offer, did not have real or ostensible authority to accept counter offer.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Sam Smith and another against the Sleepy Hollow Investment Company for specific performance of contract to sell realty. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Bartley C. Crum and Philip S. Ehrlich, both of San Francisco, for appellants.

Lawrence A. Cowen, of San Rafael, for respondent.

KNIGHT, Justice.

The defendant corporation, Sleepy Hollow Investment Co., was engaged in the business of purchasing and selling real property, and had secured an option to purchase, with power to sell, a large tract of land in Marin County belonging to West Coast Life Insurance Company. The plaintiffs, Smith brothers, alleging that on April 6, 1943, defendant entered into a contract with them for the sale to them of 1100 acres of the tract, brought this action for the specific performance of the alleged contract. The defendant denied that any contract of purchase and sale had ever been

entered into between the parties, and the trial court found in defendant's favor on that controlling issue. Accordingly judgment was entered for defendant, and plaintiffs appeal.

[1] The evidence supports the trial court's finding. The following are the facts: Plaintiffs were dairymen, and through a real estate broker named Grandi had been seeking to buy some 1000 acres of the property. The date fixed for the expiration of defendant's option to purchase the property from the owner was April 30, 1943; and Grandi had submitted a verbal, unauthorized offer on behalf of plaintiffs to purchase 1100 acres of the tract at \$36 an acre, making a total purchase price of \$39,600. On April 3rd, at a meeting of the directors of the defendant corporation, at which Samuel Gardiner, one of the directors and the attorney for the corporation, was present, Grandi's informal offer was reported to the board by George J. Kaenel, the president of the corporation. At the same meeting the board authorized Kaenel to sell 500 acres of the property to one A. J. Raisch; but his authority to close this deal was limited to 48 hours from and after 5 o'clock April 3, 1943; and the board voted to accept the Smith brothers' offer if the Raisch transaction was not carried through within the limited time. The sale was not made to Raisch, and on April 5, 1943, Kaenel instructed Gardiner to submit to plaintiffs a proposition for the sale to them of the property. That offer was addressed to Grandi, and read as follows:

"April 5, 1943.

"F. Lloyd Grandi:

"Smith Bros. proposal is very nearly satisfactory. We now have a definite authorization from the Board of Directors upon which we can close. I must limit your time to accept to 12 Noon tomorrow, because we are also close to agreement with another party and want to negotiate with him if we do not close with you by tomorrow noon.

"We offer to sell 1085 acres of ranch surrounding Sleepy Hollow Golf course, plus 15 acres off the top of the strip above the driving range, for \$39,000.00 net to us, subject to the following:

"1. Right of way to 70 acre flat shall be reasonably and conveniently located, but exact location to be chosen by us, 40' right of way with joint user by ourselves and others.

"2. Flow of water from spring on ranch is reserved for one inch pipe. May be used both in Club House and elsewhere. To be terminated as soon as practicable. Right to maintain dam and storage facilities in meantime.

"3. No right of way to be allowed along roadway past Club House. This tract will be sold or used for residence purposes hence ranch use of that part of road will not be possible.

"4. Portions to be bought by Smith Bros., to be fenced in cattle proof manner within reasonable time. Details to be worked out later.

"Samuel W. Gardiner."

The offer as thus submitted by Gardiner was not acceptable to plaintiffs, and the next day, April 6, plaintiffs and Grandi met Gardiner in the latter's office, and after some discussion a counter offer was made by plaintiff. It was reduced to writing by Gardiner, typed in his office, signed by plaintiffs, and is the basis of the present action. It reads as follows (italics ours):

"April 6, 1943.

"Sleepy Hollow Investment Company:

"We hereby offer to buy 1085 acres of ranch surrounding Sleepy Hollow Golf Course plus 15 acres off the top of the strip above the driving range for the gross price of \$39,000.00 subject to the following:

"(1) We are to have a 40 foot right-of-way from Butterfield Road directly to the 70 acre flat to the north. We understand that this right-of-way will be for the joint use of ourselves and others and that its exact location is to be chosen by yourselves within a reasonable time.

"(2) *We are to have a right-of-way from Butterfield Road south to the 120 acre tract and this also is to be for the joint use of ourselves and others and the exact location is to be chosen by you within a reasonable time.*

"(3) We understand that we are to have no right-of-way past the Club House along the present used roadway as you are selling that area for residential purposes.

"(4) You are to have the right to use the present spring on the property being sold to us and to impound water at the spring and to take from that, over a reasonable course, a one inch pipe and you are to have the flow which will be required to fill this pipe. However, it is understood that this water right is tempo-

rary and is to cease *six months after the cessation of hostilities*. You shall have the right to maintain the dam and the pipeline in the meantime. *It is understood that this is to be used primarily for the Club House and for other domestic purposes. So far as it is used for gardens, only surplus water shall be used.*

"(5) *Boundary lines for fence are to be designated by you from time to time at our request.*

"(6) *Title is to be delivered by you to us within ninety days from date, satisfactory to title company and subject to its issuance of title policy to us without exceptions.*

"Zekie Smith
"Sam Smith"

To the foregoing counter offer, Gardiner attached and signed the following (italics ours):

"*To the extent of my authority, I accept the foregoing proposition on behalf of Sleepy Hollow Investment Company. There are some slight changes in the foregoing memorandum and I will therefore have to get specific authority as to those alterations but I believe the proposition to be acceptable.*

"Dated: April 6, 1943

"Samuel W. Gardiner"

Thereafter the following was added and signed by Grandi:

"I agree to accept as a commission in full on the above transaction, the sum of \$600.00.

"Dated, April 6, 1943.

"F. Lloyd Grandi."

At the time of the signing of the foregoing instrument plaintiffs gave Gardiner a check for \$1,000 as a down payment on the purchase price; and while the instrument was being typed Grandi suggested to Gardiner that he telephone some of the other directors to ascertain whether the changes were satisfactory; and Gardiner attempted to do so. He first called Kaenel and another director, but they were not in; he then talked to another director named Main, who apparently was agreeable, but Gardiner did not discuss the details of the changes with him. Later that day Kaenel met Sam Smith on the street, and congratulated him on buying the property. But on April 8, 1943, defendant's board of directors met and rejected the counter offer of April 6, 1943, and thereafter sold the property to other purchasers.

[2, 3] It will be noted that the conditions above italicized in the Smith brothers' counter offer of April 6th were not contained in the offer submitted by Gardiner on April 5th; and it will be noted also from the italicized portions of the memorandum signed by Gardiner and attached to the Smith brothers' counter offer of April 6th that it was not an unqualified acceptance of the counter offer; but that it was expressly stated therein by Gardiner that his authority to accept the Smith brothers' offer was limited, and that because of the "changes" made therein it would be necessary to obtain "specific authority" from the company. Moreover, Gardiner testified that he told plaintiffs that he only had the express authorization contained in the April 5th letter; that he could not accept plaintiffs' counter offer unqualifiedly on behalf of the corporation on account of the changes therein; that he did not intend to get himself into difficulty and therefore could not accept the proposition unconditionally. His testimony in this regard was contradicted by the plaintiffs; but the conflict was one to be resolved by the trial court. The foregoing evidence obviously supports the trial court's findings that Gardiner's authority to act for the corporation was limited to the terms of the offer submitted by him on April 5th, and that he was not authorized to make a sale under the terms set out in the Smith brothers' counter offer of April 6th; and that Gardiner did not inform plaintiffs that he had the authority to accept the offer made by them on April 6th.

Plaintiffs argue that variances between the Gardiner offer of April 5th and their counter offer of April 6th were matters of mere detail and that therefore, since Gardiner was authorized to make the sale under the April 5th offer, he was authorized to accept the counter offer made on April 6th. But a comparison of the two offers will not sustain this view. First, the price is different. The original offer was to sell for a *net* price of \$39,000, and the counter offer was to buy for a *gross* price of \$39,000, the difference being that in the first, the plaintiffs were to pay the real estate commission, whereas in the second defendant would have to pay it. Then in the April 6th offer, plaintiffs asked for

an additional right of way, not provided for in the offer of April 5th. The provision for defendant's use of the water, instead of being terminated "as soon as practicable" was changed to "six months after the cessation of hostilities" and the provision for use of only surplus water for garden purposes was added. And, in the April 5th offer, the property was to be fenced in a cattle proof manner within a reasonable time; but in the April 6th offer it was provided that the boundary lines for the fence were to be designated by defendants, which would involve a survey of the land. And finally, the last provision relating to the delivery of the title was added. These changes were sufficiently material to support the finding that the Smith brothers' offer of April 6th constituted a counter offer, and since there was not an unqualified acceptance thereof by Gardiner, and it was afterwards rejected by the corporation, there was no meeting of the minds, nor any clear mutual understanding or positive assent on the part of plaintiffs and the corporation which is necessary in order to constitute a binding contract between the parties.

Nor in the state of the evidence can plaintiffs rely upon the doctrine of ostensible authority on the part of Gardiner, for the reason that the qualifying language used by him in the memorandum attached to the Smith brothers' counter offer completely negatives any such theory. Furthermore, the situation is not changed by the fact that the other directors did not deny Gardiner's authority to close the deal, because admittedly those other directors at that time were not fully informed of all the details of the changes made in plaintiffs' proposition; and the evidence shows that Kaenel later strenuously objected for one thing to having to designate where the cattle fences were to be put because it would involve the expense of having a survey made.

The conclusions reached on these controlling issues make it unnecessary to discuss the other points raised by the appellants.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

65 Cal.App.2d 63

Ex parte ACOSTA.**Cr. 3821.**District Court of Appeal, Second District,
Division 1, California.

June 24, 1944.

1. Criminal law ☞982

The court's power regarding probation is strictly statutory.

2. Criminal law ☞982

The court cannot impose conditions in granting probation that cannot be fulfilled within period fixed by court as term of probation. Pen.Code, §§ 1203.1, 1203.3.

3. Criminal law ☞982

An order granting probation for one year on condition that defendant must serve first year of probationary period in county jail, and that such jail term was to run consecutively with sentence which defendant was then serving, was clear, and probationer was entitled to discharge at end of the year and court was without power to enforce any condition thereafter. Pen. Code, §§ 1203.1, 1203.3.

Proceeding in the matter of the application of Andrew Acosta for a writ of habeas corpus.

Writ granted and petitioner discharged.

Phillip S. Schutz and Alexander L. Oster, both of Los Angeles, for petitioner.

Fred N. Howser, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

DORAN, Justice.

Petitioner had been found guilty of two separate offenses, to wit, assault, after a trial by jury in a criminal action wherein, by indictment, defendant was accused in several counts with the crime of murder and assault with a deadly weapon with intent to commit murder. Judgment of six months in the county jail was pronounced, in two counts, said judgments to run consecutively. While serving the sentence defendant escaped from the road camp. Later arrested and charged with escape, defendant was adjudged guilty. Application for probation followed and on the day appointed for disposing of said matter, to

wit, May 13, 1943, the court made and entered the following order: "It is ordered that proceedings herein be suspended and the defendant is granted probation for a period of one year under the following conditions: Defendant must serve the first year of his probationary period in the County Jail with no good time allowed. This jail term as a condition of probation is ordered to run consecutively with the sentence which defendant is now serving in County Jail."

It is petitioner's contention that the period of probation expired in one year from May 13, 1943, after which time, it is argued, the court was without power to enforce any condition whatsoever, hence the imprisonment is illegal.

Respondent argues as follows: "The order of the trial court in placing petitioner on probation is not as clear and explicit as it should be, but considering all the facts and circumstances before the court at the time the order was made, it is obvious that the court intended to place the petitioner on probation for a period of one year; that as a condition of probation the petitioner serve one year in the County Jail; that the period of probation and imprisonment as a condition thereof was to commence at the expiration of the sentence he was then serving."

[1-3] There can be no question as to the clarity of respondent's argument; nor can there be any question as to the clarity of the law. The power of the court with regard to probation is strictly statutory. Section 1203.1 of the Penal Code provides that: "The court, judge or justice thereof, in the order granting probation, may suspend the imposing, or the execution of the sentence and may direct that such suspension may continue for such *period of time* not exceeding the maximum possible term of such sentence * * * provided, however, that upon the payment of any fine imposed and the fulfillment of all conditions of probation, probation shall cease at the end of the term of probation, or sooner, in the event of modification." (*Italics added*) But nowhere in the law is the court empowered to impose conditions that cannot be fulfilled and satisfied within the limit of the period of time fixed by the court as the term of probation; indeed Section 1203.3 of the Penal Code provides: "The court shall have authority at any time during the term of probation to re-

voke, modify, or change its order of suspension of imposition or execution of sentence. It may at any time when the ends of justice will be subserved thereby, and when the good conduct and reform of the person so held on probation shall warrant it, terminate the period of probation and discharge the person so held, but no such order shall be made without written notice first given by the court or the clerk thereof to the proper probation officer of the intention to revoke, modify, or change its order, *and in all cases*, if the court has not not seen fit to revoke the order of probation and impose sentence or pronounce judgment, the defendant shall at the end of the term of probation or any extension thereof, be by the court discharged subject to the provisions of these sections." (Italics added)

The court's order is perfectly clear; the law also is clear, by virtue of which petitioner is entitled to be discharged, and, it is so ordered.

YORK, P.J., and WHITE, J., concur.



64 Cal.App.2d 850

PEOPLE v. AVERY.

Cr. 3777.

District Court of Appeal, Second District,
Division 3, California.

June 14, 1944.

Hearing Denied July 10, 1944.

1. Criminal law ⇨1167(2)

An error in the joinder of several charges in one information is one of procedure, not of jurisdiction, and does not justify a reversal unless defendant was prejudiced. Pen.Code, § 954.

2. Indictment and information ⇨130

Charges of rape and attempted rape were properly included in separate counts in a single information, since those offenses belong to the same class of crimes. Pen. Code, § 954.

3. Indictment and information ⇨130

Five charges of robbery of different persons were properly included in separate

counts in a single information, since an offense of the same class was charged in each count. Pen.Code, § 954.

4. Criminal law ⇨1167(2)

In prosecution for robbery of five persons and for rape or attempted rape of the same persons, joinder of the ten charges in one information was not prejudicial, where evidence required to establish charges of robbery was also required to establish the rape charges. Pen.Code, § 954.

5. Rape ⇨51(7)

Robbery ⇨24(3)

In prosecution for rape, attempted rape and robbery involving five different victims, evidence established defendant's identity, notwithstanding discrepancies in testimony of victims on question of whether their assailant had a mustache.

6. Criminal law ⇨338(1)

Where victim of rape and robbery, who had failed to identify defendant at a line-up at one station but was later positive in her identification, was cross-examined with regard to whether she discussed her case with other witnesses whom she met at a line-up at another station, and denied having discussed the matter at that time, there was no error in sustaining objection to subsequent question as to when she did discuss it with those other people.

7. Witnesses ⇨281

In prosecution for rape and robbery, where victim had denied discussing her case with other witnesses on one particular occasion, question on cross-examination as to when she did discuss it with those people was improper because it assumed, in the absence of evidence thereof, that victim had discussed the occurrence with such people.

8. Bail ⇨42

Under statute authorizing court in its discretion, at any time after appearance for trial of defendant who has given bail, to order defendant committed and held in custody, trial judge was authorized to remand defendant to custody of sheriff during course of trial for robbery and rape. Pen.Code, § 1129.

9. Criminal law ⇨824(7)

The court on its own motion should instruct jury with respect to rules of law prescribed by the Code, such as necessity

for corroboration of the testimony of an accomplice.

10. Criminal law §768(1)

Ordinarily, the trial judge is under no duty to instruct jury that testimony of certain witnesses should be examined with caution.

11. Criminal law §824(10)

In prosecution for robbery and rape with defense of alibi, failure of court, without request, to give cautionary instruction with regard to testimony of prosecution witnesses was not prejudicial.

12. Criminal law §763(13)

In prosecution for robbery and rape, there was no error in court's failure, without request, to instruct that identification from appearance was entirely a matter of opinion and that identification of defendant as person seen on one occasion is not rendered more trustworthy by another witness' opinion that he was person seen on another occasion, since such an instruction would be an invasion of jury's province.

13. Criminal law §1173(3)

Failure of court to instruct that it was necessary for jury to agree on defendant's guilt as to each count was not reversible error where, as to each verdict, jurors answered affirmatively question as to whether that was their verdict.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Ralph Tom Avery was convicted under an indictment charging robbery, rape and attempted rape. From the judgment of conviction and from an order denying his motion for a new trial, the defendant appeals.

Judgment and order affirmed.

Leola Buck Kellogg, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

BISHOP, Justice pro tem.

Feeling aggrieved at a judgment of conviction, based on ten verdicts of guilty, and at his inability to obtain a new trial, the defendant has appealed. He finds fault with the scope of the information and criticizes a ruling on the admission of evi-

dence and the silence of the instructions on three matters. The limits of the defendant's attack upon the sufficiency of the evidence are fairly presented in these words taken from his closing brief: "The defendant had and has no occasion to challenge the claims that the crimes charged were committed by some man or by several different men. His primary interest lay and lies in proving the negatives, that he was not present. In addition to his clear evidence of alibi, he greatly relies on the fact that there was no legally sufficient proof that he was present on any of these occasions." We shall find that the evidence abundantly supports the conclusion that the defendant was the assailant present on every occasion charged, and that no error occurred which would justify a reversal of either the judgment or order appealed from.

Defendant argues that the information joined offenses which were of different classes and not connected in their commission, with the result that the trial court lacked jurisdiction and that he was denied a fair trial. There were, we find, ten counts in the information. Count I charged that the defendant had, on June 1, 1943, robbed victim one, and in Count II it was alleged that on the same first day of June he had raped her. Counts III and IV gave June 3, 1943, as the date when the defendant attempted to rape victim two and did rob her. On June 20, 1943, according to Counts V and VI, he attempted to rape victim three and successfully robbed her. Attempts to rape and rob victim four on June 24, 1943, were set forth in Counts VII and VIII, while similar offenses, in which victim five was the object, occurring on July 9, 1943, were charged in Counts IX and X.

[1-4] If it was error to join these several charges in one information, the error was one of procedure, not of jurisdiction, and does not justify a reversal unless it resulted in prejudice to the defendant. *People v. Duane*, 1942, 21 Cal.2d 71, 78, 130 P.2d 123, 127. Whether or not the procedure was technically wrong depends upon the interpretation to be placed upon these provisions of section 954, Penal Code: "An * * * information * * * may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts * * *." The five charges of rape

and attempted rape were properly included in a single information, for plainly they belong to the same class of crimes. See *People v. Warriner*, 1918, 37 Cal.App. 107, 108, 173 P. 489, 490; *People v. Thorn*, 1934, 138 Cal.App. 714, 734, 33 P.2d 5, 15. The same is true of the five counts of robbery and attempted robbery. *People v. Duane*, supra, 21 Cal.2d 71, 76, 130 P.2d 123, 126. Each of the offenses of the robbery class was connected in its commission with one of the offenses of the rape class. The combination of these ten charges in one information may not have been authorized by the letter of section 954, but it neither violated the spirit of the section nor deprived the defendant of a fair trial. Had the rape and attempted rape charges been embraced in their own information, upon the trial the evidence would not have differed in any material way from that before us, for the force and fear involved in each rape charge either began in and continued over from the corresponding robberies or they were common to both offenses. Nor does it appear at all likely that the defendant was found guilty of any of the robbery charges because of the further facts brought out in support of the rape accusations. We do not consider the case of *People v. Duane*, supra (with its seven separately charged offenses, consisting of three separate robberies, three kidnappings with intent to rob, and an assault with force and violence with intent to rob), as an authority that the procedure in this case was entirely authorized by the statute. However, it strongly supports our conclusion that we should not reverse this case, for it appears to us that defendant Avery, like defendant Duane, was not prejudiced by the procedure followed.

[5] The question just discussed and two or three other procedural errors, which the defendant claims are revealed by the record, involve, to a greater or less degree, the contentions that the evidence either fails to link the defendant with the ten offenses of which he was found guilty or that at best the links are weak. We find the evidence so sufficient that the contention, that it is not, does not merit a recital of the testimony of the five victims. Each stated that she was face to face with her assailant under conditions when his face could be observed; it was observed; the assailant, in each instance, was identified as the defendant. In support of the claim that the identifications are doubtful, attention is

called to the facts that the June 1 victim described the defendant as clean shaven; on June 3, he had a mustache; on June 20, and June 24, he was without one; while his fifth victim discerned one forming a very, very light line on July 9. At the time of the trial his mustache was "flourishing," according to victim five, as compared with what it was when he attacked her. The mustache that the defendant wore at the time of the trial was described for the record by the trial judge as a "thin black mustache, probably an inch and a half from one extremity to the other * * * I can't tell the shape of his mustache from here." Such a mustache, obviously, could come and go from day to day without casting a shadow of doubt upon the positive character of the identification made by each of defendant's victims.

We find, then, the evidence of identification to be strong and the several grounds of appeal, dependent on its weakness, to be correspondingly lacking in force. This is certainly true of the criticism made of the court's action in sustaining an objection to a question asked of victim two, during her cross-examination. It had been developed that the witness had been present at a line-up at the Central Station, but had not identified the defendant, and that she and two unidentified women had been taken to another line-up at the University Station. Then the trial continued:

"Q. Now, at the University Station you met some of the other witnesses in this case? A. I did not know they were at that time. There was two other ladies there in the car, we all three went into the station with the officers.

"Q. Did you discuss this matter with the ladies? A. I beg pardon, sir?

"Q. Did you discuss your case with these other women? A. Just the neighborhood in which we lived, we remarked about how close we all lived together. That was all that was remarked.

"Q. And did you talk to them about what happened to you that evening? A. Not at the time, no, sir.

"Q. I beg your pardon? A. Not at the time, no, sir.

"Q. Not at that time? A. No, sir.

"Q. Well, when did you discuss it with these other people?

"Mr. Johnson: I object to that as irrelevant and immaterial, having no bearing upon the case at all.

"The Court: The objection is sustained.

"Q. By Mr. Solomon: By the way, was there any money in the pocketbook that was taken from you? A. As I recall, there was about 41 cents."

[6,7] Extravagant claims are made of the prejudice of the ruling. "Clearly something happened" between the first line-up, when "identification of this defendant failed" and that at the University Station, "after photographs showing the defendant with a mustache were exhibited to the identifiers," the intimation being that the "something" was a get-together of the victims. We think it is clear that defendant's present counsel, who did not represent him at the trial, takes a present view of the unanswered question entirely out of focus with that prevalent at the trial. The different result of the two line-ups was due, it was quite obvious, to the fact that at the time of the first, June 4, the defendant was not present to be identified; he was still at large. Moreover, victim two had been quite positive in her identification: "I would know him at any place because his face was within 2 inches of mine. I couldn't mistake him, he was directly in the light." And lastly, there was no evidence that she had seen any picture of the defendant at any time. If, as defendant's present counsel would have us believe, the question had a significance not apparent when asked, it should have been pointed out to the trial court. We do not consider it to have been error for the trial court to have sustained an objection to the question, under the circumstances. Moreover the ruling is defensible on the ground that the question assumed a fact not in evidence, that is, that victim two ever had discussed what happened to her with "these other people."

[8] The next "error" to which the defendant points critically, was the action of the trial judge remanding the defendant to the custody of the sheriff during the course of the trial, shortly after the defense began to put on its case. In justification of his act the trial judge referred to section 1129 of the Penal Code, reading: "When a defendant who has given bail appears for trial, the court may, in its discretion, at any time after his appearance for trial, order him to be committed to the custody of the proper officer of the county, to abide the judgment or further

order of the court, and he must be committed and held in custody accordingly." We are of the opinion that the constitutionality of the section is not open to debate before us (see *People v. Dysart*, 1940, 39 Cal.App.2d 287, 289, 102 P.2d 1091, 1092, and cases cited), and unquestionably by its terms it authorized the action taken by the trial court. The action was taken after the jury had departed, at the close of a day's session, and so far as appears there was nothing consequent upon it that prejudiced the defendant with the jury. The evil that the defendant sees in the very act of depriving an accused of his liberty on bail during the course of his trial, is implicit in the Code section, itself, which expresses a public policy determined by the Legislature, and which is not to be used as an excuse for reversing a judgment.

[9-11] Defendant's remaining contentions center around three instructions which were not given—nor requested. "It is incumbent upon a court in a criminal case" we find it said in *People v. Putnam*, 1942, 20 Cal.2d 885, 890, 129 P.2d 367, 369, 370, "to instruct the jury of its own motion, charging them fully and fairly upon the law relating to the facts of the case." It is quite clear that this should be so with respect to such rules of law as the necessity for corroboration of the testimony of an accomplice, that is, rules of law prescribed by the Code and of which it is not to be presumed that a lay jury would have knowledge. When we get into the field where the instruction is one dependent not upon any statutory provision, but upon human experience, a field in which the jury is supposed to be on familiar ground, ordinarily the trial judge is under no duty to instruct the jury that the testimony of certain witnesses should be examined with caution. However, attention is called to *People v. Putnam*, supra, 20 Cal.2d 885, 889, 129 P.2d 367, 369, and *People v. Trumbo*, 1943, 60 Cal.App.2d 681, 688, 141 P.2d 225, 228, where judgments of conviction were reversed because the trial court failed of its own motion to give a cautionary instruction to the effect that a charge of a sex offense is one easily made and difficult to disprove and that the testimony of the prosecution witness should be examined with caution. These cases give recognition, however, to the principle that the circumstances of each case must determine whether the failure to give a pre-

cautionary instruction was prejudicial, and under the circumstances of this case the trial court's failure to give the unrequested instruction was clearly not prejudicial. This is so because, as already noted, the defendant does not question the veracity of the five victims in their accounts of what happened to them, and as we review their testimony there appears no cause to believe that any part of these accounts was invented. Defendant's difficulty was not enhanced by the nature of the charges against him; he had the difficulty faced by any defendant whose position is, not that a crime was not committed, but that he was not the guilty one. We have no hesitancy in concluding that the defendant was not prejudiced by the court's failure to give the jury the cautionary instruction, not requested.

[12] Nor are we of the opinion that the defendant was entitled to the second unrequested instruction, of whose absence complaint is now made—in these words: "it was vitally necessary to point out to the jury that identification from appearance is entirely a matter of opinion, belief, impression or judgment of a witness that the defendant is the same person seen by the witness on a previous occasion and that this being true the opinion of one witness that the defendant is the man she saw on one occasion could not as a matter of law be rendered more trustworthy by the opinion of another witness that he is the man the second witness saw on an unrelated occasion." Such an instruction would be an invasion of the jury's province. We are aware of no history of erroneous convictions which warrants the conclusion that unless told what to do, respecting the subject matters covered by the quotation just made from defendant's brief, a jury is likely to err.

[13] The last ground of appeal to engage our attention is the claim that the jury should have been instructed that it was necessary for them to agree on the defendant's guilt as to each count before they found him guilty of that count. The reporter's transcript before us affirmatively shows that a separate, signed, verdict of guilty was rendered as to each of the ten counts, and that as to each verdict all the jurors answered affirmatively this question: "Is this your verdict, so say you one, so say you all?" The failure of the court to instruct the jury to do the very thing they

did do, is not a ground upon which a reversal may be based.

The judgment of conviction and order denying a new trial are affirmed.

DESMOND, P. I., and PARKER WOOD, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



65 Cal.App.2d 11

HILL v. EATON & SMITH et al.

Civ. 12616.

District Court of Appeal, First District,
Division 2, California.

June 21, 1944.

Hearing Denied Aug. 17, 1944.

1. Negligence ☞32(2)

Contractor engaged in erecting building did not owe roofer employed by subcontractor same duty to make premises safe that contractor owed to its own employees, since relationship of roofer to contractor was that of a "business visitor" or "invitee."

See Words and Phrases, Permanent Edition, for all other definitions of "Business Visitor" and "Invitee".

2. Negligence ☞32(1)

A possessor of land is not subject to liability to his licensees, whether business visitors or gratuitous licensees, for bodily harm caused to them by any dangerous condition thereon, whether natural or artificial, if they know of condition and realize risk involved.

3. Negligence ☞32(1)

The owner of property, insofar as invitee is concerned, is not insurer of safety, but must use reasonable care to keep his premises in reasonably safe condition and give warning of latent perils and is not liable for injury to invitee resulting from danger which was obvious or should have been observed in exercise of reasonable care.

4. Negligence ☞136(9)

Whether negligence can be inferred from evidence is for determination of the court.

5. Negligence Ⓒ44

Where roofer employed by subcontractor was injured while working on roof of building under construction, by fall through open skylight, general contractor was not liable for injuries sustained, where roofer did not show violation of any duty owed by general contractor to him.

6. Negligence Ⓒ124(1)

In roofer's action against general contractor for injuries sustained when he fell through open skylight on roof of building under construction, safety order of Industrial Accident Commission requiring contractor to cover and guard floor openings within building during construction of building were properly excluded.

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by John T. Hill against Eaton & Smith, a copartnership, and others for personal injuries sustained by plaintiff while working on roof of building. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Robert G. Partridge, of San Francisco, for appellant.

Bronson, Bronson & McKinnon, of San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiff appeals from a judgment of nonsuit. His action for damages for personal injuries was filed against Eaton & Smith, who were the general contractors engaged in erecting the building upon which plaintiff was injured. The building comprised a number of units, each unit forming a separate airplane hanger. At the time of his injury plaintiff was employed by the Alta Roofing Co., who had subcontracted to place a roof upon the building. There is no real dispute as to the facts.

Viewing the evidence in the light most favorable to the plaintiff, he had proved at the time of nonsuit that he was injured during his employment by the Alta Roofing Co. and that at the time of his injury he was doing his work according to the customary procedure and was an experienced roofer. Plaintiff was injured while engaged in laying base sheets which were

40' long and 32" wide and weighed 55 lbs. to the 100 square feet. The strips were composed of rags, asbestos, asphalt and cowhair and were about 1/8" thick. The roof was longer than the strips and they had to be pieced. The men worked in pairs in placing the strips in position and plaintiff was working on the ridge of the building which slanted toward the valley in which the helper was working. It is plaintiff's contention that he was pulling against the strip to place it in position, which is the standard practice in laying the strips, when the strip tore and he tumbled backwards some 5 or 6 feet into the opening of an open skylight, and onto the concrete floor below, inflicting injury upon himself. The skylight, which was approximately 7' by 12' was not protected in any way while the roofers were working.

The wooden decks of these roofs were constructed by carpenters in the employ of the defendant and contained a row of skylights. As the skylight openings were made they were covered with heavy wire mesh by defendant's employees, but as each roof was completed, as to the wooden deck, the defendant's employees moved the coverings. These wire meshes extended about two feet over the openings and had to be removed before the base sheets were laid. In putting on the base sheet and the hot asphalt the employees of the Alta Roofing Company would fold the base sheet over the place of the skylight, thus making it difficult to provide any protection for the opening.

[1] Since plaintiff was the employee of the subcontractor, his relationship to the contractor was that of a business visitor or invitee. *Dingman v. A. F. Mattock Co.*, 15 Cal.2d 622, 104 P.2d 26. Defendant, however, was not the employer of plaintiff and did not owe him the same duty to make the premises safe that an employer owes to an employee.

In attempting to prove that defendant violated his duty of care toward plaintiff, the latter has cited a number of cases in which either an affirmative act was done by the invitor or in which the danger in or upon the premises, which caused the injury, was latent and was not known to the invitee, and either was, or should have been, known to the invitor. *Crane v. Smith*, 23 Cal.2d 288, 144 P.2d 356; *McCready v. Southern Pac. Co.*, 9 Cir., 26 F.2d 569; *Mendelsohn v. Van Herick*, 133 Cal.

App. 612, 24 P.2d 878; *Sawyer v. Hooper*, 79 Cal.App. 395, 249 P. 530; *Hinds v. Wheadon*, 19 Cal.2d 458, 121 P.2d 724; *Madigan v. O. A. Hale & Co.*, 90 Cal.App. 151, 265 P. 574; *Wallace v. King*, 27 Cal. App.2d 174, 80 P.2d 523; *Ridge v. Boulder Creek, etc., School Dist.*, 60 Cal.App.2d 453, 140 P.2d 990. Plaintiff also cites *Marton v. Jones*, 44 Cal.App. 299, 186 P. 410, but in that case the negligence consisted of the violation of an ordinance. In the case at bar, the open skylights were obvious; they were not hidden in any way, and plaintiff was an experienced roofer, fully aware of their existence. Nor was defendant in any way responsible for the tearing of the paper which caused plaintiff to lose his balance and fall. The only ground of liability which plaintiff urges was that defendant in maintaining open skylights was guilty of negligence toward plaintiff.

[2] The Restatement of the Law of Torts, sec. 340, defines the liability to licensees with reference to the passive condition of the premises as follows: "A possessor of land is not subject to liability to his licensees, whether business visitors or gratuitous licensees, for bodily harm caused to them by any dangerous condition thereon, whether natural or artificial, if they know of the condition and realize the risk involved therein."

[3] In *Blodgett v. B. H. Dyas Co.*, 4 Cal.2d 511, 512, 50 P.2d 801, 802, the court states: "The owner of property, in so far as an invitee is concerned, is not an insurer of safety, but must use reasonable care to keep his premises in a reasonably safe condition and give warning of latent or concealed perils. He is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care. *Shanley v. American Olive Co.*, 185 Cal. 552, 197 P. 793; *Mantino v. Sutter Hospital Ass'n*, 211 Cal. 556, 296 P. 76."

[4] In *Carroll v. Central Counties Gas Co.*, 74 Cal.App. 303, 308, 240 P. 53, 55, the court says: "Whether negligence *can* be inferred from the evidence is for the determination of the court, * * *. *Pacheco v. Judson Mfg. Co.*, 113 Cal. 541, 545, 45 P. 833, 834."

[5] The evidence failed to show the violation of any duty owed by defendant to plaintiff and there was, therefore, no basis to subject defendant to liability for plaintiff's injury.

Plaintiff has also cited a number of cases to demonstrate that the open skylight was the proximate cause of the injury. Since, however, he has been unable to prove that having an open skylight, in a building under construction constitutes negligence, or that any other basis of liability was created by, or was the responsibility of, the defendant it is unnecessary for us to consider what act, or acts, constituted the efficient cause of the injury.

[6] Plaintiff also cites as error the failure of the court to admit in evidence Safety Orders of the Industrial Accident Commission No. 1138 and No. 1102. The former required that floor openings be covered and guarded during construction of buildings and the latter made general contractors responsible for carrying out the provisions of the Safety Orders. However, there was no basis laid for the introduction of either order. The skylight opening, and plaintiff's employment, were located on the roof; the order sought to be introduced dealt solely with floor openings within a building and clearly was not admissible. Both orders were properly excluded.

The judgment of nonsuit is affirmed.

STURTEVANT and SPENCE, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

24 Cal.2d 310

OCCIDENTAL INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.
L. A. No. 18927.

Supreme Court of California.
 June 2, 1944.

1. Seamen ⇐11(1, 5)

The liability imposed by admiralty law upon shipowners for maintenance and cure, including wages of seaman who becomes ill or injured during the period of his service, is not predicated upon the fault or negligence of shipowner, and negligence, or acts short of culpable misconduct of seaman, will not prevent recovery. Federal Employers' Liability Act, as amended in 1939, §§ 1-10, 45 U.S.C.A. §§ 51-60.

2. Seamen ⇐29(1)

A seaman suffering personal injury in course of his employment may at his election, maintain an action at law for damages, in which case the Federal Employers' Liability Act applies under which the negligence of the employer, his agents or employees must be established. Federal Employers' Liability Act, as amended in 1939, §§ 1-10, 45 U.S.C.A. §§ 51-60; Jones Act, 46 U.S.C.A. § 688.

3. Commerce ⇐22
Courts ⇐258

The source of congressional power in the enactment of the Jones Act is the power to regulate interstate commerce, and its power to make laws to carry into execution powers vested by the Constitution in the government or any department, including the judicial power which extends to all cases of admiralty and maritime jurisdiction. Jones Act, 46 U.S.C.A. § 688; U.S.C.A. Const. art. 1, § 8, cls. 3, 18, and art. 3, § 2.

4. Courts ⇐489(9)
Seamen ⇐11(9), 29(5)

The remedies afforded to injured seamen of recovering for maintenance and cure, or to maintain action for damages under the Jones Act, are each independent and cumulative of the other, and may be tried in the state or federal courts, where the action is in personam. Federal Employers' Liability Act, as amended in 1939, §§ 1-10, 45 U.S.C.A. §§ 51-60; Jones Act, 46 U.S.C.A. § 688.

5. Workman's compensation ⇐1090

The Industrial Accident Commission is not a court of the state which may give

remedies under either the Jones Act or the Maritime Law for maintenance and cure, its sole power being to apply the Workmen's Compensation Law as set forth in the Constitution and labor Codes. St. 1937, p. 265 et seq., § 3201 et seq.; Federal Employers' Liability Act, as amended in 1939, §§ 1-10, 45 U.S.C.A. §§ 51-60; Jones Act, 46 U.S.C.A. § 688; Cal.Const. art. XX, § 21.

6. Admiralty ⇐20
Seamen ⇐29(5)

The remedies provided by the Jones Act or the Maritime Law to an injured seaman are exclusive of state laws and supersede the operation of state Workmen's Compensation Laws. St.1937, p. 265 et seq., § 3201 et seq.; Federal Employers' Liability Act, as amended in 1939, §§ 1-10, 45 U.S.C.A. §§ 51-60; Jones Act, 46 U.S.C.A. § 688; U.S.C.A.Const. art. 1, § 8, cls. 3, 18 and art. 3, § 2.

7. Admiralty ⇐20

The general test for determining whether the facts of a particular case bring injured employee within exclusive jurisdiction of Maritime Law or state Workmen's Compensation Law are that to exclude the state law there must appear to be impairment of the uniformity of operation of the maritime laws and with reference to employees other than seamen, the services performed must have a relation to commerce and navigation. Federal Employers' Liability Act, as amended in 1939, §§ 1-10, 45 U.S.C.A. §§ 51-60; Jones Act, 46 U.S.C.A. § 688; U.S.C.A.Const. art. 1, § 8, cls. 3, 18 and art. 3, § 2.

8. Admiralty ⇐20

Seamen are allied with Maritime Law and their treatment is a matter peculiarly within the rule of uniformity of maritime law, and they are in a different category than harbor workers and longshoremen in respect to determining extent that maritime law is paramount over state Workmen's Compensation Laws. Federal Employers' Liability Act, as amended in 1939, §§ 1-10, 45 U.S.C.A. §§ 51-60; Jones Act, 46 U.S.C.A. § 688.

9. Admiralty ⇐20

An action to recover for injury to seaman, sustained in employer's warehouse on land while getting fishing nets to be used on boat on which he was employed, was within maritime jurisdiction by way of maintenance and cure if no tort was in-

involved, or by way of the Jones Act if there was negligence, and such remedies being exclusive the State Industrial Accident Commission had no jurisdiction to award compensation. St.1937, p. 265 et seq., § 3201 et seq.; Federal Employers' Liability Act, as amended in 1939, §§ 1-10, 45 U.S.C.A. §§ 51-60; Jones Act 46 U.S.C.A. § 688; U.S.C.A.Const. art. 1, § 8, cls. 3, 18, and art. 3, § 2.

In Bank.

Proceeding by Occidental Indemnity Company, insurance carrier, to review an order of the Industrial Accident Commission awarding compensation for personal injuries to Steve Ruljanovich, employee.

Award annulled.

Prior opinion, 143 P.2d 58.

Henry E. Kappler, of Los Angeles, for petitioner.

Everett A. Corten and Fred Goldsworthy, of San Francisco, for respondents.

CARTER, Justice.

Petitioner, the insurance carrier of the owners and operators of a fishing boat named "Betsy Ross," seeks a review of an award of the Industrial Accident Commission to Steve Ruljanovich, a fisherman-seaman employee of the owners, for an injury received in the course of his employment under the Workmen's Compensation Law of this state.

The facts are not disputed. On May 4, 1942, Ruljanovich was in the employ of the owners and operators of a fishing vessel named "Betsy Ross," as a seaman fisherman when he received an injury arising out of and in the course of his employment. The day before the accident he had been employed by the owners of the boat as a member of the crew to engage in fishing off the shores of California. On the day of the injury the boat was in the Los Angeles harbor and Ruljanovich was assisting in preparing it for the fishing expedition. At his employer's request he went to a warehouse on the shore to obtain a net to be used in fishing and while there received the injury mentioned. It was not until some time later that the boat left on the expedition.

The commission found that Ruljanovich was injured while in the course of his employment as a seaman fisherman and, in support of its claim of jurisdiction in the

matter, that the employee was not at the time of his injury engaged in work in connection with his occupation as seaman, but that the injury occurred within the boundaries of the State of California and not on the vessel or navigable waters.

On the same date that he filed his application for compensation with the commission, Ruljanovich instituted a libel in the United States District Court against the vessel and her master claiming wages, maintenance and cure pursuant to maritime law for the injury suffered. After the commission had made its award and on March 17, 1943, Ruljanovich amended his libel by naming the owners of the vessel in addition to the master and claiming damages for the alleged negligence of the owners in connection with his injury pursuant to the Jones Act, 46 U.S.C.A. § 688, in addition to the claim for maintenance and cure. The libel was tried in the federal court and ultimately resulted in a denial of damages under the Jones Act because of lack of proof of negligence; however, a judgment for wages, maintenance and cure was given.

Petitioner contends that the Industrial Accident Commission did not have jurisdiction of the case; that exclusive jurisdiction rested in maritime law and the forums appropriately exercising that jurisdiction.

[1-3] There are various remedies in the maritime law of which a seaman may avail himself when he suffers injuries arising out of his service on a ship. For present purposes, two will be mentioned. First, is the ancient liability imposed by admiralty law upon shipowners for maintenance and cure including wages of seamen becoming ill or injured during the period of their service. *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 63 S.Ct. 930, 87 L.Ed. 1107; *O'Donnell v. Great Lakes, etc., Co.*, 318 U.S. 36, 63 S.Ct. 488, 87 L.Ed. 596; *Calmar S. S. Corp. v. Taylor*, 303 U.S. 525, 58 S.Ct. 651, 82 L.Ed. 993; *The Osceola*, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760; 48 Am.Jur., Shipping, § 167. That liability is not predicated upon the fault or negligence of the shipowner, and negligence, or acts short of culpable misconduct on the seaman's part will not prevent recovery. *Aguilar v. Standard Oil Co.*, supra. Second, a seaman suffering personal injury in the course of his employment may, at his election, maintain an action at law for damages and in such action the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-60 applies. Jones Act,

46 U.S.C.A. § 688. Thereunder the negligence of the employer, its agents or employees, must be established. *De Zon v. American President Lines*, 318 U.S. 660, 63 S.Ct. 814, 87 L.Ed. 1065. The source of the congressional power in the enactment of the Jones Act is the power to regulate interstate commerce, U.S.Const., art. I, § 8, cl. 3, and its power to make laws necessary and proper to carry into execution powers vested by the Constitution in the government or any department of it, U.S.Const., art. I, § 8, cl. 18 including the judicial power which extends "to all Cases of admiralty and maritime jurisdiction." U.S. Const., art. III, § 2; *O'Donnell v. Great Lakes, etc., Co.*, 318 U.S. 36, 63 S.Ct. 488, 87 L.Ed. 596.

[4] The two foregoing remedies are each independent and cumulative of the other, and may be tried in the state or federal courts where the action is in personam. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239; *Pacific S. Co. v. Peterson*, 278 U.S. 130, 49 S.Ct. 75, 73 L.Ed. 220.

[5] Manifestly, the Industrial Accident Commission is not a court of the state which may give remedies under either the Jones Act or the maritime law for maintenance and cure. Its sole power is to apply the Workmen's Compensation Law as set forth in the Constitution and Labor Code. Cal.Const., art. XX, § 21; Labor Code, § 3201 et seq. St.1937, p. 265 et seq.

Hence, the essential question is whether or not the remedies provided by the Workmen's Compensation Law are available concurrently with or to the exclusion of the remedies under the Jones Act and maritime law.

[6] The leading case on the question of the applicability of the maritime law rather than state workmen's compensation laws is *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 529, 61 L.Ed. 1086 L.R.A. 1918C, 451, Ann.Cas.1917E, 900. That decision was rendered before the passage of the Jones Act or the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 et seq. In the *Jensen* case a stevedore was injured while working on board a ship unloading it at a wharf in navigable waters. He was not a member of the crew. The court held that the general body of maritime law as accepted by the federal courts was paramount; that the states may not change, modify or affect it

and "no such (state) legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations," and that the state workmen's compensation laws could not be constitutionally applied to the injured employee because the ship was in navigable waters while being unloaded and the employment and the injuries were maritime. Although that case has been the subject of heated controversy both in the courts and among legal writers (see 38 Yale Law Journal 472), it has not been overruled; it has been recognized as an authority with the possible limitations presently discussed in the recent cases of *Norton v. Warner Co.*, 64 S.Ct. 747, 88 L.Ed. 430; and *Davis v. Department of Labor & Industries*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246. The constitutional aspects of that principle were further vitalized when the court declared unconstitutional congressional acts aimed at giving harbor workers the right to remedies under the state workmen's compensation laws. See *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834, 11 A.L.R. 1145; *State of Washington v. W. C. Dawson & Co.*, 264 U.S. 219, 44 S.Ct. 302, 68 L.Ed. 646. In commenting upon the rule announced in the *Jensen* case the Supreme Court of the United States stated in *Davis v. Department of Labor & Industries*, supra, 317 U.S. 252, 253, 63 S.Ct. 227, 87 L.Ed. 246:

"When a state could and when it could not grant protection under a compensation act was left as a perplexing problem, for it was held 'difficult, if not impossible' to define this boundary with exactness."

"This Court has been unable to give any guiding, definite rule to determine the extent of state power in advance of litigation, and has held that the margins of state authority must 'be determined in view of surrounding circumstances as cases arise.'" However, it recognized in discussing whether the Longshoremen's & Harbor Workers' Compensation Act, supra, applied that a "shadowy" area existed where state law could provide protection. It states: "But the line separating the scope of the two (state and federal law) being undefined and undefinable with exact precision, marginal employment may, by reason of particular facts, fall on either side." And at

page 256 of 317 U.S., at page 229 of 63 S.Ct., 87 L.Ed. 246:

"There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements. That zone includes persons such as the decedent who are, as a matter of actual administration, in fact protected under the state compensation act." Likewise, in case of seamen it should logically follow under the doctrine of the Jensen case that the remedies provided by the Jones Act or the maritime law of cure and maintenance are exclusive of state laws with the qualification that there may be borderline cases where that is not true and that each case must depend upon its particular circumstances. The reference in the Jones Act to a seaman having an election to proceed under the Jones Act refers not to an election between state and maritime law but rather as to alternatives accorded by the maritime law as modified. *Panama R. Co. v. Johnson*, 264 U.S. 375, 44 S.Ct. 391, 68 L.Ed. 748. The remedy under the Jones Act is exclusive of state laws (*Panama R. Co. v. Johnson*, supra; *Northern Coal, etc., Co. v. Strand*, 278 U.S. 142, 49 S.Ct. 88, 73 L.Ed. 232; *Lindgren v. United States*, 281 U.S. 38, 50 S.Ct. 207, 74 L.Ed. 686; see, *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239) and supercedes the operation of state workmen's compensation laws. *Northern Coal, etc., Co. v. Strand*, supra.

In other fields, for illustration, injury to railway employees, it has been consistently held that the remedy given by the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-60 is exclusive of rights and remedies under state workmen's compensation laws; that act extends to all railway employees, as expressed in its 1939 amendment, "whose duties as such employees shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." 45 U.S.C.A. § 51. *New York Central R. Co. v. Winfield*, 244 U.S. 147, 37 S.Ct. 546, 61 L.Ed. 1045, L.R.A.1918C, 439, Ann.Cas.1917D, 1139; *Erie R. Co. v. Winfield*, 244 U.S. 170, 37 S.Ct. 556, 61 L.Ed. 1057, Ann.Cas.1918L,

662; see *Southern Pac. Co. v. Industrial Acc. Comm.*, 19 Cal.2d 271, 120 P.2d 880; 35 Am.Jur. Master & Servant, § 398. It will be recalled that the Jones Act makes applicable to seamen the provisions of the Federal Employers' Liability Act.

[7] From the foregoing it remains to be determined whether the facts of the instant case bring the employee within the exclusive jurisdiction of the maritime law or the state Workmen's Compensation Law or in the twilight zone mentioned in *Davis v. Department of Labor & Industries*, supra; and in so doing we are not aided by the discussion in the *Davis* case of the presumption of the correctness of a determination by the state Industrial Accident Commission that it had jurisdiction inasmuch as both it and the federal court have assumed jurisdiction. The general tests advanced for the determination of that question appear to be that to exclude the state law there must appear to be an impairment of the uniformity of operation of the maritime laws stated in the foregoing excerpt from the Jensen case, and with reference to employees other than seamen, the services performed must have a relation to commerce and navigation. See *State Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263, 42 S.Ct. 473, 66 L.Ed. 933, 25 A.L.R. 1013; *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 42 S.Ct. 157, 66 L.Ed. 321, 25 A.L.R. 1008; *Millers' Indem. Underwriters v. Braud*, 270 U.S. 59, 46 S.Ct. 194, 70 L.Ed. 470; *Alaska Packers' Ass'n v. Industrial Acc. Comm.*, 276 U.S. 467, 48 S.Ct. 346, 72 L.Ed. 656.

[8] Seamen have long been the wards of admiralty and a subject of special care under the maritime law. They are definitely allied with maritime law and their treatment is a matter peculiarly within the rule of uniformity of the maritime law. For those reasons they may be said to be in a different category than harbor workers and longshoremen in respect to determining the extent that the maritime law is paramount. See *O'Donnell v. Great Lakes, etc., Co.*, supra, 318 U.S. at page 43, 63 S.Ct. at page 492, 87 L.Ed. 596. Hence, the most recent decisions of the United States Supreme Court have determined that they are under the wing of maritime law even though the injury occurs while the seaman is on land. In *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 63 S.Ct. 930, 931, 87 L.Ed. 1107, the question involved was "whether a shipowner is liable for wages and maintenance

and cure to a seaman who, having left his vessel on authorized shore leave, is injured while traversing the only available route between the moored ship and a public street. The injury in No. 582 occurred while the seaman was departing for his leave. That in No. 454 occurred while he was returning." It was held that the maritime right of maintenance and cure applied, the test conceded by the parties to be whether the injury occurred while the seaman was "in the service of the ship." The right to recover for maintenance and cure is broader than the right to compensation under workmen's compensation laws. The court said at page 732 of 318 U.S., at page 934 of 63 S.Ct., 87 L.Ed. 1107:

"For that reason among others his employer's responsibility for maintenance and cure extends beyond injuries sustained because of, or while engaged in, activities required by his employment. In this respect it is a broader liability than that imposed by modern workmen's compensation statutes. Appropriately it covers all injuries and ailments incurred without misconduct on the seaman's part amounting to ground for forfeiture, at least while he is on the ship, 'subject to the call of duty as a seaman, and earning wages as such.' * * *

"When the seaman's duties carry him ashore, the shipowner's obligation is neither terminated nor narrowed. When he leaves the ship contrary to orders, however, the owner's duty is ended. Between these extremes are the instant cases, raising for the first time here the question of the existence and scope of the shipowner's duty when the seaman is injured while on shore leave but without specific chore for the ship. Liability in that circumstance was obscured in the first maritime codes and although early suggested has been recognized only implicitly in lower federal courts. Very recently it has been explicitly denied in several district courts.

"We think that the principles governing shipboard injuries apply to the facts presented by these cases. To relieve the shipowner of his obligation in the case of injuries incurred on shore leave would cast upon the seaman hazards encountered only by reason of the voyage. The assumption is hardly sound that the normal uses and purposes of shore leave are 'exclusively personal' and have no relation to the vessel's business. Men cannot live for long cooped up aboard ship without substantial impairment of their efficiency, if not also serious danger to discipline. * * *

"It was from considerations of exactly this character that the liability for maintenance and cure arose. From them likewise, its legal incidents were derived. The shipowner owes the protection regardless of whether he is at fault; the seaman's fault, unless gross, cannot defeat it; unlike the statutory liability of employers on land it is not limited to strictly occupational hazards or to injuries which have an immediate causal connection with an act of labor. An obligation which thus originated and was shaped in response to the needs of seamen for protection from the hazards and peculiarities of marine employment should not be narrowed to exclude from its scope characteristic and essential elements of that work. And, indeed, no decision has been found which so narrows the shipowner's parallel obligation in the case of sickness or disease.
* * *

"There is strong ground therefore for regarding the right to maintenance and cure as covering injuries received without misconduct while on shore leave. Certainly the nature and foundations of the liability require that it be not narrowly confined or whittled down by restrictive and artificial distinctions defeating its broad and beneficial purposes. If leeway is to be given in either direction, all the considerations which brought the liability into being dictate it should be in the sailor's behalf. In this view, the nature and purposes of the liability do not permit distinctions which allow recovery when the seaman becomes ill or is injured while idle aboard, * * * or when doing some minor errand for the ship ashore, * * * but deny it when he falls from the ladder or gangplank as he leaves the vessel on shore leave, * * *. Such refinements cut the heart from a protection to which they are wholly foreign in aim and effect. The sailor departing for or returning from shore leave is, sensibly, no more beyond the broad protection of his right to maintenance and cure than is the seaman quitting the ship on being discharged or boarding it on first reporting for duty."

In *O'Donnell v. Great Lakes, etc., Co.*, 318 U.S. 36, 63 S.Ct. 488, 87 L.Ed. 596, a seaman who was injured while he was ashore to assist in repairing the land end of a pipe that was being used to unload the ship, was held to be within the protection of the Jones Act. The Federal District Court had made an award for

maintenance and cure but dismissed the claim for damages under the Jones Act. The Circuit Court of Appeals came to the same conclusion. *O'Donnell v. Great Lakes, etc., Co.*, 7 Cir., 127 F.2d 901. The court concluded that recovery could be had under both and treated the "course of employment" requirement in the Jones Act and "in the service of the ship" under the maintenance and cure, as the same. It said at page 41 of 318 U.S., at page 491 of 63 S.Ct., 87 L.Ed. 596:

"As we have said, the maritime law, as recognized in the federal courts, has not in general allowed recovery for personal injuries occurring on land. *But there is an important exception to this generalization in the case of maintenance and cure.* From its dawn, the maritime law has recognized the seaman's right to maintenance and cure for injuries suffered in the course of his service to his vessel, whether occurring on sea or on land. * * *

"Some of the grounds for recovery of maintenance and cure would, in modern terminology, be classified as torts. But the seaman's right was firmly established in the maritime law long before recognition of the distinction between tort and contract. In its origin maintenance and cure must be taken as an incident to the status of the seaman in the employment of his ship. * * * That status has from the beginning been peculiarly within the province of the maritime law, * * * and upon principles consistently followed by this Court it is subject to the power of Congress to modify the conditions and extent of the remedy afforded by the maritime law to seamen injured while engaged in a maritime service.

"The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the *admiralty jurisdiction* over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters. * * *

"It follows that the Jones Act, in extending a right of recovery to the seaman injured while in the service of his vessel by negligence, has done no more than supplement the remedy of maintenance and cure for injuries suffered by the seaman, whether on land or sea, by giving to him the indemnity which the maritime law afforded to a seaman injured in consequence of the unseaworthiness of the vessel or its

tackle. * * * Since the subject matter, the seaman's right to compensation for injuries received in the course of his employment, is one traditionally cognizable in admiralty, the Jones Act, by enlarging the remedy, did not go beyond modification of substantive rules of the maritime law well within the scope of the admiralty jurisdiction whether the vessel, plying navigable waters, be engaged in interstate commerce or not." (*Italics added.*)

While neither the Aguilar nor O'Donnell cases involved the question of a conflict between state workmen's compensation laws and maritime laws, we believe they are persuasive authority on the issue. They clearly and conclusively establish the rule that a seaman may recover under maritime law for an injury received while performing duties in the course of his employment on land. If cases fall within the maritime law there is no escape from the conclusion that the applicability of that law is exclusive. It is not a case of harbor workers, longshoremen and the like, as distinguished from seamen, where there may be a twilight zone as indicated in *Davis v. Department of Labor & Industries*, supra. The latest expression of the Supreme Court of the United States on the subject appears in *Norton v. Warner Co.*, supra, 64 S.Ct. 747, 88 L.Ed. 430. Although the issue there was whether an employee was entitled to relief under the Longshoremen's and Harbor Workers' Compensation Act, supra, on the one hand or under admiralty law or the Jones Act on the other, as distinguished from the conflict between the admiralty and state workmen's compensation laws, the court cited the Jensen case and emphasized the necessity of preserving the rights of a seaman. Implicit in its holding is the thought that unless it clearly appears to the contrary a seaman should have the benefits of the admiralty law or the Jones Act. The court stated at page 750 of 64 S.Ct., at page 936 of 88 L.Ed.:

"We reviewed the history of the Act (Longshoremen's and Harbor Workers' Compensation Act) in the Bassett case [*South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 60 S.Ct. 544, 84 L.Ed. 732] and in the Parker case [*Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244, 62 S.Ct. 221, 86 L.Ed. 184] and more recently in *Davis v. Department of Labor*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246. As we noted in those cases, the Act was adopted to meet the difficulties engendered

by the decision in *Southern P. Co. v. Jensen*, * * *. And see *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834, 11 A.L.R. 1145, [20 N.C.C.A. 635; *State of Washington v. W. C. Dawson & Co.*, 264 U.S. 219, 44 S.Ct. 302, 68 L.Ed. 646, [24 N.C.C.A. 253]. That line of cases *carved out a domain* in which, according to a majority of this Court, *state law could not constitutionally afford compensation to maritime employees*. It was to fill that gap in the system of workmen's compensation that the present Act was passed. * * * But as we pointed out in the *Bassett* case * * * the effort to bring a master and members of a crew of a vessel under the Act was successfully opposed by the representatives of maritime employees. * * * And the maritime unions which appeared as *amicus curiae*, in the present case *emphasize the importance of that exception. The liability of an employer under the Act is exclusive*. * * * On the other hand, those who are not covered by it but who are protected by maritime law are entitled to maintenance and cure, a remedy not restricted to accidents. As we said in *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 732, 63 S.Ct. 930, 934, 87 L.Ed. 1107, [1114], *'In this respect it is a broader liability than that imposed by modern workmen's compensation statutes.'* Moreover, seamen may sue under the Jones Act * * * for injuries in the course of their employment. And in such actions assumption of risk is no defense. * * * Or suit may be brought in admiralty for injuries caused by unseaworthiness of the vessel or its appurtenant appliances and equipment. * * * These are *basic rights*. The maritime unions appearing in the present case maintain that those remedies are indeed superior to the relief afforded by the Longshoremen's and Harbor Workers' [Compensation] Act. Whether they are more desirable than a system of compensation is not for us to determine. But where Congress has provided that those basic rights shall not be withheld from a class or classes of maritime employees it is our duty on judicial review to respect the command and not permit the exemption to be narrowed whether by administrative construction or otherwise."

In the instant case the employee was a seaman. The day before the injury he had been employed as a member of the crew to go on a fishing cruise in navigable

waters. The following day he worked on the ship for a while, then at the direction of his employer went on land to get a fishing net, which was certainly an act in the course of and related to his service to the ship. The only reasonable conclusion from those circumstances is that he was a seaman injured in the course of his duties as such.

Respondents rely upon such cases as *Grant Smith-Porter Ship Co. v. Rohde*, supra; *State Industrial Comm. v. Nordenholt Co.*, supra; *Alaska Packers' Ass'n v. Industrial Acc. Comm.*, supra; and *London, etc., Co. v. Industrial Acc. Comm.*, 279 U.S. 109, 49 S.Ct. 296, 73 L.Ed. 632. The Rohde case involved an injury to a carpenter employed in the construction of a ship nearly completed and lying in navigable waters as a result of the negligence of his employer. He was not a seaman and it was held that neither his contract nor activities were maritime and that torts were controlled by the local law, hence the state workmen's compensation law applied. Likewise, in the Nordenholt case the injury was to a longshoreman, not a seaman, and the injury was suffered while he was working on land assisting in the unloading of a ship. It was concluded that to apply the state law would not interfere with the uniformity of marine law. In the Alaska Packers case the employee was employed as a seaman and for general work in a cannery. After the fishing season was over, that is, after his seaman's employment was past, he was injured while on shore attempting to push a fishing boat into navigable water for the purpose of floating to its winter dry dock. As expressed by the court at page 469 of 276 U.S., at page 346 of 48 S.Ct., 72 L.Ed. 656:

"Peterson was not employed merely to work on the bark or the fishing boat. He also undertook to perform services as directed on land *in connection with the canning operations*. When injured, certainly he was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law." (Italics added.) In the case at bar the employee was employed solely as a seaman fisherman and although the fishing trip had not commenced, his work was directly connected with that employment and not some distinct nonmaritime service on land. In the

London Company case the employee was a seaman on a vessel conducting fishing excursions. He was drowned while in a small boat at his master's order attempting to save the vessel which had broken from her moorings. The conclusion of the California Industrial Accident Commission that it had jurisdiction was repudiated. All of the cases since the Jensen case were discussed and distinguished. The concluding statement is pertinent (279 U.S. at page 125, 49 S.Ct. at page 300, 73 L.Ed. 632):

"The conclusion sought to be drawn by counsel for the Commission from the Rohde and other cases is that workmen's compensation acts will apply unless their application would interfere with the uniformity of the general maritime law in interstate and foreign commerce, and their is neither here. But this omits one of the grounds for making an exception—that it shall not be prejudicial to the characteristic features of the maritime law. That is just what it would be here, for here we have a transaction on the navigable waters of the United States which in every respect covers all the characteristic features of maritime law and has no other features but those. To apply to such a case a state Compensation Law would certainly be prejudicial to those features."

[9] From the foregoing it clearly appears that under the most recent decisions of the United States Supreme Court an action to recover for an injury to a seaman even though occurring on land is peculiarly within the maritime jurisdiction by way of maintenance and cure if no tort is involved or by way of the Jones Act if there is negligence. The many cases that were decided prior to these recent decisions cannot be considered controlling. The instant case falls clearly within the reasoning in the O'Donnell and Aguilar cases above discussed.

In our opinion the best solution of the problem would be to overrule the Jensen case and thus eliminate the constitutional objection to the joint operation of state compensation and federal maritime laws. A right under the state law would then exist in those cases where the injury occurred within the territorial jurisdiction of the state regardless of whether the employee's activities were maritime or on navigable waters. Less difficulty would be encountered at least in determining whether or not a case is justiciable under

the state law. Rights under the maritime law would be the same as now exist. The difficulty in fixing the limits of the maritime law in particular cases would still exist but they would be no greater than the analogous problem of determining whether the injury occurred in the course of employment. To avoid double recovery for the same injury and the compensable factors thereof where both remedies were sought before the statute of limitations had run, the appropriate tribunal could offset one against the other to the extent that they overlapped. However, the Supreme Court of the United States has not chosen to follow such course and we are not authorized to do so.

We conclude therefore that the respondent commission did not have jurisdiction of the case at bar and therefore its award is annulled.

GIBSON, C. J., and SHENK, CURTIS, TRAYNOR, and SCHAUER, JJ., concur.

EDMONDS, J., concurred in the judgment.



24 Cal.2d 354

TOSCHI v. CHRISTIAN et al.
S. F. No. 16978.

Supreme Court of California,
June 12, 1944.

1. Appeal and error ⇨927(3)

On an appeal from a judgment of nonsuit, evidence must be viewed in light most favorable to plaintiff.

2. Railroads ⇨327(1)

The "stop, look and listen rule" ordinarily applied to railroad crossing collisions is not applicable to factual bases where its application would be unreasonable.

See Words and Phrases, Permanent Edition, for all other definitions of "Stop, Look and Listen Rule".

3. Railroads ⇨350(28)

The "stop, look and listen rule" cannot operate to establish contributory negligence as a matter of law, where highway is cross-

ed by six railroad yard tracks on which switching operations progress almost constantly, and railroad has employed two flagmen for both railroad and highway traffic control, and a practical necessity exists for travelers on highway to rely on flagmen's signals.

4. Railroads ⇨330(2)

• As respects railroad crossing accidents, extent to which a traveler may rely upon failure of a mechanical warning device to operate or upon absence of a customary flagman is a relative proposition dependent upon surrounding circumstances, and is not subject to precise definition as a pure proposition of law.

5. Negligence ⇨136(14)

As respects negligence, conduct must be gauged in relation to all other material circumstances surrounding it, and, if such other circumstances admit of a reasonable doubt as to whether questioned conduct falls within or without bounds of ordinary care, then such doubt must be resolved as a matter of fact rather than of law.

6. Railroads ⇨330(2)

A railroad cannot encourage persons to relax their vigilance concerning dangers that lurk in railroad crossings by assuring them, through erection of safety devices, that danger has been removed or minimized, and at same time hold them to same degree of care as would be required if such devices have not been provided.

7. Railroads ⇨330(2)

A person approaching a guarded crossing cannot blindly rely upon absence of warning by flagman or silence of an automatic signal and proceed without further regard for his own safety.

8. Railroads ⇨350(28)

Whether a truck driver, in attempting to traverse busy metropolitan railroad crossing customarily guarded by two flagmen, in exercise of ordinary care should have taken additional precautions than those which he did take, was for jury.

9. Railroads ⇨350(32)

In railroad crossing collision case, whether plaintiff's alleged violation of Vehicle Code section in making left turn at intersection immediately prior to crossing tracks was proximately contributing cause of collision between his truck and backing locomotive was for jury. Vehicle Code, § 540(b), St.1935, p. 184.

10. Railroads ⇨330(2)

Truck driver, in approaching railroad crossing customarily protected by two flagmen, upon observing absence of one flagman and inattention of other flagman, was not required to take precautions which would not be taken by an ordinarily careful driver under the circumstances to hear a possibly approaching train.

11. Railroads ⇨350(32)

Where railroad crossing flagman was playing with a mirror which flashed in eyes of truck driver who stopped truck which was then struck by a train, whether flashing of mirror in driver's eyes caused him to stop upon track which he might otherwise have cleared in safety, or whether incident had no causal connection with accident, was for jury.

TRAYNOR, J., dissenting in part.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Mario Toschi against L. L. Christian and others for injuries resulting from a collision between plaintiff's truck and a railroad engine. From a judgment of nonsuit granted on defendants' motion at the close of plaintiff's case, plaintiff appeals.

Reversed.

Prior opinion, 143 P.2d 37.

William E. Ferriter and James C. Purcell, both of San Francisco, for appellant.

Dunne & Dunne and Arthur B. Dunne, all of San Francisco, for respondents.

SCHAUER, Justice.

This is an action to recover damages for personal injuries sustained by the plaintiff in a crossing collision between a truck driven by him and a locomotive of the defendant railroad company. Named as defendants are the Southern Pacific Company (hereinafter sometimes referred to as the railroad), the fireman and the engineer who operated the locomotive, and two flagmen who were stationed at the crossing, the latter four being employees of the railroad. The plaintiff appeals from a judgment of nonsuit. So far as concerns disposition of this appeal the negligence of the defendants is conceded and the sole question is whether the trial court was correct in its determina-

tion that plaintiff was guilty of contributory negligence as a matter of law. We have concluded that in the state of the record the question of contributory negligence was one of fact.

[1] There are substantial conflicts in the evidence as disclosed by the transcript and, as is not unusual in the enthusiasm of advocacy, still more in the contentions of counsel. It is elementary, however, that on appeal from a judgment of nonsuit the evidence shall be viewed in the light most favorable to plaintiff. (*Gregg v. Western Pac. R. Co.* (1924), 193 Cal. 212, 216, 223 P. 553.) Application of this rule strikes down at once, and without necessity for further comment thereon, all those portions of defendants' argument which depend on the resolution of conflicting inferences favorable to defendants. Viewing the record obediently to the designated rule this opinion must predicate the following facts:

This is not a rural crossing case. The locale of the accident is a congested mercantile and industrial district in the city of San Francisco in the area of a passenger and freight terminal where six substantially parallel tracks of defendant company cross Berry Street and where switching operations are almost constantly in progress. Berry Street runs generally east and west, and is intersected by Seventh Street running generally north and south. The most westerly of the six tracks curves from the northeast into Seventh Street and reaches the approximate center of that street (down which it then runs) at the intersection of Berry and Seventh. Immediately east of Seventh Street are the other five tracks crossing Berry. The most westerly track (in the center of Seventh Street) figures little in the controversy. The next two tracks are main line tracks and the remaining three (branching into a fourth just north of Berry Street) are yard tracks. There was a flagman's shelter at the northeast corner of the intersecting streets and another flagman's shelter on the south side of Berry Street just east of the sixth track. The collision occurred on the first (westerly) main line track; i.e., the first track east of the most westerly of the six tracks. The five tracks crossing Berry Street east of Seventh are closely spaced and may be spoken of as a group. Two flagmen were normally present in this area, one on either side of this group of five tracks, and both were on duty on the day of the accident. All the tracks approach Berry Street (and

Seventh) on an easy curve from the northeast and cross Berry at approximately right angles. Except for the flagman's shelter at the northeast corner of the two streets, there were no fixed obstructions to a view of the tracks by a person traveling south on Seventh Street (as was plaintiff here) in the block just north of the intersection. However, at the time of the accident several automobiles were parked along Seventh Street, between plaintiff's route (while he was on Seventh Street) and the tracks. A driver on Berry Street or one attempting to turn onto Berry Street from Seventh Street cannot ordinarily know whether any locomotives which may be moving in the yards in the course of switching operations will cross Berry Street or stop short of it. Recognizing this fact and in an effort to expedite traffic and secure safety, the railroad regularly stationed a flagman on each side of the group of five tracks, as previously mentioned, with the duty of going out into Berry and raising a stop sign as a warning for highway vehicles when railroad traffic was to cross, and of flagging down railroad engines when necessary to permit highway traffic to be cleared from the tracks. Plaintiff was familiar with the crossing; in his work as a truck driver he had driven over it at least twice and sometimes twenty times every working day for ten years. During all this time flagmen were stationed at the crossing and plaintiff was accustomed to rely upon their signals. In reliance upon them and pursuant to the long-established practice, when a flagman held up a stop sign plaintiff stopped; when a stop sign was not displayed or a flagman not in view plaintiff, apparently, had always previously found the crossing safe.

On the morning of April 12, 1938, plaintiff approached the crossing driving south on Seventh Street and intending to turn left onto Berry Street. This was to have been his fifth traverse of the crossing that morning. The day was clear. About 50 feet before he came to the intersection he looked to his left "On the tracks * * * straight ahead and all around," and saw no railroad traffic; at about the same time he decreased his speed from approximately 25 miles an hour to 10 miles an hour and shifted into a lower gear. He saw two automobiles approaching, one on Seventh Street from the south and one on Berry Street from the west; both cars stopped to let plaintiff make the left-hand turn onto and across the railroad tracks. He also looked for a flagman but there was none

visible on the Seventh Street side of the tracks. (This flagman was not seen at all on this occasion by plaintiff but other witnesses establish that he emerged from his shelter after the accident.) Plaintiff turned onto Berry Street and drove safely across the first or single track (which extends into and along the center of Seventh Street) and then saw one flagman (Darrrough) on the far side of the group of five tracks which he was approaching. Plaintiff observed that such flagman was not standing in the middle of Berry Street, the usual position of the flagman when a locomotive was approaching, but was close to the north boundary line of the street; that he was not signaling traffic with either the stop sign, which was regularly used to signal highway vehicles, or the red flag, which was provided for signaling to railroad traffic, but was instead holding the sign and the flag under his arm; and that in his hands he held a mirror with which he was playing by flashing sunlight in it. After plaintiff turned, he did not look to the left along the tracks. As he drove onto the first track (referred to as the "South-bound Main Line") of the group of five tracks light from the mirror, with which the flagman was still playing, was flashed in his eyes, blinding him. He stopped and immediately his truck was struck by an engine which was backing in a southwesterly direction on the curved track and which had been approaching at an angle from behind him and to his left as he drove south down Seventh Street. At no time had plaintiff seen the engine before it hit his truck and there is testimony from which it may be inferred that he could not have heard it: the neighborhood was noisy, the street was rough, and on the truck driven by plaintiff was a concrete mixer with drums which constantly revolved. For the purpose of this appeal we must take as true testimony that neither a whistle nor a bell on the engine sounded a warning.

Defendants contend that from these facts it is evident that plaintiff did not exercise the slightest care for his own safety; that had he exercised any care the accident would not have happened. Plaintiff argues that the fact that he could have seen the engine had he looked with greater care "is a wholly false quantity in the case," that he was not only entitled but required, whether or not he saw a train approaching, to rely upon the long-established custom that the absence of a flagman was an

assurance of safety since, so he asserts, a traveler who would wait at this crossing until no engine was within sight or hearing could never cross. We are of the opinion that the correct view of the case lies between these two extremes.

[2,3] Counsel for defendants assiduously argue the fact as to whether plaintiff's view of the tracks and of the approaching engine was open or impeded, and contend that if it was open plaintiff's failure to look and see and stop in safety inexorably convicts him of contributory negligence. They rely upon *Koch v. Southern Cal. R. Co.* (1906), 148 Cal. 677, 84 P. 176, 4 L.R.A.,N.S., 521, 113 Am.St.Rep. 332, 7 Ann.Cas. 795, and cases which have followed that decision. We think that in this argument counsel are viewing the evidence and selecting conflicting inferences favorable to their clients rather than to the plaintiff, but even if we assume their factual theory, as far as it goes, we find their proposition of law untenable. The "stop, look and listen" rule, urged by defendants, will not be applied to factual bases where its application would be unreasonable. In the circumstances of this case, which comprise a six-track railroad yard crossing, switching operations progressing almost constantly, the employment of two flagmen by the railroad, whose duties involve traffic control on the highway and to some extent on the railroad, and a practical necessity for travelers on the highway to rely on the flagmen's signals because ordinarily it would be impossible for such travelers after they had observed railroad traffic approaching to know whether it would cross or stop short of the highway, the "stop, look and listen" rule is not wholly appropriate and cannot operate to establish contributory negligence as a matter of law. Merely adding the further circumstance that a traveler knew that two of the six tracks were main line tracks and that ordinarily trains on those tracks would constitute through traffic would not alter the legal proposition above stated.

[4,5] The extent to which a traveler may rely upon the failure of a mechanical device to operate, or upon the absence of a customary flagman, cannot be precisely defined as a pure proposition of law applicable to all the circumstances which usually complement such occurrences. Standards of care are typically relative; rules of law are basically absolute. Hence, in regard to negligence, any attempt to

screen factual conduct into legal classifications through a sieve of absolute law will be impracticable whenever the related circumstances admit of materially conflicting inferences. In other words, the actor's conduct must always be gauged in relation to all the other material circumstances surrounding it and if such other circumstances admit of a reasonable doubt as to whether such questioned conduct falls within or without the bounds of ordinary care then such doubt must be resolved as a matter of fact rather than of law. (Cf. *Peri v. Los Angeles Junction R. Co.* (1943), 22 Cal.2d 111, 120, 137 P.2d 441; *Pokora v. Wabash R. Co.* (1934), 292 U.S. 98, 105, 54 S.Ct. 580, 583, 78 L.Ed. 1149, 1155, 91 A.L.R. 1049, 1054; *Gregg v. Western Pac. R. Co.* (1924), supra, 193 Cal. 212, 224, 223 P. 553; *Zibbell v. Southern Pacific Co.* (1911), 160 Cal. 237, 240, 116 P. 513; *Wessling v. Southern Pac. Co.* (1931), 116 Cal.App. 447, 450, 451, 3 P.2d 22; *Ogburn v. Atchison, etc., R. Co.* (1930), 110 Cal.App. 587, 594, 294 P. 491.)

[6,7] It is settled in this state that "A railroad company will not be permitted to encourage persons to relax their vigil concerning the dangers that lurk in railroad crossings by assuring them, through the erection of safety devices, that the danger has been removed or minimized, and, at the same time, to hold them to the same degree of care as would be required if those devices had not been provided. [Citations.] This does not mean that a person approaching a guarded crossing may blindly rely upon the absence of warning by a watchman, or the silence of an automatic signal, and proceed without further regard for his own safety." (*Will v. Southern Pac. Co.* (1941), 18 Cal.2d 468, 474, 116 P.2d 44, 47.)

[8] Here it does not appear that plaintiff exercised no care whatsoever; i. e., that he drove blindly ahead, heedless of his own safety. He testified that he looked at the tracks before he turned. He slowed the speed of his truck and shifted to a lower gear. His other testimony indicates that he was not oblivious of his surroundings and that he had in mind the relationship of Berry Street and the traffic thereon to the railroad tracks and the traffic over them. While he was on Seventh Street, he could not have seen the engine merely by looking to his left because it was behind him. Whether he could have seen it even by looking backward over his shoulder is not clear. Behind the rear window of the cab

of his truck was mounted a concrete mixer about 10 feet high, that is, higher than the cab itself. The near edge of the window in the left door of the cab was about 4 inches in front of plaintiff. Thus it may be that before he turned plaintiff could have seen the engine only by leaning forward, putting his head out the side window, and looking back. Whether no reasonable man exercising ordinary care, about to traverse a busy metropolitan crossing customarily guarded by two flagmen, having the knowledge of the locality which plaintiff possessed, driving the truck which plaintiff was operating, and under the other circumstances shown here, would fail to adopt such mode of observation is a question of fact for a jury, not one of law for a court. In the *Koch* case (supra, 148 Cal. 677, at page 680, 84 P. 176, at page 177, 4 L.R.A.,N.S., 521, 113 Am.St.Rep. 332, 7 Ann.Cas. 795) the court declared: "Of course, in any case such as this, where it is shown that a plaintiff has exercised some care, the question whether or not the care actually exercised was due and sufficient, will always be a matter for determination by the jury." The majority of the court held that upon the facts in that case the plaintiff had failed to exercise any care whatsoever. Chief Justice Beatty, dissenting, differed from his associates, not fundamentally in the law but rather in his view and interpretation of the evidence. The rule which we follow in our view of the evidence has already been stated. We entertain no doubt that the record before us, insofar as the doctrine of the *Koch* case is concerned, presents a factual question requiring submission to the jury.

Pertinent in the surrounding circumstances of the instant case, it is to be noted that only after plaintiff turned, passing the momentary obstruction of the small flagman's shelter, did he have available a direct view of the tracks to his left. (Plaintiff completed his turn between 10 and 30 feet from the first main line track, depending upon whether he "cut the corner," as discussed infra.) His prior observation had disclosed no train or engine; his present observation disclosed nothing which he interpreted as a warning. He may well have regarded the presence of a flagman at the side of the street with his stop sign under his arm as a greater indication of safety than the absence of a flagman. In his belief that one flagman would not be absent from sight and the other engaged in child-

ish play if danger was imminent, plaintiff may have been "deceived by appearances calculated to deceive an ordinarily prudent man." (Sheets v. Southern Pacific Co. (1931), 212 Cal. 509, 514, 299 P. 71, 73.) We do not say that plaintiff's failure to look to his left as he turned onto the tracks and before he was blinded by the mirror flash is or is not excused; that is a question of fact. In the circumstances there appears no "standard of conduct * * * so obvious as to be applicable to all persons." (Chrissinger v. Southern Pacific Co. (1915), 169 Cal. 619, 624, 149 P. 175, 177; see, also, Fernandes v. Sacramento City Railway Co. (1877), 52 Cal. 45, 50.)

[9] Defendants argue that plaintiff's own testimony shows he "cut the corner" in violation of section 540(b) of the Vehicle Code, St.1935, p. 184 which conduct was negligent per se; that had he turned properly he would have had a direct view of the tracks for several more feet before he came upon them. Although plaintiff did testify that he "cut the corner" and although he so indicated his course on a diagram of the intersection, he also testified that he was "coming right in the center, right over the manhole"; "I was coming right near to the manhole; I was going right over that." It appears from defendants' Exhibit 5 that the manhole was in the center of the intersection. This conflict in the testimony of plaintiff, like any other conflict in the evidence, in conformity with the above mentioned rule governing appeals from judgments of nonsuit, must be resolved in favor of plaintiff's case. But assuming that plaintiff did "cut the corner," whether his violation of the Vehicle Code section was a proximately contributing cause of the collision is under the circumstances depicted, a question of fact. (See Sheets v. Southern Pac. Co. (1934), 1 Cal.2d 408, 412, 413, 35 P.2d 121; Crawford v. Southern Pacific Co. (1935), 3 Cal.2d 427, 433, 45 P.2d 183.)

[10] Defendants point out that although there is general testimony that the neighborhood was noisy, there is no evidence that any locomotive except the one which struck plaintiff was moving in the yards at the time of the collision or that there was any other noise which would have prevented plaintiff's hearing the sound of the locomotive's operation except that made by his own truck, which was within his control. To silence the sound of the truck, however,

it would have been necessary, not only that plaintiff stop to avoid the noise of travel over the rough cobblestone street, and turn off the truck motor, but also that he turn off the engine which kept the drums of the concrete mixer constantly revolving. If the drums of the mixer were not kept revolving the concrete would tend to dry and set and freeze the drums so that they could not be operated. It may be doubted whether these suggested precautions would be taken by the ordinarily careful driver in the circumstances.

[11] Plaintiff argues that the flashing of the mirror into his eyes caused him to bring his vehicle to a stop upon the track, which he might otherwise have cleared in safety. Defendants urge that the incident of the mirror could have had no causal connection with the accident since from plaintiff's own testimony it appears that the light shone only at the very instant of collision, after he had negligently driven onto the track. Plaintiff testified, "As I stopped, that second I was hit by a train. * * *". We are not satisfied that his testimony of immediacy of the collision *after stopping* of the truck completely precludes the possibility that the mirror flash which *blinded him and caused him to stop* on the track may have caused him to stop just in time to be struck by the engine. There would necessarily be some appreciable interval of time between the flashing of the mirror and the translation of such stimulus into stoppage of the truck. That defendants' interpretation of the incident may appear more probable than plaintiff's is a consideration not within the province of a reviewing court. Certainly the incident is not one so within the range of common experience that its solution is obvious.

Defendants further contend that there is no evidence identifying the man supposed to have flashed the mirror as the flagman Darrough. Plaintiff testified, "I saw this fellow over here (indicating), with that signal under his arm, playing with a mirror, and it shone right in my eyes, and I stopped"; also, "I * * * saw this other flagman on the other side that was playing with the mirror. He had his stop sign under his arm, with his little flag * * *". Furthermore Darrough was in court and apparently was the person indicated by plaintiff. Darrough himself testified that he was the flagman on the far side of the tracks at the time of the accident.

While he denied that he was playing with a mirror it is obvious that the evidence amply supports a contrary conclusion.

As stated above, plaintiff contends that, even had he seen the approaching engine, he could have assumed, in the absence of a signal and in the light of the other circumstances shown, that it was safe to cross. Defendants call attention to plaintiff's testimony that he knew the first two tracks (of the group of five) were main line tracks, and argue that he must have known that no switching operations take place on the main line tracks, that had he seen the engine he would have known from the fact that it was proceeding on a main line track that it was not a switch engine but a road engine on its way to the roundhouse south of Berry Street and hence would not stop short of the crossing. Since plaintiff admittedly did not see the engine, it is not necessary to discuss these conflicting contentions as to what would have been reasonable conduct on plaintiff's part had he seen it, identified the track it was on, and drawn the deductions suggested. Inasmuch as it is a question of fact as to whether plaintiff was contributively negligent in failing to see or hear the engine at all, the case must go to the jury on that theory and for determination of that fact.

The judgment of nonsuit is reversed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and CARTER, JJ., concur.

TRAYNOR, Justice (dissenting in part).

I concur in the judgment. I cannot subscribe, however, to the view that when a jury determines standards of care in negligence cases it is simply finding facts. It is a question of law what the rule or standard of conduct should be for adjudging the actions of men as lawful or unlawful and for determining the consequences of those actions. A question of fact relates to what acts or events have occurred or what conditions exist or have existed. See Thayer, Preliminary Treatise on Evidence at The Common Law, 183-262. Questions of fact in this country, where there is a constitutional right to a jury trial, are for the jury, while questions of law are ordinarily for the judge. In the field of negligence it is common practice for the jury to determine not only the facts but the standard of conduct to be applied within the compass of the rule that the conduct prescribed must be that of a reasonably prudent man

under the circumstances. To determine whether given conduct should impose liability or bar a recovery is to make law. If the court has formulated a standard of reasonable conduct that is applicable to the case, the jury's sole concern is to determine whether a person's conduct has met that standard, a question of fact. If the court has not formulated such a standard, it becomes the jury's responsibility to do so, and thereafter to determine whether a person's conduct has met that standard. The decision as to whether the standard should be fixed by the court or left to the jury rests with the appellate courts and turns upon whether the jury would be at an advantage in arriving at a standard by virtue of being a cross-section of the community and therefore representative of the community views and attitudes. See *Clinkscales v. Carver*, 22 Cal.2d 72, 136 P.2d 777; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 664, 84 U.S. 657, 664, 21 L.Ed. 745; *Grand Trunk R. Co. v. Ives*, 144 U.S. 408, 417, 12 S.Ct. 679, 36 L.Ed. 485; *Restatement: Torts*, § 285; *Holmes, The Common Law*, 120-129; *Holmes, Law in Science and Science in Law*, 12 Harv.L.Rev. 443, 457.



24 Cal.2d 365

TRASK v. MOORE et al.

Sac. 5587.

Supreme Court of California.

June 16, 1944.

1. Waters and water courses ☞158½(1)

Where water piping system was physically connected with pumping plant on premises described in deed of trust in such a manner as to be essential to the function of the apparatus as a whole, purchaser of property at trustee's sale acquired piping system as an "appurtenance" to the land, notwithstanding that pipes and mains were laid in various streets and alleys. *Civ. Code*, § 1084.

See Words and Phrases, Permanent Edition, for all other definitions of "Appurtenance".

2. Deeds ☞117

Generally, a conveyance of property carries with it by implication all incidents

rightfully belonging to and essential to full enjoyment of such property at time of conveyance.

3. Mortgages ⇨131

Fixtures subsequently attached to mortgaged land passed to purchaser at foreclosure sale, although not mentioned in mortgage.

4. Waters and water courses ⇨202

Whether a water system is a public utility subject to regulation of railroad commission depends on character of the business. Gen.Laws 1937, Act 6386, § 52(d).

5. Waters and water courses ⇨202

Mere fact that a person furnished with in a limited area a portion of his water supply to a certain number of consumers, each individually receiving use and benefit of the water and paying an agreed sum as a monthly rate, did not of itself prove the waterworks to be a "public utility" subject to regulation of railroad commission. Gen.Laws 1937, Act 6386, § 52(d).

See Words and Phrases, Permanent Edition, for all other definitions of "Public Utility".

6. Dedication ⇨41

Dedication of property to a public use is never presumed without evidence of unequivocal intention.

7. Waters and water courses ⇨202

Evidence supported finding that water distributing system which was covered by deed of trust securing note was not a public utility subject to regulation of railroad commission, and hence order of railroad commission authorizing note and deed of trust was not required. Gen.Laws 1937, Act 6386, § 52(d).

8. Appeal and error ⇨78(3)

An order striking from the files a cross-complaint against one not otherwise a party to the action was a "final judgment" from which an appeal would lie.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

9. Appeal and error ⇨356

Where appeal was not taken from order striking from files a cross-complaint against one not otherwise a party to the action, and appeal from judgment for plaintiff against defendant was taken after time for taking appeal from such order had

expired, appeal as to cross-complainant would be dismissed.

In Bank.

Appeal from Superior Court, of Stanislaus County; B. C. Hawkins, Judge.

Action by Dora B. Trask against Joseph A. Moore and another to quiet title to water distributing system, for an accounting, and other relief, wherein the defendants filed a cross-complaint against Edward Ealey. From a judgment for plaintiff and cross-defendant, the defendants and cross-complainants appeal.

Attempted appeal as to cross-defendant dismissed, and judgment in favor of plaintiff affirmed.

Prior opinion 140 P.2d 73.

T. B. Scott and Nathan B. McVay, both of Modesto, for appellants.

Herbert E. Paul, of Modesto, for respondent.

Francis O. Hoover, of Modesto, for cross-defendant and respondent.

CURTIS, Justice.

The defendants appeal from a judgment quieting title in the plaintiff to "that certain water distributing system including the pipes, situate in the Modesto High School Tract now in the possession of defendants and formerly connected to wells and pumping plants located upon Lots 7 and 8 in Block 'D' and Lots 22 and 23 in Block 'B' of the Modesto High School Tract"; directing the defendants to "reconnect the said pipes and the said distributing system to the aforesaid wells and pumping plants in as nearly as possible the manner in which the same were at the time the defendants disconnected the same"; and decreeing that the "plaintiff is entitled to an accounting by defendants of all moneys received by said defendants from the operation of said pipes and distributing system from November 18, 1940, to the date of reconnection * * * as herein ordered." The notice of appeal further recites that the defendants as cross-complainants appeal from the judgment in favor of the cross-defendant Ealey.

There is no dispute concerning the material facts of this case: On February 21, 1939, and for several years prior thereto, the cross-defendant Ealey was the owner of the four lots mentioned in the judgment as situated in the Modesto High School

Tract, an unincorporated residential district adjacent to the city of Modesto. Upon this property were located two wells and pumping plants from which there extended a series of pipes furnishing water to approximately seventy neighboring homes at a monthly rate. On the date mentioned Ealey executed to the plaintiff as security for his promissory note a deed of trust covering these four lots "together with the rents, issues and profits thereof; also all appurtenances including water rights in which trustor may have an interest, whether represented by stock of any water company or otherwise, benefiting the property herein described." Thereafter, and on March 1, 1939, Ealey sold these same lots to the defendants Moore, and by a separate conveyance he transferred to them the water distributing system. Upon default in the payment of the aforesaid promissory note the property was sold under the deed of trust, the plaintiff became the purchaser thereof at the sale, and the trustee's deed was executed and delivered to her on November 18, 1940. Some six months prior to these foreclosure proceedings the defendants Moore had disconnected the water distributing system from the pumping plants on the premises in question and attached it to a well and pumps installed on other lands owned by them. Under these circumstances the plaintiff brought the present action to have the distributing system reconnected and for an accounting with respect to the defendants' operation thereof since the date of her purchase of the property at the trustee's sale. The portion of the distributing system here involved lies entirely outside of the bounds of the lots described in the deed of trust and consists largely of pipes and mains placed in the streets and alleys of the Modesto High School Tract.

The trial court's findings and its judgment rendered in favor of the plaintiff, as in part above noted, establish that it took the following view of this case: (1) That the distributing system involved, although lying without the limits of the land described in the deed of trust, passed to the plaintiff as an appurtenance of the lots which she purchased at the trustee's sale; and (2) that while "the Railroad Commission of the State of California did not authorize Ealey to execute said note and said deed of trust on said property," the distributing system in question was not a public utility so as to require the commission's or-

der of authorization prior to the valid execution of the security instruments. Public Utilities Act, § 52(d), Stats. 1915, p. 115, 152, as amended, Deering's Gen. Laws 1937, Act 6386, p. 3167. Application of settled legal principles to the undisputed facts disclosed by the record herein sustains the trial court's decision as premised upon the above two determinative points.

[1] The first matter for consideration is the interest in the water system acquired by the plaintiff under the deed of trust. It appears from the record that for some time prior to the date of execution of said security instrument the water piping system in question had been annexed and physically connected with the pumping plants on Ealey's lots; that the piping as laid throughout the streets and alleys was merely an extension and continuation of the apparatus for the production and distribution of the water supply—a part of it, and not separable from it without destroying the efficiency of the whole; and that the waterworks as so constructed were functioning as an integrated system when the loan arrangements between the plaintiff and Ealey were consummated, as above detailed. Appurtenances are things belonging to another thing as principal and which pass as incident to the principal thing. 1 Bouv. Law Dict., Rawle's Third Revision, Appurtenances, page 224. Here the principal thing was the pumping works, and the piping system attached thereto was an incident to the main machinery—the pumps and the wells. Such pipe extension was necessary to the enjoyment of the principal thing and indispensable in the supply of water to the neighboring homes in the tract. By being so joined and essential to the function of the apparatus as a whole, the distributing system contained and combined in itself all of the elements and attributes of a fixture or appurtenance to real estate. Civ. Code, § 662; 6 C.J.S., Appurtenance, page 133, et seq.

Analogous considerations as to structural appendages were involved in the case of Western Elec. Co., Inc., v. Colley, 79 Cal. App. 770, 775, 251 P. 331, 333, where it was stated that "a power line, consisting of poles set in the ground and wires strung thereon, would pass as appurtenant to one's land upon the owner executing a conveyance of the soil upon which the poles of the power line stood or were imbedded." In line with this principle are cases from other jurisdictions holding that electric

transmission lines and similar structures, though extending beyond the real estate upon which the mechanical plant is situated, constitute an appurtenance to the plant so as to be encumbered by a lien attaching to the realty: *Wells v. Christian*, 165 Ind. 662, 76 N.E. 518; *Badger Lumber Co. v. Marion Water, etc., Co.*, 48 Kan. 182, 29 P. 476, 15 L.R.A. 652, 30 Am.St.Rep. 301; *Roebbling's Sons Co. v. Nebraska Electric Co.*, 106 Neb. 255, 183 N.W. 546; *Hughes v. Lambertville Electric Light, etc., Co.*, 53 N.J.Eq. 435, 32 A. 69; *Dreisbach v. Ross*, 195 Pa. 278, 45 A. 722; *National Foundry & Pipe Works v. Oconto Water Co., C.C.*, 52 F. 43; *Stearns Lighting & Power Co. v. Central Trust Co.*, 6 Cir., 223 F. 962, 139 C.C.A. 442. Thus, the fact in the present case that the water pipes and mains were laid in various streets and alleys will not change their character or make them any the less an appurtenance to the mentioned Ealey premises. The record herein does not touch in any way upon Ealey's authority—either affirmatively or negatively—for so laying the piping system in the tract in question. However, his ownership of the system as originally installed was in nowise disputed, and it must be assumed that the distributing appendages were rightfully laid as essential parts of the entire enterprise.

Similarly, where questions as to the property characteristics of a water distributing system have arisen in connection with tax assessment problems, the courts have declared the pipes, mains and hydrants of a water company to be appurtenant to and taxable with the real estate where the main works are located. *City of Pasadena v. Los Angeles County*, 182 Cal. 171, 187 P. 418; *Oskaloosa Water Co. v. Board of Equalization of City of Oskaloosa*, 84 Iowa 407, 51 N.W. 18, 15 L.R.A. 296; *State ex rel. Sedalia Water Co. v. Harnsberger*, 322 Mo. 94, 14 S.W.2d 554; *Joplin Waterworks Co. v. Jasper County*, 327 Mo. 964, 38 S.W.2d 1068. Thus, in the *Sedalia Water Co.* case the matter is discussed as follows (322 Mo. at page 105, 14 S.W.2d at page 557): "In this case the water mains in the streets of Sedalia are practically worthless considered as personal property, separated from the soil. They are 'necessary to the full enjoyment of the property.' The plant located upon the land of the relator [water company] would be absolutely worthless without the pipes and the pipes would be worthless without the plant which supplies them with water. They are appurtenant.

'An appurtenance is a thing used with and related to or dependent upon something else which is its principal.' Words and Phrases. There could be no case in which one thing is more completely dependent upon another for its value and utility than the water mains are dependent upon the plant which supplies them with water."

[2] Thus upon both reason and authority the water distributing system here in question was appurtenant to the Ealey lots upon which the pumping works were located. As a general rule, a conveyance of property carries with it by implication all incidents rightfully belonging to, and essential to the full enjoyment of, such property at the time of conveyance. 26 C.J.S., Deeds, § 106, p. 386, et seq. In this state, under authority of section 1084 of the Civil Code, incidents and appurtenances to lands pass with a transfer thereof unless expressly excepted. 9 Cal.Jur. § 152, p. 286. That the plaintiff and Ealey in executing the deed of trust here involved, intended the appurtenances to Ealey's lots to be encumbered under the terms of that instrument is manifest from the specific inclusion therein of "all appurtenances * * * benefiting the property herein described." There was no need for direct reference to the water piping system in order to have it covered by the language of said deed of trust, and Ealey's subsequent property negotiations with the defendants could not affect the plaintiff's rights established under the security instrument. The propriety of the plaintiff's claim here is emphasized when considered in relation to the legal principles applied in the disposition of the case of *Harper v. Buckles*, 19 Cal.App.2d 481, 65 P.2d 947, an action to quiet title to all water rights and pumping equipment appurtenant to real property claimed through first and second encumbrances upon the land. No part of the water system there in question had been constructed at the date of the first deed of trust, but a considerable portion of it was built between that time and the date of the second deed of trust. For a recitation of the rules of law governing such factual situation the court referred to the case of *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 93 P. 858, 15 L.R.A., N.S., 359 and quoted therefrom as follows (19 Cal.App.2d at pages 484, 485, 65 P.2d at page 949):

[3] "The rights of Bachman under the agreement are the same as those of Threlfall.

"It is immaterial that the mortgages of Threlfall's land, under which Bachman acquired title, were executed before Threlfall obtained the water right. The water right, when acquired, became an easement appurtenant to the land (*Farmer v. Ukiah Water Co.*, 56 Cal. (11) 13) and passed with it, upon the foreclosure sale in the same manner as any other appurtenance or fixture passes with the title and possession of land. (Civ.Code, §§ 1084, 1104; *Cave v. Crafts*, 53 Cal. (135) 140; *Farmer v. Ukiah Water Co.*, 56 Cal. (11) 13; *Cross v. Kitts*, 69 Cal. (217) 221, 10 P. 409, 58 Am.Rep. 558; *Smith v. Corbit*, 116 Cal. (587) 591, 48 P. 725.) It was an incident of the land and would pass as such by a conveyance of the land, without express mention and without any reference thereto, such as by the use of the word "appurtenances" or otherwise. A conveyance of land upon a foreclosure sale must of necessity, at least as between the parties to the mortgage, carry with it a water right appurtenant to the land acquired and used by the mortgagor for the benefit of the land although obtained after the execution of the mortgage and before the sale or foreclosure. We are cited to no authority for or against this proposition, and have not succeeded in finding any relating to it, but from the nature of the case it must be correct. Fixtures subsequently attached to mortgaged land pass to the purchaser at foreclosure sale, although not mentioned or referred to in the mortgage. *Merritt v. Judd*, 14 Cal. (59) 72; 2 *Jones on Mortgages*, § 1657; 1 *Am. & Eng. Ency. of Law*, 255. The same rule applies to improvements made by the mortgagor on mortgaged land. 1 *Jones on Mortgages*, §§ 147, 681; *Union Water Co. v. Murphy's Flat F. Co.*, 22 Cal. (620) 631; *Tibbetts v. Moore*, 23 Cal. (208) 215. We are unable to perceive any material difference in principle, in this respect, between fixtures and improvements attached to or erected upon land and a water right attached to land as an appurtenance, such as that here involved, and we hold that it is governed by the same rules."

The Harper opinion then continues (19 Cal.App.2d at page 486, 65 P.2d at page 950): "When we apply the principles thus announced to the facts of the instant case, the conclusion follows that the water system constructed between the dates of the first and second deeds of trust became appurtenant to the land and became incumbered by the first deed of trust. It fol-

lows that as an appurtenance to the land, title passed to defendant at the time of the trustee's sale, and the execution of the trustee's deed to him as the lien of the first trust deed was prior and superior to the lien of the second."

Here, in contrast to the factual situation prevailing in the Stanislaus and Harper cases *supra*, the water system in question was in place and functioning as a valuable adjunct to the Ealey premises when the deed of trust was executed by Ealey and the plaintiff. Upon the basis of legal principles governing the passage of title to appurtenances under a conveyance of the land, there would seem to be no practical difference between a piping system constructed to convey water to said land for use thereon and a piping system installed to convey water from said land, as part of the mechanical apparatus located on the premises. In either event the piping system is incident to and necessary to the beneficial enjoyment of the land so as to follow a transfer of the realty unless expressly excepted. In the light of this reasoning the conclusion is inescapable that the water distributing system here in question was covered by the plaintiff's deed of trust on the Ealey lots; that her title to the encumbered property was established by her purchase at the trustee's sale; and that the defendants were properly directed by the trial court to reconnect said piping system to the pumping works on said lots and to render an accounting to the plaintiff as specified in the judgment.

[4-7] Nor is the plaintiff's position available upon the ground that the water system as maintained by Ealey was a public utility and subject to the order of the Railroad Commission, which admittedly did not authorize the security arrangements made with respect to the Ealey premises. Whether or not a water system is a public utility depends on the character of the business. *Van Hoosear v. Railroad Commission*, 184 Cal. 553, 555, 194 P. 1003. The trial court, in rendering a judgment in favor of the plaintiff, impliedly found from the meager evidence on the issue that Ealey's operation of his water plant for the purpose of supplying water to his neighbors in the residential tract did not establish its dedication to a public use, and therefore any property negotiations affecting such water system was wholly a matter for private contract

and of no concern to the Railroad Commission. The record is entirely consistent with such conclusion. The mere fact that a person furnishes within a limited area a portion of his water supply to a certain number of consumers, each individually receiving the use and benefit of the same and paying an agreed sum as a monthly rate, does not of itself prove the waterworks to be a public utility. While such conduct shows the enterprise to be a business proposition, rather than a mere accommodation or a neighborly act, in the sense that there is a monetary consideration for the service, it does not necessarily establish a dedication of property to public use. *Richardson v. Railroad Commission*, 191 Cal. 716, 721, 218 P. 418; *Klatt v. Railroad Commission*, 192 Cal. 689, 701, 221 P. 926. "To hold that property has been dedicated to a public use is 'not a trivial thing' ([City and County of] San Francisco v. Grote, 120 Cal. [59] 60, 52 P. 127, 41 L.R.A. 335, 65 Am.St.Rep. 155), and such dedication is never presumed 'without evidence of unequivocal intention.'" *Niles v. City of Los Angeles*, 125 Cal. 572, 58 P. 190. * * * *Allen v. Railroad Commission*, 179 Cal. 68, 85, 175 P. 466, 473, 8 A.L.R. 249. In the condition of the evidence as hereinabove outlined, the trial court's determination of the point in the plaintiff's favor is not open to attack.

[8, 9] Turning now to the attempted appeal from the judgment in favor of the cross-defendant Ealey, the following facts appear from the record. A cross-complaint was filed against Ealey and he was brought into the action as a cross-defendant by permission of the court. On January 15, 1942, in the course of the trial, the court made an order striking the cross-complaint from the files. The judgment was rendered on May 11, 1942, and it contains by way of recital only the statement "the cross-complaint having been stricken from the files upon motion of the cross-defendant." Notice of appeal was filed on July 17, 1942 and it purports to appeal only from the judgment entered on May 11, 1942.

The order of January 15, 1942, striking the cross-complaint from the files was as to Ealey the cross-defendant, not otherwise a party to the action, a final and appealable judgment. *Howe v. Key System Transit Co.*, 198 Cal. 525, 246 P. 39; *Young v. Superior Court*, 16 Cal.2d 211, 105 P. 2d 363; *Halterman v. Pacific Gas & Elec. Co.*, 22 Cal.App.2d 592, 71 P.2d 855. The

notice of appeal, even if liberally construed as an attempt to appeal from the order of January 15, 1942, was filed too late. Code Civ.Proc. § 939.

The attempted appeal as to the cross-defendant Ealey is dismissed. The judgment in favor of the plaintiff is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.



65 Cal.App.2d 109

RINKER v. McKINLEY.

Civ. No. 14364.

District Court of Appeal, Second District,
Division 2, California.

June 29, 1944.

1. Appeal and error ⇨1012(1)

It is not sufficient ground for reversal of a judgment to demonstrate that a finding is against preponderance of the evidence, but appellant must show that there is no substantial evidence to sustain the finding.

2. Appeal and error ⇨757(3)

When an appellant contends that there is no substantial evidence to sustain a finding he must point out in his brief the evidence, the particular finding, and show wherein the evidence does not sustain the finding, otherwise the finding of the trial court is presumed to be correct and will be upheld.

3. Judgment ⇨18(2)

Where administratrix brought action to have certain property declared to be property of the estate, and defendant set forth the facts upon which she predicated right to relief and prayed for general relief, the pleadings permitted a judgment quieting title in defendant to the property described in complaint.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Lucy R. Rinker, administratrix of the estate of William Henry Rinker, de-

ceased, against Ruth McKinley to have certain real and personal property declared to be the property of the estate of plaintiff's decedent. From a judgment for defendant, the plaintiff appeals.

Judgment affirmed.

Charles M. Johnson, of Los Angeles, for plaintiff and appellant.

Lynn O. Hossom and Bruce Mason, both of Long Beach, for defendant and respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury in an action to have certain real and personal property declared to be property of the estate of plaintiff's decedent, plaintiff appeals.

Plaintiff, administratrix of the estate of William Henry Rinker, was married to decedent on December 3, 1931. On June 2, 1933 they separated. After separation decedent's only source of income was a pension which he received from the Federal Pension System for postal employees. With this income he paid bills which had been contracted during the time he and plaintiff were living together; paid his living expenses; and entered into certain transactions with defendant, his daughter by a former marriage. At the time of decedent's death, defendant took into her possession personal property belonging to her father consisting of a Pontiac automobile, a Buick automobile, a kitchen stove, and cash in the sum of \$5.

The Pontiac automobile was repaired by defendant at a cost of \$50 and was sold for \$200; the Buick was sold for \$25; and the kitchen stove was sold for \$5. The net value of decedent's personal property which defendant took into her possession was \$185. Defendant paid funeral expenses of her father amounting to \$360.01 and certain debts totaling \$4.29. She filed a claim against his estate for \$364.30.

The trial court gave judgment in favor of defendant quieting title in her as to the real property described in the complaint and to the personal property of decedent, of which she had taken possession, on condition that defendant would release and

satisfy her claim against decedent's estate. Defendant did release her claim against the estate of her father.

Plaintiff urges reversal of the judgment on three propositions which will be stated and answered hereunder seriatim:

First: *A preponderance of the evidence is against the findings of the trial court.*

[1] This proposition is untenable, for the rule is established that it is not sufficient ground for reversal of a judgment for an appellant to point out or to even demonstrate to an appellate court that a finding is against the preponderance of the evidence; he must show that there is not any substantial evidence to sustain the questioned finding. (*Meyer v. Great Western Ins. Co.*, 104 Cal. 381, 386, 38 P. 82; *Goodwin v. Franich*, 37 Cal.App. 493, 494, 174 P. 83.)

Second: *The judgment is not supported by competent evidence.*

[2] This proposition is likewise untenable. The rule is established that when an appellant contends that there is not any substantial evidence to sustain a finding of fact he must point out in his brief the (a) evidence,¹ (b) particular finding claimed to be unsupported,² and (c) show wherein the evidence does not sustain the questioned finding;³ otherwise the finding of the trial court is presumed to be correct and not erroneous and it will be upheld by an appellate court.

In the present case plaintiff has failed to show the particular finding or findings that he claims are unsupported by the evidence or wherein the evidence does not sustain the findings.

Third: *The pleadings do not permit a judgment quieting title in defendant to the property described in the complaint.*

[3] This proposition is untenable for the reason that defendant in her answer set forth the facts upon which she predicated relief and in the prayer of her answer she asked for general relief.

For the foregoing reasons, the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

¹ *Brovelli v. Bianchi*, 136 Cal. 612, 613, 69 P. 416; *People v. One 1938 Buick Sedan*, 39 Cal.App.2d 42, 45, 102 P.2d 447.

² *Kyle v. Craig*, 125 Cal. 107, 116, 57 P. 791; *Cooper v. Weatherholt*, 28 Cal. App.2d 321, 325, 82 P.2d 524.

³ *Duncan v. Ramish*, 142 Cal. 686, 689, 76 P. 661; *Wieczorek v. Texas Co.*, 45 Cal.App.2d 450, 457, 114 P.2d 377; *Glass v. City of Fresno*, 17 Cal.App.2d 555, 559, 62 P.2d 765.

65 Cal.App.2d 111

GOLDBERG et al. v. RABUCHIN et ux.
Civ. 14387.

District Court of Appeal, Second District,
Division 2, California.

June 29, 1944.

Rehearing Denied July 17, 1944.

1. Evidence ⇨571(10)

In action to recover for injuries as a result of dog bites, testimony of physician who treated plaintiff was substantial evidence to sustain finding as to plaintiff's injuries and as to medical treatment administered. Gen.Laws 1931, Act 384a.

2. Appeal and error ⇨1071(5)

Where a judgment is supported by findings which are unobjectionable, findings on immaterial issues which are unsupported by evidence do not constitute ground for reversal.

3. Animals ⇨74(4)

In action to recover for injury suffered by child when bitten by defendants' dogs while on a public street, testimony tending to show that defendants' dogs were not vicious was properly excluded, in view of statute making dog's former viciousness and owner's lack of knowledge of such viciousness immaterial. Gen.Laws 1931, Act 384a.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Judith Arlene Goldberg, a minor, by Edward L. Goldberg, her guardian ad litem, and Edward L. Goldberg, against B. D. Rabuchin and wife to recover for injuries sustained by the minor plaintiff as the result of bites inflicted upon her by defendants' two dogs. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Charles Murstein, of Los Angeles, for appellants.

Wolfson, Swetow & Essey, of Los Angeles, for respondents.

McCOMB, Justice.

This is an appeal by defendants from a judgment in favor of plaintiffs, after trial before the court without a jury, in an action to recover damages for personal injuries sustained by plaintiff, Judith Arlene Goldberg, a minor, as a result of having

been bitten by two dogs which belonged to defendants.

The evidence being viewed in the light most favorable to plaintiffs (respondents), the essential facts are:

On May 5, 1943, while crossing the intersection of Livonia and Pickford streets, public highways in Los Angeles, two dogs owned by defendants attacked Judith Arlene Goldberg, a minor nine years of age, and bit her, causing numerous bruises and lacerations on her body.

Defendants rely for reversal of the judgment on two propositions which will be stated and answered hereunder seriatim:

First: *There was not any substantial evidence to sustain the trial court's findings that:*

a) *The minor plaintiff sustained "two (2) wounds about one and one-half (1½) inches apart on posterior surface of the right leg at the junction of the distal and middle thirds."*

b) *The minor plaintiff was given sulfanilamide; and*

c) *Defendants permitted their dogs wrongfully and negligently to go at large without being properly guarded or confined.*

[1] This proposition is untenable.

a) Dr. Herbert L. Herscher who attended the injured plaintiff testified as follows:

"I can't recall the exact location of each laceration unless I have my notes because it is impossible for a physician to note the location which is unimportant in treatment. This girl came to the office with a bruise on her right elbow, laceration about two and one-half (2½) inches long on the calf of her leg, about two and one-half (2½) inches long on the lateral side of the leg below the knee, laceration about one (1) inch long in the medial side of the right leg, two (2) small lacerations which connected under the skin half-way from the ankle to the middle third of the leg. A deep laceration to the left of the vagina and a small abrasion of the left leg. That is the extent of her injuries."

The foregoing testimony clearly sustains the first finding which defendants question.

b) Dr. Herscher also testified:

"We gave this little girl an anaesthetic, cleansed these wounds thoroughly and did the proper amount of removal of dead tissue, sutured the lacerations and inserted

drains in the other ones, gave the girl tetanus antitoxin to prevent lockjaw, sent her home with her leg elevated and administered sulfanilamide."

This testimony sustained the second finding attacked by defendants.

c) Under the so-called Dog Bite Statute of 1931* the owner of any dog which bites a person who is lawfully in a public or private place is liable for any damage suffered by the injured party regardless of whether the owner of the dog has wrongfully or negligently permitted his dog to be at large without being properly guarded.

[2] It is also settled that if a judgment is supported by findings which are unobjectionable, findings on immaterial issues which are unsupported by evidence do not constitute grounds for reversal of the judgment. (*Martinelli v. Luis*, 213 Cal. 183, 185, 1 P.2d 980; *Shreve & Co. v. McGinnis*, 7 Cal.App.2d 243, 245, 45 P.2d 364; *Grenshaw v. Roy c. Seeley Co.*, 129 Cal. App. 627, 633, 19 P.2d 50.)

In view of the foregoing rules it is unnecessary to consider whether there is substantial evidence to sustain the third finding questioned by defendants.

Second: *The trial court erred in excluding testimony proffered by defendants which would have tended to show that defendants' dogs were not vicious.*

[3] This proposition is also untenable.

Under the Dog Bite Statute of 1931,* supra, the (1) former viciousness of a dog causing injuries, or (2) owner's lack of knowledge of such viciousness, is immaterial. (See statute cited in the footnote. See also *Delay v. Braun*, 63 Cal.App.2d 8, 146 P.2d 32.

In view of the provisions in the statute the trial court's ruling was correct.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

65 Cal.App.2d 25

HILL v. FOWBLE.

SAME v. WHITTENTON et al.

Civ. 3305.

District Court of Appeal, Fourth District, California.

June 21, 1944.

Hearing Denied Aug. 17, 1944.

1. Automobiles ⇨19

To complete a sale of a motor vehicle to a dealer who holds it for resale, there must be bona fide contract of sale, indorsement and delivery of ownership certificate and delivery of the motor vehicle. Vehicle Code, §§ 178, 180, St.1935, pp. 115, 116; § 186, St.1941, p. 2095; Civ.Code, § 1763(1, 3).

2. Bailment ⇨11

Where personalty is damaged through negligence of bailee, loss falls on owner who may recover his damages from the bailee.

3. Contracts ⇨170(1)

The practical construction placed on a contract by parties, by their conduct and actions in executing it, is strong evidence of what was intended by its provisions.

4. Appeal and error ⇨996

Where trial judge has drawn reasonable inference from competent evidence, appellate court is not permitted to draw a contrary inference in order to reverse judgment.

5. Appeal and error ⇨931(1)

On appeal it is duty of reviewing court to draw such reasonable inferences from evidence as support the judgment.

6. Automobiles ⇨244(32)

Where owner desiring to trade old automobile in on new model and to take delivery at factory gave friend authority to complete details of deal and to use old automobile during his absence, owner-

A person is lawfully upon the private property of such owner within the meaning of this act when he is on such property in the performance of any duty imposed upon him by the laws of this state or by the laws or postal regulations of the United States of America, or when he is on such property upon the invitation, express or implied, of the owner thereof." (Vol. 1, Deering's General Law of 1931, page 174, Act 384a.)

*The statute referred to reads thus: "Liability of owner of dog. The owner of any dog which shall bite any person while such person is on or in a public place, or lawfully on or in a private place, including the property of the owner of such dog, shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness.

ship certificate was indorsed and delivered to dealer, after delivery had been taken of new automobile friend had accident with old automobile and sale of two automobiles was finally made under new contract executed after accident, evidence sustained finding that title had not passed from original owner at time of accident, and therefore original owner was liable for friend's negligent operation of automobile. Vehicle Code, §§ 178, 180, St. 1935, pp. 115, 116; § 186, St. 1941, p. 2095; Civ. Code, § 1763(1, 3).

7. Appeal and error ☞ 1056(1)

Where buyer of new automobile had agreed to turn in old automobile and action presented issue whether buyer or dealer was owner of old automobile at time buyer's friend driving old automobile had accident, error, if any, in excluding testimony that friend was willing to turn old automobile over to dealer at any time dealer desired after new automobile had been delivered to buyer at factory was without prejudice in view of fact that her willingness had been made perfectly plain to the court.

Appeals from Superior Court, San Diego County; Edward J. Kelly, Judge.

Personal injury action by Cynthia C. Hill against James R. Fowble, Jr., Dorothy Boyer Fowble, Carl L. Whittenton and Glenn Pearson, both individually and as copartners doing business as Pearson Motor Company. From a judgment for plaintiff, James R. Fowble, Jr., appeals, and from judgment in favor of Carl L. Whittenton and Glenn Pearson individually and as copartners, the plaintiff appeals.

Affirmed.

C. Rupert Linley and Clarence Harden, both of San Diego, for appellant and respondent Cynthia C. Hill.

Paul Nourse, of Los Angeles, for appellant James R. Fowble, Jr.

Gray, Cary, Ames & Driscoll and John N. Cranston, all of San Diego, for respondents Carl L. Whittenton and Glenn Pearson.

MARKS, Justice.

There are two appeals from a judgment in favor of plaintiff against Dorothy Boyer Fowble in the sum of \$10,000, and James R. Fowble, Jr., in the sum of \$5000, and in favor of Carl L. Whittenton and Glenn

Pearson, copartners, doing business under the firm name of Pearson Motor Company, which we will refer to as Pearson, as we will refer to Dorothy Boyer Fowble as Miss Boyer. At the time of the accident here involved, Dorothy Boyer was engaged to James R. Fowble, Jr., and they were married shortly thereafter.

The action grew out of a collision between an automobile being driven by Miss Boyer and one in which plaintiff was riding. No question is raised as to the negligence of Miss Boyer nor to the amount of damages awarded.

The appeal of the plaintiff is from the portion of the judgment in favor of Pearson and is precautionary. Plaintiff states that she is satisfied with the present judgment, but if the judgment against Fowble should be reversed the portion thereof in favor of Pearson should be reversed so that its liability could be determined at a second trial.

Miss Boyer was driving a 1941 Ford at the time of the accident. It was owned either by Fowble or Pearson. She was driving it with the consent of the owner so the important question argued and to be decided is which one of these two defendants was the owner of the car on December 14, 1941, the date of the accident.

In October, 1941, Fowble was the owner of the Ford and desired to trade it in on a 1942 model. He and Miss Boyer went to the place of business of Pearson and discussed a trade. Fowble had to make a business trip east and desired to take delivery of the new car at Dearborn. The agent of Pearson was not certain of being able to make such delivery nor of being able to get the necessary priority for the sale.

Before Fowble left on his trip he gave Miss Boyer authority to determine the color of the new car, its upholstery and other such details. He left the 1941 Ford with her to use during his absence. There is no argument made that she was acting as his agent in driving the car at the time of the accident. Miss Boyer carried on certain negotiations for the purchase of the new car after Fowble left.

Pearson obtained the priority for the purchase of the new car and learned that delivery could be made in Dearborn. A purchase order was prepared for the new car which was delivered to Miss Boyer

will a bill of sale which was entirely in blank. The purchase order was dated November 19, 1941, and stated the price of the new car at \$1395.78, trade in value of the 1941 Ford at \$1180, and that the balance was to be paid under a conditional sales contract.

Miss Boyer sent these documents with the pink slip of the 1941 Ford to Fowble who signed and returned them all to her. She delivered them all to Pearson during the latter part of November, 1941. Miss Boyer testified concerning a conversation at that time with the representative of Pearson as follows: "We discussed that, and at that time it had been previously understood, and we discussed it, that I was to keep the '41 Ford until my fiancée returned with the 1942 Ford. We discussed that and it was thoroughly understood. They said it was all right with them."

The new Ford was delivered to Fowble in Dearborn on December 12, 1941. There was some communication by telephone between Miss Boyer and a representative of Pearson which she described as follows: "A. That was not what I called him about, but during the conversation I said, 'I will be coming to San Diego—that week end. I don't remember whether that call took place on Thursday, or when, but I knew that Saturday morning I was coming to San Diego and I told him at that time. I could turn in the car if they wanted it. He told me—asked me if I still needed the car. I told him yes, that I still needed it but that I would turn it in then. He said, 'Well, when will your fiancée be home?' I said, 'Probably—I am expecting him either on Sunday or Monday, the first of the week.' He said, 'Well, that is such a short time, you might as well keep it.'"

Miss Boyer drove the car from El Centro to San Diego on December 13th, and the accident happened the next day on the return trip.

The foregoing evidence is undisputed with the exception that the agent of Pearson denied giving Miss Boyer permission to use the 1941 Ford until Fowble returned from the east with the new car.

Shortly after the accident Fowble conferred with the representative of Pearson. This resulted in a new contract for the sale of the 1942 Ford and the trade in of the 1941 car. A second purchase order was executed apparently on December 17, 1941. The selling price of the new car was \$1395.78, as before, but no price was fixed

on the old car. The following appears in the order: "Payable Ford 41 conv. coupe to come in trade at agreeable amount." Under date of January 2, 1942, Pearson prepared a car invoice in which the trade in allowance for the 1941 Ford was fixed at \$465.68. The balance of the purchase price was borrowed by Fowble on a conditional sales contract.

Counsel for Fowble argue that the evidence is insufficient to support the finding that his client was the owner of the 1941 Ford at the time of the accident because, (1) he had made a bona fide sale of the car to Pearson, (2) the ownership certificate (pink slip) had been endorsed and delivered to Pearson, and (3) the car had been delivered to Pearson. Based on the foregoing premise counsel draws the conclusion that Pearson and not Fowble was the owner of the 1941 Ford at the time of the accident.

Fowble relies on sections 178, 180, 186 of the Vehicle Code, St.1935, pp. 115, 116, St.1941, p. 2095, as they existed at the time of the accident, and on subdivisions 1 and 3 of section 1763 of the Civil Code to support his contention. He argues that a bona fide sale of the 1941 Ford was made by the first contract signed in November, 1941; that the pink slip was regularly endorsed by Fowble and delivered to Pearson on November 23, 1941; that delivery was made by Miss Boyer, a third person in possession of the car, when she offered to deliver it to Pearson. (Sec. 1763, Civil Code.) It is argued that Miss Boyer was in possession of the car as bailee; that she attorned to Pearson before the accident by offering to deliver the car to Pearson as soon as it desired thus recognizing its title and that she held the car for the buyer which satisfied the requirements of subdivision three of section 1763 of the Civil Code and completed the delivery to Pearson. Plaintiff admits the endorsement and delivery of the pink slip in November, 1941, but disputes the completed sale under the contract of November, 1941, and argues that there was no delivery of the car prior to the accident.

[1] Counsel for all parties seem to agree that there are three elements necessary to complete a sale of a motor vehicle to a dealer who holds it for resale: (1) A bona fide contract of sale; (2) endorsement and delivery of the pink slip, and (3) delivery of the car. Fowble argues that as the Vehicle Code is silent on the ques-

tion of when the delivery of a motor vehicle is deemed complete we must look to the provisions of the Civil Code to decide that question. Plaintiff argues that the provisions of the Vehicle Code are complete and determine the manner in which title to a motor vehicle can be transferred and being legislation on a special subject control over the general provisions of the Civil Code.

The question is an interesting one but we find it unnecessary to decide it. We will assume, without holding, that the provisions of the Civil Code defining what constitutes delivery of personal property when sold, are applicable here.

It seems clear to us, as it did to the trial court, that the contract of November 1941, was never fully consummated by the parties. The sale of the two cars was finally made under another contract and upon entirely different terms from those set forth in the first contract. The selling price of the 1942 Ford was the same in both contracts. The trade in value of the 1941 Ford was fixed in the first contract at \$1180 and at \$465.68 in the second. The balance to be paid under a conditional sales contract was \$265 in the first contract, and \$1107.72 in the second. The instalments to be paid under the first contract were \$22.09 per month for twelve months, while they were \$61.54 per month for eighteen months under the second. The sale was completed under the second contract executed after the accident and not under the first.

[2] If Pearson was the owner of the 1941 Ford at the time of the accident and Miss Boyer was bailee, the law fixed the rights and remedies of the parties. Where personal property is in the possession of a bailee and it is damaged through the negligence of the bailee the loss falls upon the owner who may recover his damages from such bailee. *Baugh v. Rogers*, 24 Cal.App.2d 200, 148 P.2d 633. Thus if the contract of November, 1941, had been fully executed, Pearson was the owner of the 1941 Ford and the loss resulting from its injury in the accident would fall on Pearson with the right to recover its loss from Miss Boyer, its bailee. If that contract had not been executed, Fowble was the owner of the car on December 14, 1941, and the loss resulting from the damage to the 1941 Ford would fall on him with the right to recover that damage from Miss Boyer. By contract of the parties for-

mally made after knowledge of all of the facts the loss was placed on Fowble.

Section 1738 of the Civil Code provides as follows:

"(1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

"(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case."

[3-6] The practical construction placed on a contract by the parties, by their conduct and actions in executing it, is often considered strong evidence of what was intended by its provisions. *Skousen v. Herz*, 135 Cal.App. 116, 26 P.2d 498. In the instant case the conduct of the parties after the accident, in placing the damage loss to the 1941 Ford on Fowble, is at least some evidence showing an intention of the parties that title to the 1941 Ford was not to be passed by the first contract, so that Fowble and not Pearson was its owner on December 14, 1941. At least this conduct furnishes a foundation for the reasonable inference drawn by the trial court that title had not passed and that Fowble was the owner of the car at the time of the accident. Where the trial judge has drawn a reasonable inference from competent evidence, the appellate court is not permitted to draw a contrary inference in order to reverse the judgment. *Rovengo v. San Jose K. of C. Hall Ass'n*, 108 Cal. App. 591, 291 P. 848. On appeal it is the duty of the reviewing court to draw such reasonable inferences from the evidence as support the judgment. *Mah See v. North American Acc. Ins. Co.*, 190 Cal. 421, 213 P. 42, 26 A.L.R. 123. It follows that the finding by the trial court, to the effect that Fowble was the owner of the 1941 Ford at the time of the accident and that it was being driven by Miss Boyer with his consent, has sufficient evidentiary support and is final and conclusive here.

[7] Fowble urges error in a ruling made by the trial court in sustaining an objection made by counsel for Pearson to a question propounded to Miss Boyer, asking her if she was ready and willing to turn the 1941 Ford over to Pearson when she came to San Diego on December 13th.

It clearly appears from Miss Boyer's testimony that she was willing to turn the car over to Pearson at any time Pearson so desired, after the 1942 Ford had been delivered to Fowble at Dearborn. Assuming, without holding, that the ruling was error, it was without prejudice as the fact of her willingness was made perfectly plain to the court.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



65 Cal.App.2d 105

NAND SINGH v. CORBIN.

Civ. No. 7030.

Sac. No. 5641.

District Court of Appeal, Third District,
California.

June 27, 1944.

1. Appeal and error ⇐931(1)

On appeal from judgment in favor of plaintiff, evidence must be considered in its aspect most favorable to plaintiff, giving plaintiff the benefit of all favorable inferences therefrom.

2. Landlord and tenant ⇐323

Evidence supported finding that plaintiff was employed by defendant in production of rice crops on defendant's land, so as to entitle plaintiff to recover for his services rendered and for money advanced in payment of others for labor performed in production of the crops, as against contention that plaintiff was a sharecropper.

3. Appeal and error ⇐1010(1)

Where there is ample evidence to sustain trial court's findings and judgment, they will not be disturbed on appeal.

Appeal from Superior Court, Colusa County; W. T. Belieu, Judge.

Action by Nand Singh against George R. Corbin to recover for labor and services rendered and money advanced by plaintiff

to defendant. From a judgment for plaintiff, the defendant appeals.

Affirmed.

U. W. Brown, Neil J. Cooney, and John H. O'Donnell, all of Colusa, and Percy Napton, of Woodland, for appellant.

Duard F. Geis, of Willows, and Timothy I. O'Reilly, of San Luis Obispo, for respondent.

ADAMS, Presiding Justice.

Plaintiff and respondent, Nand Singh, brought this action, alleging that defendant was indebted to him for labor and services rendered and money advanced by him to defendant. His claim was that during the years 1935 to 1939, inclusive, he worked for defendant with his own farming equipment in preparing, irrigating and harvesting rice and other crops grown in part on lands owned by appellant and in part on lands leased by appellant from others, and that during said period he advanced moneys to appellant or for his benefit, mainly in payment for labor performed by others in the production of the rice crops.

Appellant and defendant, Corbin, denied plaintiff's allegations and claimed that during all of the years above mentioned his rice lands and those leased by him from others were leased to Nand Singh upon a share cropping basis, the agreement being that Nand Singh should furnish his own equipment and materials and the labor necessary for the production and harvesting of rice, and should pay to Corbin, as rental, one-third of the crops produced.

The action was tried by the court sitting without a jury, and resulted in a judgment for plaintiff. Defendant has taken this appeal on the sole ground that the evidence fails to support the findings that during the period under consideration plaintiff was employed by defendant and that the relationship of landlord and tenant did not exist between the parties during such years.

In support of his contentions appellant relies upon his own testimony that plaintiff had during previous years leased defendant's land, and that he leased it during the period in controversy; also upon evidence that plaintiff hired, paid and fed the help used in his operations, that plaintiff claimed an interest in the rice crops, that, when harvested, the rice was separated into piles of one-third and two-thirds thereof, that plaintiff bought fertilizer, and that defendant had taken title to plaintiff's engine as

security for plaintiff's indebtedness to defendant.

Respondent, in reply, points out evidence showing that appellant raised other crops besides rice upon his lands; that he leased lands from others for rice culture; that he warehoused all crops, including rice, solely in his own name; that he mortgaged and sold such crops; that he intermingled the proceeds of rice sales with those of other crops and with his other income in one bank account in his own name; that he kept all parity, conservation and benefit payments received from the Agricultural Adjustment Administration, though under the law such payments were required to be divided between landlord and tenant when that relationship existed; that defendant never kept books of account disclosing the relationship of landlord and tenant between himself and plaintiff, or giving plaintiff credit for any part of the proceeds of rice crops sold, and never accounted to plaintiff therefor; that he personally negotiated all contracts for harvesting, hauling and warehousing of the rice; that he frequently gave orders to men working in the rice; and that he never produced any book entries showing any charges against plaintiff for seed purchased by defendant, for interest on money borrowed by plaintiff, or for bills for threshing, sacks, twine, etc., which would have been chargeable to plaintiff had he been the owner of the crops.

We have read the entire record and the testimony shows without conflict that plaintiff owned and operated a tractor and other farming equipment and that he was experienced in farming, especially in the production of rice; that defendant was engaged in general farming including the growing of rice, alfalfa and barley, and that he owned certain lands and at times leased the lands of others for farming operations but that he had no adequate equipment for his operations. Plaintiff himself testified that during the years 1935 to 1939, inclusive, he plowed, dragged and disked rice land for defendant at an agreed price per acre, using his own equipment; that he also sometimes cultivated a portion of defendant's land for the production of barley or alfalfa or corn at an agreed price per acre; that he cut and bound rice with his own tractor and binder, and sometimes, but not always, threshed the rice; that he also repaired levees on defendant's lands at an agreed price per hour, using his own equipment; that at times, at Corbin's request, he

hired others to assist him, and advanced their wages at defendant's request; that he also had an agreement with Corbin to receive wages of \$125 per month for sowing and irrigating rice for a part of each year, plaintiff to use his own truck and pay for the gasoline used therein; that from time to time Corbin paid him sums of money, and sometimes bought groceries for him, and furnished him with butter; that he never had any written agreement with Corbin, that the latter kept the books and plaintiff did not. He also testified that in 1920 and 1921 he and his brother leased land from Corbin, but that neither of them ever had a lease thereafter; that in 1934 he had a settlement with Corbin and received a check for \$1,000, but that there had been no settlement since that time; that he was not a rice partner with Corbin.

While defendant denied the statements of plaintiff and testified that he leased his lands to plaintiff, he admitted that there was no written lease, that all the rice was stored in defendant's name and sold by him, that he deposited the proceeds of sales of the rice in his own bank account with his other funds, that at times he borrowed moneys on his warehouse receipts for the rice, that the books kept by him showed no entries in favor of plaintiff but only charges for moneys or goods advanced to plaintiff, and that he collected and kept all the soil conservation benefits resulting from the rice operations.

[1, 2] Considering the evidence in its aspect most favorable to plaintiff and giving him the benefit of all favorable inferences therefrom, as this court must do, it cannot be said that there is insufficient evidence to sustain the judgment of the trial court. *Macaulay v. Booth*, 53 Cal.App.2d 757, 761, 128 P.2d 386; *De la Motte v. Ricker*, 55 Cal.App.2d 226, 229, 130 P.2d 444; *High v. Pacific Gas & Electric Co.*, 52 Cal.App.2d 701, 709, 126 P.2d 911, 127 P.2d 588; *Nichols v. Southern Pacific Co.*, 58 Cal.App.2d 91, 97, 136 P.2d 332; *Norgard v. Estate of Norgard*, 54 Cal.App.2d 82, 89, 128 P.2d 566; *Porter v. Signal Trucking Service*, 59 Cal.App.2d 289, 293, 138 P.2d 753.

[3] Furthermore, the arguments made here were fully presented to the trial court on a motion for a new trial which, as stated by the trial court in denying said motion, was based on the sole contention that the evidence was insufficient to justify the decision and that the evidence preponderated

in favor of defendant. That court was in a better position than we are to judge of the credibility of the witnesses and the weight to be given to the evidence, and there being ample evidence to sustain its findings and judgment, they may not be disturbed on this appeal.

The judgment is affirmed.

PEEK, and THOMPSON, JJ., concur.



65 Cal.App.2d 89

**DULIN v. INDUSTRIAL ACCIDENT
COMMISSION et al.**
Civ. 14448.

District Court of Appeal, Second District,
Division 1, California.
June 27, 1944.

1. Workmen's compensation ☞1192

Under Workmen's Compensation Act authorizing Industrial Accident Commission to adopt rules of procedure, to regulate manner of representation of minors and incompetent persons, and to appoint a trustee or guardian ad litem to appear for such person, commission is vested with discretion to proceed through medium of a general guardian appointed by court, if one is or has been appointed, or to appoint a guardian by order of the commission to represent the guardian in the premises. St.1937, p. 292, § 5307.

2. Limitation of actions ☞72(1)

The provision of Code of Civil Procedure to effect that statutes of limitation do not commence to run until minor attains majority has reference only to actions mentioned in limitation provisions of such code. Code Civ.Proc. § 352.

3. Workmen's compensation ☞50

In determining whether six months' limitation on time for commencement of proceedings under Workmen's Compensation Act applied to a minor who at time of injury was the ward of a general guardian, provision that no limitation should run against a minor until a guardian or trustee is appointed was to be read with

provision authorizing Industrial Accident Commission to appoint a trustee or guardian ad litem to represent a minor. St.1937, pp. 292, 295, 296, §§ 5307, 5405, 5408.

4. Workmen's compensation ☞1212

Under provision of Workmen's Compensation Act that no limitation of time should run against a minor until a guardian or trustee was appointed and provision authorizing Industrial Accident Commission to appoint trustee or guardian ad litem to represent any minor, the exception to running of limitations applied only to appointment of a guardian or trustee by Industrial Accident Commission, and fact that a general guardian had been appointed for minor employee prior to injury did not render such employee subject to limitations provision of the act. St.1937, pp. 292, 295, 296, §§ 5307, 5405, 5408.

Proceedings under the Workmen's Compensation Act by Garry Dulin, a minor, etc., opposed by the workmen's compensation insurance carrier. To review an order and award of the Industrial Accident Commission and order denying the applicant's petition for rehearing, the applicant petitions for a writ of review.

Order and award and order denying petition for rehearing annulled and case remanded.

Gibson, Dunn & Crutcher, of Los Angeles, for petitioner.

Everett A. Corten, Atty. for Industrial Accident Commission, and Fred G. Goldsworthy, Asst. Atty., both of San Francisco, and G. W. Winbigler, of Los Angeles, for respondents.

DORAN, Justice.

In the answer to the petition herein for a writ of review of the action of the Industrial Accident Commission, respondent commission summarizes the undisputed facts as follows:

"On July 2, 1942, petitioner was employed at Alhambra, California, by Kay-Brunner Steel Products, Inc., a corporation. At that time petitioner was 18 years of age, having been born September 2, 1923. While so employed he sustained an injury to his right elbow which injury the respondent commission found occurred in the course of and arose out of his employment.

"On January 5, 1943 petitioner filed with the respondent commission his application for adjustment of his claim for compensation, in which application he was represented neither by guardian nor by attorney.

"At the request of the applicant, hearing upon his application was delayed. The matter came on for hearing on August 4, 1943, at which time the applicant was represented by counsel. Good cause appearing, the commission appointed the applicant's counsel, John Henry Peckham, Jr., guardian ad litem. The affirmative defense of the statute of limitations was pleaded by the defendants.

"Upon cross-examination by counsel for the workman's compensation insurance carrier the applicant disclosed that his mother had been appointed guardian of his person and of his estate prior to the time of his injury. He further testified that he lived with his mother and that she was aware of the fact of his injury.

"A certified copy of letters of guardianship was filed in evidence, disclosing that Jane Stimson Dulin had been appointed general guardian of the minor applicant for compensation, the letters having been issued by order of the Superior Court of Los Angeles County on February 8, 1938, and that the said letters had not been revoked and were in full force and effect on and subsequent to July 2, 1942, which was the date of injury.

"Upon this evidence the respondent commission made its order dismissing and discharging from the proceedings the guardian ad litem theretofore appointed. The commission concluded that at the time of injury, namely, July 2, 1942, the minor applicant had been under no legal disability because of his minority, since at that time, and subsequent thereto, he had been a ward of the general guardian appointed by the Superior Court. His application for compensation having been filed more than six months subsequent to the date of injury, and no compensation benefits having been provided nor any agreement entered into to provide such benefits, the commission held that the claim of the applicant was barred by the period of limitations provided in sec. 5405(a) of the Labor Code [St.1937 p. 295]."

The record reveals, in the petition for appointment of the guardian, that such proceedings were required in connection with the disposition of an interest in an

insurance policy accruing in favor of said minor Garry Dulin. The petition was dated September 1, 1937, and the order appointing the mother of said minor as guardian was dated October 6, 1937.

Respondent commission submits the question involved to be as follows: "Is a minor employee, who suffers an industrial injury during the period of minority, under legal disability within the meaning of Labor Code section 5408 when at the time of injury he is the ward of a general guardian, duly appointed qualified and acting?"

The controversy herein results from a disagreement as to the meaning and construction of section 5408 of the Labor Code of California, St. 1937, p. 296. Said section is as follows: "If an injured employee or, in the case of his death, any of his dependents, is under twenty-one years of age or incompetent at any time when any right or privilege accrues to such employee or dependent under this division, a general guardian, appointed by the court, or a guardian ad litem or trustee appointed by the commission or a commissioner *may*, on behalf of the employee or dependent, claim and exercise any right or privilege with the same force and effect as if no disability existed. No limitation of time provided by this division shall run against any person under twenty-one years of age or any incompetent *unless and until a guardian or trustee is appointed*. The commission may determine the fact of the minority or incompetency of any injured employee and may appoint a trustee to receive and disburse compensation payments for the benefit of such minor or incompetent and his family." (Italics added)

It is contended by petitioner "that a reasonable interpretation of Section 5408 of the Labor Code of the State of California and one which will not result in discrimination against any class of minors is that the provisions thereof are prospective and anticipate the appointment of a general guardian by a court or a guardian ad litem or trustee by the commission after a minor has received a compensable injury, for the purpose of representing him and pressing his rights with reference to that particular injury, and that under such an interpretation, the claim of your petitioner herein is not barred by Section 5404 of the Labor Code of the State of California [St.1937, p. 295]. It is further submitted that this construction is a liberal construc-

tion, conforms to the mandates of the Constitution of the State of California and the Legislature, and is entirely consistent with all other provisions of the Labor Code."

It is not disputed by respondent that either a general guardian or a guardian ad litem appointed by the commission may present the claim of an injured minor. But, it is argued by respondent, "In the event a guardian shall have been appointed by the court then no jurisdiction exists in the commission to appoint a guardian ad litem for the purpose of prosecuting before it a claim for workmen's compensation benefits," and, therefore, "it follows that since in this present case the court had appointed a guardian of the estate of the injured employee, Garry Dulin, and that the Letters of Guardianship had not been revoked and were in full force and effect at the time the injury was sustained and at all material times subsequent thereto, Garry Dulin was privileged, by and through his guardian, to prosecute his claim for compensation at any time within six months of date of injury. A guardian having been appointed and acting for Garry Dulin at the time of his injury, he was not at such time under legal disability, and the limitation of time provided by sec. 5405(a) of the Labor Code commenced to run from the date of injury in the same manner and to the same extent as it would had Garry Dulin been an adult when injured."

[1] The contention of the respondent commission cannot be upheld. There can be no conflict in jurisdiction between the court and the respondent commission with regard to proceedings before the commission affecting the claim of a minor. Section 5307 of the Labor Code St.1937, p. 292, provides that the commission may: (a) Adopt reasonable and proper rules of practice and procedure. (b) Regulate and provide the manner in which, and by whom, minors and incompetent persons are to appear and be represented before it. (c) Appoint a trustee or guardian ad litem to appear for and represent any minor or incompetent upon the terms and conditions which it deems proper. Reading the foregoing provisions of section 5307 in the light of the provisions of section 5408, supra, and bearing in mind the function of construction with regard to preserving the effectiveness of code provisions, the conclusion is inevitable that the commission is vested with a discretion to proceed through

the medium of a general guardian appointed by the court, if one is or has been appointed, or appoint a guardian by order of the commission, to represent the guardian in the premises.

[2] As to the effect of the statute of limitations, there can be no conflict here either. In connection with the subject of guardian and ward under the provisions of the Code of Civil Procedure, section 352 thereof provides in part as follows: "If a person entitled to bring an action, mentioned in chapter three of this title, be, at the time the cause of action accrued, either: 1. Within the age of majority; * * * The time of such disability is not a part of the time limited for the commencement of the action." Thus the general rule to the effect that the statutes of limitation do not commence to run until the minor attains majority is clearly established. But such rule has reference only to "an action mentioned in chapter three of this title." For a discussion of this subject, see *Aronson v. Bank of America N. T. & Savings Ass'n*, Cal.App., 65 P.2d 823.

Section 5405 of the Labor Code provides for the period of time within which proceedings may be commenced to obtain the benefits covered by the Workmen's Compensation Act. So far as it affects the status of petitioner herein, the limitation is six months from the date of injury. However, as noted above, section 5408 provides that "No limitation of time provided by this division shall run against any person under twenty-one years of age or any incompetent unless and until a guardian or trustee is appointed." Thus, with regard to the rights of minors accruing by virtue of the labor code, a disability is created, but not "unless and until a guardian or trustee is appointed".

[3,4] In order to determine the meaning and purpose of this last quoted language, it need be read only in connection with related provisions of the Labor Code. It should be emphasized at this point that section 5408 is concerned with three separate and distinct subjects. The first sentence determines who may present the claim of a minor; the second is concerned only with the subject of limitations and the third vests the commission with power to determine the fact of minority, etc. Both section 5408 and section 5307 appear in part four of Division Four of the Labor

Code under the heading "Compensation Proceedings." Read together, it is at once evident that the language, "Unless and until a guardian or trustee is appointed," refers to the "trustee or guardian" mentioned in paragraph (c) of section 5307, supra. This being true, and there having been no guardian or trustee appointed by the commission, petitioner was under no disability in the circumstances.

For the foregoing reasons, the order and award of the Industrial Accident Commission and the order thereof denying the applicant's petition for a rehearing are, and each of them is hereby, annulled; and the case is remanded for further proceedings before the commission in accordance with the views herein expressed.

YORK, P. J., and WHITE, J., concur.



65 Cal.App.2d 42

McCARTHY v. SUPERIOR COURT, IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

No. 12640.

District Court of Appeal, First District,
Division 1, California.
June 22, 1944.

I. Prohibition ⚡32

Petitioner for a writ of prohibition prohibiting superior court, sitting in probate, from enforcing by execution or contempt proceeding an order theretofore made, was not entitled to modification of the writ to include provision fixing and allowing damages, where petition for writ did not by allegation or prayer ask for damages. Probate Code, §§ 613-615.

2. Prohibition ⚡30, 35

The Code provisions authorizing prevailing party to recover damages and costs, with proviso that where respondent is a state, county, or municipal officer, all damages and costs awarded shall be recovered against state, county, or municipal corporation represented by such officer and not against such officer, do not apply to prohibition proceeding against superior court to

restrain erroneous exercise of judicial power in litigation to which state is not a party and in which it is not interested. Code Civ.Proc. §§ 1095, 1105.

3. Prohibition ⚡30, 35

Though judge of superior court is a "state officer", and common practice is to join him as party to mandamus or prohibition proceeding arising out of matter pending or determined in court over which he presides, it is superior court itself that is respondent in such proceedings, and superior court is not a "state, county, or municipal officer" within statute providing that prevailing party may recover damages and costs, but that where respondent is a state, county, or municipal officer, damages and costs shall be recovered against the state, county, or municipal corporation represented by such officer and not against the officer. Code Civ.Proc. §§ 1095, 1105.

See Words and Phrases, Permanent Edition, for all other definitions of "State, County or Municipal Officer" and "State Officer".

On petitioner's motion to modify writ of prohibition by adding thereto a provision fixing and allowing damages, including attorneys' fees and costs.

Motion denied.

Prior opinion 149 P.2d 55.

Albert J. McGuire, of San Francisco, for petitioner.

Lloyd J. Cosgrove and Herbert Chamberlin, both of San Francisco, for respondent.

KNIGHT, Justice.

On May 23, 1944, a peremptory writ of prohibition was granted by this court prohibiting the Superior Court in and for the City and County of San Francisco from enforcing by execution or contempt proceedings an order theretofore made by said court in the exercise of its probate jurisdiction in a proceeding instituted therein under the authority of sections 613, 614 and 615 of the Probate Code (McCarthy v. Superior Court, 149 P.2d 55); and on June 6, 1944, the applicant for the writ gave notice of motion to modify the decision granting the writ by adding thereto a provision fixing and allowing damages including attorneys' fees, and an allowance of costs amounting to \$337. It is petitioner's

contention that he is entitled to such allowances by virtue of the provisions of section 1095 of the Code of Civil Procedure, which by section 1105 of the same code are made applicable to prohibition proceedings.

Section 1095 reads as follows: "If judgment be given for the applicant, he may recover the damages which he has sustained, as found by the jury, or as may be determined by the court or referee, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue; and a peremptory mandate must also be awarded without delay; provided, however, that in all cases where the respondent is a state, county or municipal officer, all damages and costs, or either, which may be recovered or awarded, shall be recovered and awarded against the state, county or municipal corporation represented by such officer and not against such officer so appearing in said proceeding, and the same shall be a proper claim against the state, or county, or municipal corporation for which such officer shall have appeared, and shall be paid as other claims against the state, county or municipality are paid; but in all such cases, the court shall first determine that the officer appeared and made defense in such proceeding in good faith." From the foregoing provisions it will be seen that if the motion is granted the award of damages and costs must be paid by the state.

[1, 2] The motion in our opinion should be denied. The denial of the claim for damages might well be placed alone upon the ground that nowhere in his petition for the writ, either by way of allegation or prayer, did petitioner ask for damages. *Colthurst v. Fitzgerald*, 56 Cal.App. 740, 206 P. 471. However, aside from that point, and as to both damages and costs, we are of the opinion that the provisions of section 1095 have no application to a proceeding such as this, brought against a superior court to restrain the erroneous exercise of judicial power in litigation between private individuals, to which the state is not a party, in which it is in no way interested, and wherein it has no right of representation. In a certiorari proceeding brought against the superior court it was held that the successful petitioner was not entitled to invoke the benefit of the general code sections allowing costs to the prevailing party (*Platnauer v. Superior Court*, 33 Cal.App. 394, 165 P. 41); and

the provisions of the code sections there considered are equally as broad in their terms as section 1095. At the time the decision in that case was rendered, section 1038 (now section 1028 as amended) provided that when the state is a party and costs are awarded against it, they must be paid out of the state treasury; and in holding adversely to the contention there made by the petitioner the court said in part: "* * * this is not the ordinary action to which said sections of the code apply. It [the proceeding] was directed against a court of record for the purpose of reviewing a judicial determination of that tribunal. In such cases the court is not liable for damages or for costs."

[3] Moreover, the language used in framing section 1095 supports the view above expressed. As will be noted, the right to damages and costs thereunder is made available "in all cases where the respondent is a state, county or municipal officer * * *"; and while it is true that a judge of the superior court is deemed to be a state officer and the common practice is to join him as a party to a mandamus or prohibition proceeding which has arisen out of a matter pending or determined in the court over which he presides, it is the tribunal itself, the superior court, that is the respondent in the mandamus or prohibition proceeding, and the writ if issued is directed against the superior court. The real respondent is the court, and it is not a "state, county or municipal officer" within the meaning of section 1095.

Where the state is the real party in interest to the special proceeding or to the litigation out of which such proceeding has arisen, and the state is represented therein by a state officer appearing in behalf of the state, a different situation is presented; but it is inconceivable that the Legislature ever intended that the state should be held liable in damages and for costs for the erroneous exercise of judicial power by a court in hearing and determining litigation between private individuals to which the state is not a party, in which it has not the slightest interest, and has no right of representation.

In support of the motion, petitioner relies mainly on the cases of *Gould v. Moss*, 158 Cal. 548, 111 P. 925; *Union Trust Co. v. Superior Court*, 13 Cal.2d 541, 90 P.2d 582, and *Ringel v. Superior Court*, 56 Cal. App.2d 334, 132 P.2d 516. But the precise point here presented was not in those cases.

considered or decided. All that was decided therein was that after the judgment or decision of a reviewing court has become final it is not subject to alteration or modification. In each of those cases the party seeking to invoke the provisions of section 1095 filed his motion after the judgment or decision had become final, and it was upon that ground the motion in each case was denied.

The motion is denied.

PETERS, P. J., and WARD, J., concur.



PHILLIPS et al. v. TRUSHEIM et al.
Civ. 3331.

District Court of Appeal, Fourth District,
California.

June 26, 1944.

Rehearing Denied July 19, 1944.

Hearing Granted Aug. 24, 1944.

1. Judgment ⇨518

A seasonable motion to vacate judgment is a direct attack upon the judgment.

2. Judgment ⇨304, 355

Ordinarily, trial court for the purpose of correcting judicial errors may not set aside or amend a judgment previously entered by it, but entry of judgment in disregard of a statute forbidding its entry is in the nature of an inadvertent rather than a judicial error, and may be corrected by court which entered judgment.

3. Judgment ⇨346

A judgment which is erroneous in the sense that it ought not to have been entered at all against a particular party or under certain circumstances may be set aside on a motion timely made for that purpose.

4. Appeal and error ⇨4

Dismissal and nonsuit ⇨65

Judgment ⇨141

The duty imposed by statute of dismissing an action where no answer has been filed and plaintiff has failed to have judgment entered within three years after service of summons must be exercised by court on its own motion if defendant does not request such action, and error in en-

tering judgment in disregard of such statute may be corrected on appeal or on timely motion to set aside the judgment. Code Civ.Proc. § 581a.

5. Judgment ⇨141

Trial court had jurisdiction on motion filed within time allowed for appeal to vacate as against nonanswering defendant a judgment entered upon his default and written stipulation between plaintiffs and other defendants, where judgment was entered more than three years after service of summons on nonanswering defendant in disregard of statute requiring court under such circumstances to dismiss the action. Code Civ.Proc. § 581a.

6. Dismissal and nonsuit ⇨45, 63

Statute authorizing court in its discretion to render judgment against one of several defendants, leaving action to proceed against other defendants where a several judgment is proper, does not limit application of statute requiring dismissal of action where defendant has not answered and plaintiff has failed to have judgment entered within three years after service of summons to cases in which no defendant has filed an answer, but where there are several defendants, dismissal is required as to any defendant who has not answered, but only as to him. Code Civ.Proc. §§ 579, 581a.

7. Stipulations ⇨17(2)

That plaintiffs entered into stipulation for judgment with certain defendants fixing one boundary of land in belief that they were obtaining valid judgment against nonanswering defendant fixing boundary on the other side, did not preclude vacation of judgment as against nonanswering defendant on ground that it was not entered within three years after service of summons on him. Code Civ.Proc. § 581a.

8. Stipulations ⇨17(2)

Stipulation for judgment between plaintiffs and certain defendants should not bind nonanswering defendant who was not a party to such stipulation.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by William E. Phillips and wife against Alvin A. Trusheim and others to quiet title to realty. From an order vacating judgment as to named defendant en-

tered upon his default and dismissing the action as to him, plaintiffs appeal.

Order affirmed.

Vincent Whelan, of San Diego, for appellants.

Lindley & Higgins, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order vacating a judgment as to one of the defendants and dismissing the action as to him. The plaintiffs owned 80 acres of land in San Diego County. The defendant Trusheim owned 80 acres adjoining this property on the east, and the defendants Caldwell owned 80 acres adjoining it on the west. While this action was quiet title in form its purpose was to determine the east and west boundaries of plaintiffs' property.

The complaint was filed on December 10, 1938. The defendants Caldwell filed an answer on December 15, 1938. The default of defendant Trusheim was entered on January 6, 1939. For some reason another return of service on him was made and his default again entered on March 30, 1939. The defendant Trusheim was adjudged an incompetent and a guardian appointed on February 2, 1940. On June 28, 1940, there was filed on his behalf a notice of motion to vacate his default based upon the grounds named in section 473, C.C.P. This was accompanied by a proposed answer. Not only was this filed more than six months after the entry of the default, but the motion was never made in court and no permission was ever obtained to file the proposed answer.

Nothing having been done in the meantime a judgment in favor of the plaintiffs was entered on September 25, 1942, based upon a written stipulation between the plaintiffs and the defendants Caldwell, and upon the default of the defendant Trusheim. The judgment defined the boundaries of the plaintiffs' property and quieted title against all of the defendants as to the property so defined and described. A writ of possession was then issued against the defendant Trusheim and served.

On November 12, 1942, the defendant Trusheim filed notice of a motion to recall and quash the writ of possession, to vacate the judgment that had been entered and to dismiss the action as to him. The hearing of this motion was continued from time to time. An amended notice of motion was

filed setting forth as additional grounds therefor that the court had neither power nor jurisdiction to enter a judgment against Trusheim at the time of its attempted entry, and that more than three years had then elapsed since the service of summons on him. The motion was finally heard on affidavits and on May 13, 1943, the court made and filed an order granting the motion, vacating the judgment as to the defendant Trusheim and dismissing the action as to him. This order was based upon findings that summons was served on Trusheim on March 12, 1939; that his default was entered on March 30, 1939; that no answer had been filed on his behalf; that the plaintiffs had failed to have a judgment entered within three years after the service of summons on him; and that the judgment was entered more than three years after the service of summons on this defendant. From the order so made the plaintiffs have appealed.

The appellants contend that this motion could not have been granted under section 473, C.C.P., since it was made too late and was not accompanied by a proposed answer, that the trial court had jurisdiction to enter judgment against a defaulting defendant more than three years after he was served with a summons, and that since the court had such power any errors which appear could not be attacked by a motion to set aside a judgment made on the ground that the court lacked jurisdiction to enter the judgment. In making the latter contention the appellants ignore the fact that the order in question was not based upon any lack of jurisdiction in entering the judgment, but was based on the ground that the judgment was entered after three years had elapsed from the time summons was served on the respondent.

[1-3] It may be conceded that this motion could not have been granted under section 473, C.C.P. *Hunt, Mirk & Co., Inc., v. Hesperides Min. Co.*, 200 Cal. 382, 253 P. 317. It may be further conceded, for the purposes of this opinion, that a trial court has jurisdiction to enter such a judgment after the lapse of three years from the date summons was served. See, *Lynch v. Bencini*, 17 Cal.2d 521, 110 P.2d 662. But it is well settled that a seasonable motion to vacate a judgment is a direct attack upon the judgment. *City of Los Angeles v. Glassell*, 203 Cal. 44, 262 P. 1084; *Shelley v. Casa De Oro, Ltd.*, 133 Cal.App. 720, 24 P.2d 900. While, ordinarily, errors of

law are to be corrected on appeal from the judgment and the court having once entered its judgment may not set aside or amend it for the purpose of correcting judicial error (*Stevens v. Superior Court*, 7 Cal.2d 110, 59 P.2d 988), a distinction or exception is made under some circumstances as, for instance, where the judgment has been entered in disregard of a statute which forbade its entry. This is in the nature of an inadvertence, rather than a judicial error. Where a judgment is erroneous in the sense that it ought not to have been entered at all against a particular party or under certain circumstances it may be set aside on a motion timely made for that purpose. *Shelley v. Casa De Oro, Ltd.*, 133 Cal.App. 720, 24 P.2d 900; *Lynch v. Bencini*, 17 Cal.2d 521, 110 P.2d 662.

[4] The last paragraph of section 581a, C.C.P., provides that an action must be dismissed if summons has been served and no answer has been filed, where the plaintiff has failed to have judgment entered within three years after the service of summons. In discussing that provision and the duty there imposed upon a plaintiff the court said in *Lynch v. Bencini*, 17 Cal.2d 521, 110 P.2d 662, 668:

"When the plaintiff fails to perform that duty his rights are affected and a benefit is conferred upon the defendant by the provision that the court must dismiss the action. The duty thus imposed on the court, however, is not confined to where such action is requested by the defendant but is one which the court is required to exercise 'on its own motion.' This statutory provision is clearly intended to apply to cases where the defendant is not yet taking any steps for his own protection. Clearly, under the statute, it is error for the court to fail to perform this duty directly imposed upon it. While a judgment so entered may not be void for lack of jurisdiction the court's error in failing to perform that duty is one which may be corrected on appeal from the judgment, if taken within the statutory time. The duties and rights of the parties are still affected by the last paragraph of section 581a and the judgment itself is still subject to review on a direct and timely appeal. Assuming that the clerk had here a duty to perform in his ministerial capacity, and that he had no power to pass upon the effect of the last paragraph of section 581a, the court had both the power and the duty to do so, the matter was directly presented to it on timely motions

after judgment, and the matter is now properly here for review. Under such circumstances the error may be corrected and the judgment, entered and allowed to stand in disregard of the provisions of section 581a, should be reversed."

The appellants argue that the principles of the case just cited are not applicable here since in that case there was an appeal from the judgment. However, that case also involved an order refusing to set aside the judgment and that order was also reversed. In effect, it is argued that the respondent's rights here were limited to an appeal from the judgment or to a motion for a new trial. There could have been no motion for a new trial since no trial was had and the motion to set aside the judgment was an appropriate remedy which was available to the respondent.

[5] The motion here made was a direct attack upon the judgment, made well within the time allowed for an appeal and at a time when the court still had jurisdiction to act with reference to the judgment which had been improperly entered in disregard of a specific duty imposed by the statute. The court acted within its authority and in accordance with the duty placed upon it by the statute in the very matter which we are asked to review. We know of neither principle nor authority which compels an aggrieved party, under such circumstances as here appear, to refrain from seeking relief in the court where a judgment has been improperly entered and to confine himself to an appeal. Such a litigant should not be penalized because he has successfully sought relief in the trial court and thereby made unnecessary an appeal from the original judgment.

[6] The appellants further argue that the last paragraph of section 581a, C.C.P., seems to conflict with section 579, C.C.P., which provides that the court may, in its discretion, render judgment against one of several defendants, leaving the action to proceed against the others whenever a several judgment is proper. It is then argued that, in order to give full effect to section 579, C.C.P., the last paragraph of section 581a should be interpreted as meaning that such an action should be dismissed "only in a case where no defendant has filed an answer." To so hold would be to put something into that statute which was not placed there by the legislature. Under the terms of that statute the right there created in favor of a party who has

not appeared is made available to "any party interested," and where there are several defendants the language used would seem to make the provision applicable to any defendants who did not answer and to require a dismissal only as to such defendants.

It is further argued in this connection that the last paragraph of section 581a does not deprive the court of the discretion, conferred by section 579, to hold in abeyance the entry of judgment against a non-answering defendant until the action has been decided as to an answering defendant. If we assume this to be true, no such a situation here appears. If the appellants had attempted to have judgment entered, against the respondent, before the three years had expired and the court had denied their application on the ground that a several judgment was not proper, a different question might have been presented calling for a consideration of the contention thus advanced. In the instant case, the court did not hold the matter in abeyance, no discretion on the part of the trial court was interfered with, nothing occurred which prevented the plaintiffs from carrying out the duty imposed upon them by section 581a, and whatever else it does or does not do section 579 does not confer any discretion on the appellants, as plaintiffs in the action, which would authorize them to disregard section 581a.

[7,8] The appellants dwell at some length upon the equitable considerations involved and accuse the respondent of inconsistency and of seeking to avoid a trial on the merits. It does appear that with respect to the respondent this case should be tried on the merits, a result which would not follow if the appellants were to prevail. While the first application for relief under section 473 C.C.P., was made too late, the grounds and reasons given were such that the application could hardly have been denied if made on time. The appellants state that they are now at a disadvantage because they would not have agreed to the stipulated judgment as between them and the Caldwells had they not thought they were also getting a valid judgment against this respondent. The issues as to the two boundaries were not necessarily connected although the establishment of the correct boundary on one side might well make it easier to establish the correct boundary on the other side. If

the true boundary between the appellants' land and that of the Caldwells was correctly established by the stipulated judgment between those parties, the appellants will in no way be prejudiced in any subsequent action which they may bring to establish the boundary between their land and that of the respondent. On the other hand, if that boundary as fixed by the stipulation was not the true boundary on that side the agreement thereon ought not to affect the true boundary on the respondent's side and should not bind the respondent, who was not a party to that stipulation. If the equities were to be considered at all they tend to support the order as made by the trial court rather than the original judgment as entered.

The order appealed from is affirmed.

MARKS and GRIFFIN, JJ., concur.



65 Cal.App.2d 32

KORABEK v. WEAVER AIRCRAFT CORPORATION et al.

Civ. 3321.

District Court of Appeal, Fourth District,
California.

June 21, 1944.

Rehearing Denied July 19, 1944.

Hearing Denied Aug. 17, 1944.

1. Specific performance ⇐68

Jurisdiction of a court of equity to decree specific performance of a contract relating to personal property depends upon whether the breach complained of can be adequately compensated in damages. Civ. Code, § 3384.

2. Specific performance ⇐114(1)

A party who relies upon exception to general rule that equity will not decree specific performance of a contract respecting personal property must state in his pleadings the facts which bring his case within exception. Civ. Code, §§ 3384, 3387, 3422; Code Civ. Proc. § 526.

3. Action ⇐6

In giving declaratory relief a court has the powers of a court of equity.

4. Specific performance ⇨70

Where stock involved in contract providing for the transfer of certain shares of stock to plaintiff for the performance of certain services was stock in a new corporation and was of undeterminable value, upon breach plaintiff was entitled to specific performance of contract rather than money damages. Civ.Code, §§ 3384, 3387, 3422; Code Civ.Proc. § 526.

5. Evidence ⇨383(6)

Ordinarily a corporation, in the absence of any countervailing proof, is bound by the facts recited in its resolution.

6. Contracts ⇨88

The burden of showing want of consideration sufficient to support a written instrument lies with the party seeking to invalidate it. Civ.Code, §§ 1614, 1615.

7. Appeal and error ⇨1010(1)

Trial court's finding, upon substantial evidence, that a corporation's agreement to issue stock to plaintiff was for a valuable consideration, could not be disturbed on appeal. Civ.Code, §§ 1614, 1615, 3422; Code Civ.Proc. § 526.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Fred Korabek against Weaver Aircraft Corporation and others for declaratory judgment to plaintiff's rights with reference to certain stock of defendant corporation. From a judgment for plaintiff, defendants appeal.

Affirmed.

Dempster McKee and Edgar A. McNulty, both of San Diego, for appellants.

Sloane & Steiner, of San Diego, for respondent.

GRIFFIN, Justice.

In an amended complaint plaintiff seeks declaratory relief and alleges that prior to September 30, 1940, plaintiff and defendant Weaver were interested and active in procuring the incorporation of the Weaver Aircraft Corporation; that thereafter plaintiff and all of the defendants above named became interested and active in procuring assets and working capital for said corporation; that plaintiff furnished his services and ability in arranging for the incorporation and in negotiating for the "J. L. Weaver License Agreement Weaver

Airplane Motors'" for the benefit of such corporation, and advanced the sum of \$400 in cash for expenses of incorporation and procuring permit and issuance of stock, payment of franchise tax, etc.; that on September 30, 1940, the Weaver Aircraft Corporation was duly incorporated and organized.

Defendants' answer to the amended complaint sets out a "Memorandum of Promotion Agreement" signed by the four promoters on October 21, 1940. It reads:

"That the undersigned, J. L. Weaver, Tom Keck, Fred Korabek and Robert R. Dunn, Jr., have been engaged and are still associated in promoting a California corporation now holding a charter under the name of Weaver Aircraft Corporation; that they have respectively advanced things of value, including cash, development ideas, personal services and experience, to the welfare of said corporation and for the benefit of its future stockholders, and that they, and each of them, will continue to use their best efforts, aside from their other occupations, and aside from positions in said corporation, to put it on a sound financial and production basis.

"In view of the contribution by the respective parties heretofore made and expected of them hereafter, said parties have agreed that such portion of the capital stock of said corporation as may be allotted and authorized as promotion stock shall be apportioned amongst them in the following ratio:

"J. L. Weaver	50%
"Tom Keck	12-1/2%
"Fred Korabek	25%
"Robert R. Dunn, Jr.	12-1/2%

"Upon issuance of any and all promotion stock, the same shall be made subject to a voting trust on behalf of the owners thereof upon the usual conditions and for a term of years.

"It is contemplated that 49,500 shares of the original block of 99,000 shares to be issued shall be set apart as promotion stock; but whether the same be more or less than the contemplated amount, division thereof shall be made in the proportions specified and stock shall be issued accordingly to the undersigned, their heirs, assigns, or legatees.

"It is contemplated that Tom Keck and Robert R. Dunn, Jr., will receive 5,000 shares of the remainder of such 99,000

shares as payment for which the sum of \$5,000 now posted by them shall comprise full consideration. Said sum is to be available for corporation requirements pending receipt of proceeds from general stock sales, but shall be drawn only upon checks signed by said Keck and Dunn as officers of the corporation. Until authorized issuance of such 5,000 shares upon such consideration, said sum of \$5,000.00 shall constitute a loan payable by the corporation sixty days after demand."

On October 22, 1940, the defendant corporation, through its Board of Directors, adopted a resolution which reads in part as follows:

"It is further resolved that this corporation accept and take advantage of the services heretofore rendered and arrangements heretofore made by John L. Weaver, Tom Keck, Robert R. Dunn, Jr., and Fred Korabek.

"It is further resolved that the fair value to the corporation in monetary terms for such 'License Agreement Weaver Airplane Motor' and such services and arrangements, is the sum of \$49,500 and that upon obtaining proper authority therefor 49,500 shares of the capital stock of this corporation to be issued to said J. L. Weaver, Tom Keck, Robert R. Dunn, Jr., and Fred Korabek in consideration of the matters hereinabove recited, such shares to be accepted by them in lieu of the 49,500 shares and the 7,000 shares referred to in the resolution of the board of directors of this corporation adopted October 7, 1940, and to constitute full payment of all obligations of the corporation to such persons, and either of them."

On October 22, 1940, the following agreement was signed by plaintiff Korabek and defendants Weaver, Keck and Dunn:

"Designation of Share Allotment

"The undersigned hereby agree upon and request authority for issuance of stock of Weaver Aircraft Corporation as follows:

"Promotion stock:

"To John L. Weaver	24,750 shares
Fred Korabek	12,375 "
Tom Keck	9,900 "
Robert R. Dunn, Jr.	2,475 "

In satisfaction of \$5,000 advance to the corporation Tom Keck 4,000 shares; Robert R. Dunn, Jr., 1,000 shares."

On October 24, 1940, pursuant to application, the Commissioner of Corporations issued to Weaver Aircraft Corporation a permit. It recites that the corporation was organized for the purpose of engaging in the business of manufacturing and selling airplane parts, etc.; that the corporation will receive a license from Weaver to manufacture and sell an airplane engine known as the "Weaver Pancake Airplane Motor"; that Weaver filed application for letters patent. It then authorizes the issuance of 49,500 shares of promotion stock as consideration for the license agreement described in the application and for promotional and other services rendered by the promoters for applicant and reserves the right to applicant to issue to them under future permits additional shares when and as authorized by the commissioner, as final consideration for said license agreement and for services. Additional conditions were imposed, namely, that none of the shares shall be sold or issued but shall be placed in escrow pending further order of the commissioner; that they shall execute an agreement with the corporation to waive any right to participate in any distribution of assets (except dividends) while said shares are held in escrow and until all other stockholders who have paid cash or its equivalent for their shares shall have received the return of the full amount of the purchase price. The amended complaint then alleges that thereafter the defendant corporation sold and issued to Keck and Dunn an aggregate of 5,000 shares and sold additional shares, at par, for purposes recited in the application. Plaintiff then alleges that all conditions of the permit have been complied with except that defendants failed and refused to issue certificates evidencing the shares of stock to which he is entitled; that the corporation, at all times mentioned, was under the control of Weaver, Keck and Dunn, as a majority of the Board of Directors; and that an actual controversy exists as to the legal rights and duties of the parties and as to the promotion stock. Plaintiff then prays for a declaration of his rights and that the defendant corporation be required to issue to plaintiff 12,375 shares and deposit them with the escrow holder designated, in accordance with the terms of the permit, and asks for general relief.

Defendants admit generally the allegations of plaintiff's complaint, admit the exe-

cution of the instruments above mentioned, and in addition thereto allege that the Weaver Aircraft Corporation, on October 7, 1940, adopted a further resolution as follows:

"Resolved that the officers of the corporation make immediate application to the Division of Corporations, Department of Investment, State of California, for leave to issue 99,000 shares of capital stock of Weaver Aircraft Corporation, such shares to be issued subject to the approval of the Corporation Commissioner for the following purposes:

"49,500 shares to J. L. Weaver, Tom Keck, Robert R. Dunn, Jr., and Fred Korabek, in consideration for their services rendered and to be rendered in behalf of the corporation and its affairs;

"7,000 shares to J. L. Weaver in exercise of the option to acquire all manufacturing and distribution rights of Weaver Pancake Airplane Motor;

"42,500 shares to general purchasers at \$1.00 per share, cash."

They admit that the corporation sold and issued to Keck and Dunn 5,000 shares and that the corporation issued 23,710 additional shares; and admit that the license agreement described in the application was executed, filed and recorded in the patent office. As a defense to plaintiff's amended complaint they allege that on October 21, 1940, the Weaver Aircraft Corporation entered into a separate "Fiscal Agency Agreement" with the plaintiff reciting that the corporation contemplates issuance of 42,500 shares of its capital stock, at a par value of \$1 per share to the general public; that the corporation is in need of the services of an agent; that said Fred Korabek, being experienced, qualified and licensed for such purposes, undertakes to sell the same promptly to the public and bear all expenses in connection therewith; that as compensation therefor the corporation will pay him as said agent a commission of 15 per cent with certain exceptions. Exclusive rights of such sales were given him for a period of six months, but in the event that during such period he did not produce sales to the satisfaction of the directors of the corporation they might appoint another sales agent on like terms. It is then alleged in the answer that as part of the consideration for the issuance to the plaintiff of any promotion stock, he was to perform all of

the terms and conditions of the fiscal agency agreement; that plaintiff sold only 3,635 shares of the capital stock of the corporation and that by reason of his failure to make sales in the amount agreed upon the corporation had to borrow large sums of money to carry on its business and that they subsequently, on December 30, 1940, adopted a resolution cancelling his authority as fiscal agent, to take effect January 6, 1941; and that the plaintiff failed to comply with the terms of the "Memorandum of Promotion Agreement" above mentioned.

The trial court then found that on October 22, 1940, the corporation, "*for valuable consideration received by it*", promised and agreed to issue to plaintiff and the other defendants 49,500 shares of its capital stock as promotion stock, upon approval of the commissioner of corporations; that on October 22, 1940, "*for valuable consideration*" the parties agreed upon a division of the 49,500 shares, as indicated in their written agreement; that the corporation commissioner issued to the defendant corporation its permit as above described; that the conditions of said permit have been fully complied with and that the corporation selected and designated an escrow holder approved by the commissioner; that thereafter the corporation sold and issued to Keck and Dunn 5,000 shares, and sold and issued additional shares at par for cash in the amount of 23,710; that the corporation has failed to issue any of the 49,500 promotion shares referred to in the permit although it is now entitled to issue such promotion shares in the amount of 28,710; that plaintiff has rendered to said corporation and to said individual defendants the full consideration entitling him to 25 per cent of the promotion stock now issuable and hereafter to become issuable; that the corporation is under the control of defendants Weaver, Keck and Dunn, as a majority of the Board of Directors thereof. The court then concluded that the corporation is authorized and obligated to issue 28,710 shares of promotion stock; that 7,177½ shares thereof should be issued forthwith in the name of Fred Korabek and the certificate thereof should be placed in escrow pursuant to the terms of the permit; that whenever said corporation, in accordance with the terms of such permit, is authorized to issue additional shares of promotion stock, it should issue the same and that 25 per cent thereof should be

issued in the name of plaintiff and deposited with the escrow agent.

From this judgment defendants appeal.

In the opening brief defendants raise only two questions. It is first claimed that the form of judgment is in effect either a mandatory injunction or a decree for specific performance, and that therefore the trial court is not authorized, upon the showing that by contract a person is entitled to certain shares, to require, by mandatory provisions of the judgment, the issuance of such shares; second, that plaintiff is not entitled to specific performance of a contract to transfer corporate stock, when there is no pleading or proof that the breach of such contract can be adequately compensated for in damages or in the case where such shares would give control and there is no other stock available. Citing Sec. 3422, Civ.Code; Sec. 526, Code Civ.Proc.; *McGarvey v. Hall*, 23 Cal. 140; *Wehen v. Lundgaard*, 41 Cal.App.2d 610, 107 P.2d 491; *Dunner v. Hoover*, 43 Cal.App.2d 753, 111 P.2d 737; and *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17. The cases cited state that as a general rule equity will not decree specific performance of a contract respecting personal property. Each case cited, however, recognizes that there are exceptions to the general rule where the remedy at law is not adequate. Sec. 3384, Civ.Code. It likewise appears in some of the cited cases, that by reason of the provisions of section 3387 of the Civil Code a presumption prevails in cases of a contract for the transfer of personalty that money damages will provide adequate compensation for a breach.

[1,2] In *Krouse v. Woodward*, 110 Cal. 638, 42 P. 1084, cited by defendants, the court held that specific performance of a contract for the return of corporate stock will be decreed if there is no other stock available or if the stock has no market or ascertainable value and it was purchased for investment with a view to anticipated increase in value. It is the general rule that the jurisdiction of a court of equity to decree specific performance depends upon the question whether the breach complained of can be adequately compensated in damages, and of course a party who relies upon an exception to a general rule must state in his pleadings the facts which bring his case within it. *Senter v. Davis*, 38 Cal. 450; *Dougherty v. Creary*, 30 Cal.

290, 89 Am.Dec. 116; The cases where a delivery of stock is compelled, instead of money damages for its withholding, are almost innumerable, and courts of equity have never hesitated to compel a transfer of stock held by a person in trust for another. *Senter v. Davis*, supra; *Treasurer v. Commercial Coal Mining Co.*, 23 Cal. 390. The facts of the last-cited cases are so similar to the facts in the present case that we adopt the reasoning there expressed and the conclusion there reached. It is there said, quoting from *Justice Story*, in his work on *Equity Jurisprudence* (Vol. 2, sec. 717):

"And the true reason why a contract for stock is not now specifically decreed, is, that it is ordinarily capable of an exact compensation. But cases of a peculiar stock may easily be supposed, where courts of Equity might still feel themselves bound to decree a specific performance, upon the ground that from its nature it has a peculiar value, and is incapable of compensation by damages. Indeed, it has been thought, that on contracts for stock a bill ought now to be maintainable generally in equity for a specific delivery thereof, upon the ground that a Court of Law cannot give the property, but can only give a remedy in damages, the beneficial effect of which must depend upon the personal responsibility of the party."

[3] Our Supreme Court has recently enunciated the rule that "in giving declaratory relief a court has the powers of a court of equity". *City of Los Angeles v. City of Glendale*, Cal.Sup., 142 P.2d 289, 297.

[4] The facts of the instant case come well within the exceptions to the rule as stated in *Tillotson v. Findley*, 87 Cal.App. 654, 661, 262 P. 438, 441, as follows:

"Respondent claims that plaintiffs have mistaken their remedy in that they should have proceeded in an action in damages for breach of covenant to convey personal property. Counsel correctly states the law that: 'In general, a court of equitable jurisdiction will not decree the transfer of personal property which has a market value and no special or unique value.' But the record reveals that this company, at the time this case was tried, was a struggling corporation with its success or its degree of success or failure as yet unproved. The facts in the case do not bring it under the principle stated in section 3387, Civil Code."

The stocks referred to in the agreement in the instant case were of undeterminable value and before they were marketable, many conditions attached. The facts of the instant case come well within the exception above stated. See also *Fleishman v. Woods*, 135 Cal. 256, 260, 67 P. 276.

It has been well established in this state that if the facts alleged in the pleadings and those proved are sufficient to bring a case within the exception and show inadequacy of legal remedy that is enough. *Wait v. Kern River Mining, etc., Co.*, 157 Cal. 16, 23, 106 P. 98. The pleadings and facts established in the present case are sufficient to authorize the judgment given. The cases cited sufficiently dispose of the two questions presented in the opening brief.

Appellants' closing brief, due to the untimely death of Dempster McKee, Esq., able counsel for appellants, was prepared by other counsel. In it, the additional contention is made that there was no consideration passed to the corporation for the contract for delivery of the promotion stock; that there was no consideration given to the corporation under its resolution agreeing to deliver that stock, and that therefore the agreement was unenforceable in this action for declaratory relief. It is argued that according to the weight of authority, a corporation is not under any liability to pay for services rendered or expenses paid or incurred by the promoters in bringing it into existence, unless the charter or statute law otherwise provides, or unless the corporation, after it is formed, and for a sufficient consideration promises or covenants to pay therefor; and that a corporation should not be held bound in equity to deliver stock to a person unless the legal obligation so to do can be clearly shown, citing *Rockford Rock Island, etc., Ry. v. Sage*, 65 Ill. 328, 16 Am.Rep. 587; *Biggart v. Lewis*, 183 Cal. 660, 192 P. 437; *Pennell v. Lothrop*, 191 Mass. 357, 77 N.E. 842; and *Williston on Contracts*, Revised Ed. 893, et seq.; 18 *Corpus Juris Secundum*, Corporations, p. 547, §§ 144, 145. It is argued that the preceding authorities in summary hold that before a promoter can recover from a corporation for services performed prior

149 P.2d—56

to its corporate entity, he must plead and prove the existence of two binding agreements, one created before the corporate existence, and second, the agreement of the corporation, for a consideration, to compensate the promoter for his services.

[5-7] The evidence discloses, that mostly through plaintiff's efforts as a promoter, the corporation secured the exclusive license rights to "Weaver Pancake Airplane Motors", and "* * * options, commitments for valuable machinery and equipment * * * the services of skilled mechanics" arranged for, and tentative "orders for airplane parts and accessories" and "secured a valuable lease for the plant". The corporation accepted and took advantage of them and placed a monetary value thereon of \$49,500. In its resolution it recited all of these facts and "in consideration of the matters hereinabove recited" agreed to deliver the shares of promotion stock of the corporation in accordance with the permit to be thereafter issued. Plaintiff has complied with all of its terms. The resolution itself recites that a consideration was given. Ordinarily a corporation, in the absence of any countervailing proof, is bound by the facts recited in its resolutions. *Purser v. Eagle Lake L. & I. Co.*, 111 Cal. 139, 43 P. 523. Under sections 1614 and 1615 of the Civil Code a written instrument is presumptive evidence of a consideration and the burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it. *Toomy v. Dunphy*, 86 Cal. 639, 25 P. 130; *Creditors' Union v. Lundy*, 16 Cal.App. 567, 117 P. 624. In the instant case lack of or failure of consideration was not established. The trial court found, upon substantial evidence, that the corporation's agreement to issue the stock to plaintiff was for "valuable consideration". It was not conditioned upon plaintiff's fulfillment of the "Fiscal Agency Agreement" or any other agreement. That finding, therefore, cannot be disturbed on appeal.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

VINCENT v. McCOLGAN, Bank and Corporation Franchise Tax Com'r.

Civ. 12601.

District Court of Appeal, First District,
Division 2, California.

June 22, 1944.

Hearing Granted July 20, 1944.

Dismissed Jan. 22, 1945.

Taxation ¶104

Where situs of each active trust during 1936 was in San Francisco and all income received by nonresident from the various trusts was from securities and other intangible property, except for some real property in California, moneys received therefrom were moneys "derived from sources within this state" for income tax purposes. St.1935, pp. 1093, 1095, 1105, §§ 5, 7(f), 12(c).

See Words and Phrases, Permanent Edition, for all other definitions of "Derived from Sources within this State".

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

On petition for rehearing.

Petition denied.

Prior opinion 149 P.2d 83.

Robert W. Kenny, Atty. Gen., Hartwell H. Linney, Chief Asst. Atty. Gen., and James E. Sabine, Deputy Atty. Gen., for appellant.

McCutchen, Thomas, Matthew, Griffiths & Greene, of San Francisco, for respondent.

PER CURIAM.

The petition for a rehearing is denied.

The plaintiff complains because we did not mention or discuss Robinson v. McColgan, 17 Cal.2d 423, 110 P.2d 426, a case he had cited in his brief. He admits that case presented facts showing that therein the trust involved was a naked trust and not an active trust. In our decision we took pains to show that the case at bar involves two active trusts. It follows that authorities in point did not include cases involving naked trusts. Consequently we did not have occasion to cite and discuss any cases which involved naked trusts.

The plaintiff contends that the case at bar presents only a question of statutory con-

struction and that the statute makes no distinction between naked and active trusts. That is so. The statute in terms does not use either expression directly. But it uses the more general expression, income "derived from sources within this state". Having determined that moneys received from an active trust are moneys "derived from sources within this state", there was no occasion to go further and discuss moneys derived from naked trusts or other sources.

Hearing granted; TRAYNOR, J., not participating.

**LITVINUK v. LITVINUK.***

Civ. 14261.

District Court of Appeal, Second District,
Division 3, California.

June 22, 1944.

Rehearing Granted July 12, 1944.

1. Divorce ¶145

Defendant in divorce proceeding was not entitled to successive continuances until her attorney had finished another trial in which he was engaged, irrespective of the time it might take.

2. Divorce ¶165(3)

Where wife and son had come from Pennsylvania to contest husband's divorce suit, and wife was reluctant to testify in absence of her attorney who was engaged in a criminal trial, and court failed to question either wife or son concerning truth of husband's uncorroborated charges, refusal to vacate decree for husband, in view of foregoing facts and suggestion that Pennsylvania court had recently denied husband a divorce, was error. Code Civ.Proc. § 473; Civ.Code, § 130.

Appeals from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action for divorce by Paul Litvinuk against Anna Litvinuk. From an order denying defendant's motion to vacate decree for plaintiff, and from decree for plaintiff and order denying motion to re-

*For subsequent opinion see 150 P.2d 899.

open the case, and for a new trial, the defendant appeals.

Order denying motion to vacate decree reversed and appeals from decree and order denying motion to reopen the case, and for a new trial, dismissed.

A. P. Coviello, of Los Angeles, for appellant.

Ernest Best, of Los Angeles, for respondent.

SHINN, Justice.

Plaintiff brought this action for divorce, charging desertion and mental cruelty. Defendant, who resided in Pennsylvania, came to California, employed attorneys and filed an answer. In August, 1942, an order was made for the payment of \$25 fees to defendant's attorney and \$4 a week for the support of the 17-year-old son of the parties, who was residing with defendant. On October 6 defendant changed attorneys and employed one A. P. Coviello, who was then engaged in the trial of a criminal case in which his client, with many others, was charged with murder. Prior to that time the divorce trial had been set for March 15, 1943. On October 9 plaintiff served on defendant's first attorneys a notice of a motion to advance the case for trial; the motion was heard October 16 and the trial was advanced to November 23; on the latter date Mr. Coviello made a motion for a continuance on the ground that he was then actually engaged in the trial of the murder case. The motion was denied by a judge who was acting as presiding judge, the case was sent out to a trial department and, because of other engagements of the judge of that department, was sent back to the calendar department, where it was continued to December 4. In granting the continuance the court ordered that the case be tried on December 4 and that Mr. Coviello or some other attorney be prepared to try it at that time. On December 4 Mr. Coviello was still engaged in the criminal case and made a motion for a further short continuance, supported by affidavit. This motion was denied, but on account of the condition of the calendar the case went over from Friday to Monday, December 7, when it was again sent out to a trial department. Mr. Coviello was still engaged in the criminal case. He sent a clerk to the trial department to inform the court that he was so engaged. Defendant during these proceedings had been accompanied to court by an adult son of the parties. In the trial

department she requested a continuance until her attorney could be present. The court denied a continuance and proceeded with the trial in the absence of Mr. Coviello and without communicating with him. Plaintiff was sworn and gave testimony which, if believed and corroborated, would have justified the granting of a divorce to him, in the absence of a defense of recrimination. At the conclusion of plaintiff's testimony and that of a witness which was offered under the label of corroboration, the following proceedings took place:

"The Court: Take the stand, Mrs. Litvinuk.

"The Defendant: Your Honor, I can't understand without my attorney here. I would like to have him here.

"The Court: The record shows your attorney has had plenty of chance to be here.

"The Defendant: He told me I should say this to you.

"The Court: You get up on the stand and I will be your attorney.

"The Defendant: But my attorney, I want him to be here, please.

"The Court: He has had plenty of chance to be here. Do you want to tell me about your side of the case?

"The Defendant: I can't tell it without my attorney.

"The Court: All right. Decree granted to the plaintiff."

Later, on the same day, Mr. Coviello gave notice of a motion, to be heard on December 16, to vacate the minute entry ordering a decree in favor of plaintiff and for reopening of the case. He made an affidavit by which he represented that on December 7 he was actually engaged in the trial of the criminal case, and defendant made an affidavit in which she stated that on December 4, when the motion had been made for a short continuance in the calendar department, Mr. Coviello's client in the criminal case was then under cross-examination by the district attorney and it was impossible for him to leave the trial to attend the trial of the instant case. Her affidavit further stated that plaintiff, shortly before coming to California, had instituted an action for divorce in the State of Pennsylvania; that the case had been tried and that plaintiff had been denied a divorce. No affidavit by plaintiff was filed denying these statements concerning the Pennsylvania case. Plaintiff's attorney filed an affidavit which contained the following equiv-

ocal statement: "That affiant also alleges that to his knowledge no action was ever filed for divorce in the State of Pennsylvania wherein the divorce was denied." Unaccountably, Mr. Coviello failed to make an appearance on December 16 to present his motion and it was denied. Immediately thereafter findings and a decree of divorce were signed and filed. On February 17 Mr. Coviello gave notice of a motion, under section 473 of the Code of Civil Procedure, to vacate the decree on the grounds of "mistake, inadvertence, and surprise." With the motion was tendered a verified proposed cross-complaint for separate maintenance, charging plaintiff with desertion. It was alleged in the cross-complaint that plaintiff herein on or about March 5, 1940, had instituted a divorce action in the Court of Common Pleas for Philadelphia County, Pennsylvania; that said divorce proceeding continued for approximately one year, and that plaintiff herein had been denied a divorce in that action. There was a counter affidavit of plaintiff's attorney which added no material facts. Again, there was no affidavit by plaintiff that he had not been denied a divorce in Pennsylvania shortly before he came to California. The motion to vacate the decree was duly presented, was denied, and defendant appeals from that order. She gave notice of appeal from the judgment and from her motion to reopen the case and for a new trial, but these latter appeals were taken too late and must be dismissed.

[1] Our conclusion as to the order refusing to vacate the decree is that it should be reversed. We do not agree that defendant had a right to successive continuances of the trial until her attorney had finished the trial in which he was engaged, regardless of the time it might take. He appears to have believed she had an absolute right to such continuances and that he owed the court little cooperation in arranging for a satisfactory trial date. He represented but one of many defendants jointly charged with murder, and the trial was one which was bound to and did last for several months. In his affidavit for a continuance he made no statement as to when he expected to be through with the criminal trial and the record does not show when it was finished, nor does it show that he advised defendant of the order that she would have to obtain other counsel for the trial on December 4, if he was still engaged in the criminal trial, or that he made any effort

to assist her in obtaining other counsel, although he knew, from the notice of the continuance which was served on him November 23, that the court had made such day of trial either in the calendar department or the trial department, and it was not shown that he made any request to be excused from the criminal trial long enough to explain his position to the trial judge. It is reasonable to believe that if he had done so, some plan would have been arranged under which defendant could have been represented at the trial by him or someone else. His noncooperative attitude was later manifested by his failure to be present on December 16 to urge his motion for reopening of the case. In view of the ruling of the acting presiding judge that the case would have to be tried on December 4, we find little justification for Mr. Coviello's assumption that the court would continue to postpone the trial until he had finished with the trial of the criminal case.

But in all of this there was presented only a situation which is a common one in the trial courts. It is of daily occurrence that through amenities of counsel or the direction of the judges the trial calendars are rearranged with due regard for the convenience of attorneys who are engaged in trial. These situations do not involve questions of law but only those of good court administration, and it is seldom that they cannot be worked out satisfactorily and without furnishing grounds for appeal. The instant case, for some reason, had been advanced for early trial. There may have been a good reason why it was given precedence over other cases but the record does not show it. There is no policy of the law which we are aware of that calls for the granting of speedy divorces. Plaintiff was not paying his wife any alimony and if he wanted a divorce in a hurry he was only in the position of most others who sue for divorce. We think the court should have recognized that his insistence upon an immediate trial, when it appeared that his wife would be without benefit of counsel, reflected the common attitude of litigants in divorce cases, and we cannot see that it would have been difficult, or unfair to the impatient plaintiff, for the court to arrange for the trial of the case so that defendant would be represented. However, we are not placing our reversal upon the failure of the court to do this. Our only purpose in discussing the matter is to point out the need for greater cooperation in arranging

for suitable trial dates than was manifested in this case.

[2] The ground of our reversal is that with the defendant in court without an attorney, the trial judge should have questioned her concerning the truth of the charges which her husband had made against her. It is true that she was reluctant to testify in the absence of her attorney, but the record shows that that was because he had instructed her to state that she could not proceed with her defense in his absence. She is of Polish nationality; her husband is a Russian. She had come from Philadelphia with her son to present her defense and the son attended court with her as a witness. The husband had testified that the son struck him and that defendant ordered him out of the house in 1934. A transcript of the evidence is before us and we have read it. We think the notice of motion to vacate the decree was broad enough to include the evidence that had been received, as a part of the proceedings in the case upon which the motion would be based. The matters that had been testified to were known to the court and necessarily must have been given some consideration in the exercise of the court's discretion in ruling upon the motion. We quote in full the testimony of Mary Dimitroff, which was offered to meet the demands of section 130 of the Civil Code that no divorce shall be granted upon the uncorroborated statement, admission or testimony of the parties:

"By Mr. Best: Q. You know both parties to this action, Anna and Paul Litvinut? A. I know Anna Litvinut from 1912, when I come to the United States.

"Q. You know Paul has lived in this County and State since February, 1941? A. In this State, yes; he has been to my house.

"Q. You knew both these parties when they were married back East, did you not? A. Yes.

"Q. Do you know of your own knowledge these parties separated in 1934? A. Yes; I was on a trip back East then, and I heard from my parents they are separated. They fight, and they lead an unhappy life.

"Q. You also saw Paul at that time, did you not? A. Yes.

"Q. You knew he had left the house? A. Yes.

"Q. Because he was going to be beaten up? A. I heard they fighting and don't live together.

"Q. You know that separation was against his will and consent? A. That's right.

"Q. You know they have lived separated and apart ever since that time? A. That's right.

"Q. Were these parties very happily married? A. I know they was not.

"Q. Tell the Court what you have observed about the married life—fighting on the streets, and all that? A. Well, I believe it was 1921; I am not very sure; I saw them on Easter Day, another lady fighting her.

"Q. On the street? A. Yes.

"Q. A fist fight? A. Yes; they been fighting.

"Q. Do you know that Paul and Anna were never happy in the house? A. That's what I heard.

"Q. You were in the house too, weren't you? A. Yes.

"Q. Did you ever see how Anna treated Paul? A. No, I never saw.

"Q. Never saw her treat him affectionately? A. No.

"Mr. Best: That's all."

The court was being asked to dissolve a marriage of a man and woman who had lived together for 17 years, and was conducting a trial for the purpose of ascertaining the truth as to the reasons for their separation. The duty of ascertaining by satisfactory proof whether the wife had given the husband cause for divorce rose above mere technicalities of procedure. The court should be satisfied before granting a decree of divorce that the ends of justice will be served thereby and that the court is not being imposed upon by the assertion of unfounded grounds for divorce through the collusion of the parties or otherwise. The state is interested in the institution of marriage and the preservation of family ties, and the dissolving of them involves a judicial determination. Nothing in modern times has brought greater discredit upon the judiciary as a department of government than the granting of so-called mail order divorces and other procedure under which some courts are suspected as being little better than vending

machines for the issuance of divorce decrees. Not that this is such a case. But it is a case where the plaintiff, after testifying briefly, offered as corroboration of his charges, testimony that was no corroboration at all. Following this the judge stated to the defendant, "You get up on the stand and I will be your attorney," and then asked her, "Do you want to tell me your side of the case?" to which defendant answered, "I can't tell it without my attorney." She did not decline to testify; she was simply at a loss as to what to do. There was no reason to believe that she would not have answered willingly any questions propounded by the court. She had come from Pennsylvania for that very purpose and it would have been a simple matter for the court to put her at her ease and to learn her side of the story. The son Paul, who had been accused of striking his father at the time of the alleged separation, was in court with his mother to act as her witness. The fact that plaintiff had failed to produce any corroboration of his charges of desertion and cruelty made it the plain duty of the court to question the son, and if he failed to corroborate his father's testimony, to deny plaintiff a decree. Not only did the court fail to do this, but it granted a decree upon plaintiff's uncorroborated testimony. It is true that we are not considering an appeal from the judgment, because the attempted appeal was taken too late. But the glaring insufficiency of the evidence to justify a decree in plaintiff's favor emphasizes the court's error and abuse of discretion in denying the motion to vacate. The decree should have been vacated because it never should have been granted. Upon the case made by plaintiff, and without any evidence for the defense, the court should have refused a decree in favor of the husband.

There is another reason why the motion should have been granted. The mere suggestion to the court that plaintiff had been denied a divorce in Pennsylvania shortly before coming to California should have caused the court to inquire fully into the facts. An attempt to procure a divorce in this state which had recently been denied

by the courts of Pennsylvania, by concealing information as to the earlier case, would have been a flagrant fraud. When it was represented by defendant's affidavit and her verified cross-complaint, both of which stood unchallenged, that plaintiff had been denied a divorce in Pennsylvania, the decree should have been vacated for the express purpose of ascertaining whether a fraud had been perpetrated upon the court, even if no other ground existed for vacating it. It does not appear why the Pennsylvania decree had not been pleaded by answer but, considering the manner in which defendant's case had been handled by her attorney, it will not do to say that her representations with reference to the Pennsylvania case came too late. Situations which suggest that the court has been imposed upon involve far more than the rights of the parties in the premises. They call for the assertion of the dignity and independence of the court and for prompt and effective action to determine whether the court has been misled by the concealment or misrepresentation of material facts. Divorce cases have been known to present such situations. It would be scandalous and a reproach to the administration of justice to permit one who had been denied a divorce in the state of his domicile to go to another state and, through concealment of the earlier judgment, obtain relief which his own courts had denied him. Such conduct would be of too grave concern to be put aside upon the ground that knowledge of the fraud had not been brought to the attention of the court promptly. It comes in time if the court still has the power to correct any mistake that has been made. The failure of the court to make such an inquiry is not excused by reason of the ignorance and inexperience of a litigant or the mistakes or derelictions of his counsel.

The order denying the motion to vacate the judgment is reversed. The appeals from the judgment and the order denying the motion to reopen the case and for a new trial are dismissed.

DESMOND, P. J., and PARKER
WOOD, J., concur.

MOSLEY v. ARDEN FARMS CO.*

Civ. 3322.

District Court of Appeal, Fourth District,
California.

June 29, 1944.

Rehearing Denied July 19, 1944.

Hearing Granted Aug. 24, 1944.

1. Negligence ⇨121(1, 5)

In personal injury suit, burden is on plaintiff to prove that defendant was negligent and that his negligence was proximate cause of injuries.

2. Appeal and error ⇨717

The District Court of Appeal may refer to trial judge's written opinion in order to discover process of reasoning used by him.

3. Municipal corporations ⇨819(4)

In city employee's action against milk company for injuries sustained as result of being thrown to sidewalk when wheel of power mowing machine operated by plaintiff struck one or more empty wooden boxes, in which defendant's milk bottles were carried, while plaintiff was cutting weeds between sidewalk and property line, evidence was insufficient to show that defendant's negligence, if any, in piling such boxes on parkway between opposite side of sidewalk and street curb, in violation of city ordinance, rather than some unknown person's intervening negligent act in moving some of boxes, was proximate cause of injury.

4. Municipal corporations ⇨809(1)

A city employee, injured as result of power mowing machine operated by him striking empty wooden boxes, in which milk company's milk bottles were carried, while cutting weeds between sidewalk and property line, was not entitled to recover damages from company on ground that it created nuisance in public street, contrary to city ordinance and state law, in absence of proof that such violation was proximate cause of injury.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by Sam R. Mosley against the Arden Farms Company for personal injuries sustained as the result of being thrown to a sidewalk when the wheel of a mowing machine operated by plaintiff

struck a box or boxes in the space between the sidewalk and the property line. Judgment for plaintiff, and defendant appeals.

Reversed.

Monroe & McInnis, of San Diego, for appellant.

Johnson & Johnson, of San Diego, for respondent.

MARKS, Justice.

This is an appeal from a judgment in favor of plaintiff for damages for injuries suffered by him on February 16, 1942.

Highland Avenue is a public street running in a general northerly and southerly direction in National City. It has a roadway 48 feet wide bounded by a curb on the westerly side. The space set apart for sidewalk purposes is sixteen feet wide. The curb is six inches wide at the top, bounded on the westerly side by a parkway space eight feet six inches wide. This space had trees planted in it and the balance had grown up to weeds. A tree with a trunk about six inches in diameter was growing in this parkway space near the place of the accident. On the westerly side of this parkway space there was a five foot cement sidewalk. Between the westerly edge of the sidewalk and the property line was a strip of land two feet wide on which weeds were growing.

Plaintiff was employed by National City as a laborer. On the day of the accident he was operating a power driven mowing machine and was cutting the weeds which were growing on both sides of the cement sidewalk.

Defendant is a corporation engaged in the sale and delivery of milk and, up to about the middle of January, 1942, delivered milk to customers in National City. Its milk bottles were carried in wooden boxes. It had been the custom of the employees to pile these boxes, when empty, in the parkway space south of the tree we have mentioned from which point they would be picked up and returned to defendant's place of business. Defendant sold its milk route in National City about the middle of January, 1942. At that time there were about eighteen of these boxes stacked in the parkway space south of the tree. These boxes were not removed by defendant until after the accident in question here. They were stacked in the center of the parkway space and were in plain sight as no weeds were growing around them.

* Subsequent opinion 157 P.2d 372.

On February 16, 1942, plaintiff drove the power mowing machine southerly over the cement sidewalk and cut the weeds growing in the parkway space. The blade had to be lifted to avoid the tree and the piled boxes. At the southerly end of his run he turned his mowing machine around and proceeded northerly over the cement sidewalk, cutting the weeds on the westerly side. At a point opposite the pile of boxes and in the space between the westerly side of the cement walk and the property line there were two more of the boxes. They were completely hidden by high weeds and their bottoms were embedded in the soil indicating they had been there for some time and during rains. The wheel of plaintiff's mowing machine struck one or more of these boxes. He was thrown to the sidewalk and injured.

At the time of the accident there was in full force and effect in National City an ordinance which provided in part as follows: "That it shall be, and it is hereby, declared unlawful for any person * * * to obstruct any street or alley, or portion thereof, or the sidewalk space thereof within said City, by placing or permitting thereon any signs, boxes, or other thing or article which will in any way obstruct or hinder the use thereof or travel thereon, within the limits of said City; * * *."

Defendant argues that it was error to admit this ordinance in evidence as the boxes piled in the parking space did not obstruct or hinder the use of the cemented portion which was constructed for the convenience and use of pedestrians; that the ordinance must be construed as prohibiting the obstruction of a sidewalk so as to interfere with the ordinary use for which it was intended which did not include a roadway for the travel of a power mowing machine. *Rodkey v. City of Escondido*, 8 Cal.2d 685, 67 P.2d 1053. We do not consider this question controlling here.

Other than the testimony of one witness, which was rejected by the trial court, there is no evidence showing how the two boxes came to be on the ground on the westerly side of the cement portion of the sidewalk. Other than the evidence of this one witness there is nothing to suggest that they were placed there by defendant or any of its employees. Plaintiff suggests that they may have been blown there by a strong wind or that they might have been taken from the pile and placed there by playful children. This is mere specula-

tion and is not supported by anything in the record.

[1] It is well established in this State that the burden of proving negligence on the part of a defendant is upon the plaintiff (*Diamond v. Weyerhaeuser*, 178 Cal. 540, 174 P. 38), who must also establish that such negligence was the proximate cause of the injuries. *Hale v. Pacific Tel. & Tel. Co.*, 42 Cal.App. 55, 183 P. 280.

Here the injury was not caused by the boxes piled on the parkway space but the boxes in the weeds westerly from the cement sidewalk. Boxes do not move themselves a distance of about ten feet. They must have been moved by some agency either human or natural. There is no suggestion in the evidence of any natural force that could have moved them. There is no evidence showing that they were moved by human hands. We are left to guess as to how or by whom they were moved. If they had been left in the pile plaintiff would not have been injured. It should follow that plaintiff's injuries were caused, not by defendant's negligence, if it was negligent in stacking the boxes on the parkway space, but the intervening act of some unknown person or force which moved the boxes from the pile westerly into the weeds.

The facts of this case are quite similar to those of *Schwartz v. California Gas, etc., Co.*, 163 Cal. 398, 125 P. 1044, 1046, in which the Supreme Court reversed a judgment for plaintiff for the following reasons:

"Defendants requested the court to instruct the jury as follows: 'You cannot find for the plaintiff in this case, unless you believe from the evidence:

"(1). That plaintiff's horse was injured by an insulator, the property of defendants. (2). That the employes of defendants negligently placed said insulator on the premises where, it is claimed, said horse was injured and *at the point where the evidence shows said horse was in fact injured.*" As given by the court the second subdivision was modified to read as follows: "That the employes of defendants negligently placed or permitted said insulator to remain on the premises where, it is claimed, said horse was injured, *and at a point where the evidence shows some injury might result.*"

"In the language of appellants: 'As proposed, this instruction limited responsibility to the placing of the insulator at the

point where the horse was injured. The modification made the defendants liable if they placed it anywhere on the premises."

"The proposed instruction was based upon the theory that an intervening, independent agency may have been the proximate cause of the injury. It seems plain that if appellants carelessly dropped the insulator upon the premises and did not remove it they would be guilty of negligence; but after it was dropped, if somebody else picked it up and moved it to this spot where the damage was done, it was the negligence of the latter that proximately caused the injury.

"It would not be a case of correlative and concurring causes, but of proximate and remote agencies independent of each other. The rule is well settled that 'an injury is not actionable which would not have resulted from the act of negligence, except for the interposition of an independent cause.' (Citing cases.)"

The Schwartz case has been frequently cited with approval and followed. See, *Thomas v. German General, etc., Society*, 168 Cal. 183, 141 P. 1186; *Hartford v. All Night and Day Bank*, 170 Cal. 538, 150 P. 356, L.R.A. 1916A, 1220; *Stasulat v. Pacific Gas & Elec. Co.*, 8 Cal.2d 631, 67 P.2d 678; *Polloni v. Ryland*, 28 Cal.App. 51, 151 P. 296; *Hale v. Pacific Tel. & Tel. Co.*, supra; *Solomon v. Red River Lumber Co.*, 56 Cal.App. 742, 206 P. 498; *McCamish v. Groff*, 83 Cal.App. 776, 257 P. 79; *Northrup v. Pacific Elec. R. Co.*, 8 Cal. App.2d 189, 47 P.2d 365.

Plaintiff points to the evidence of Mrs. Frances Galway to the effect that on September 17, 1941, she was driving past the place of the accident and saw an Arden Farms milk truck standing near the pile of boxes; that a man in the uniform used by employees of defendant threw a box over the pile of boxes and onto the strip on the westerly side of the cement sidewalk. Had the trial court accepted this evidence as true it might have been argued that defendant was responsible for placing the box where it caused the accident.

The trial court found that the ordinance already referred to was in full force and effect; that defendant piled its boxes in the parkway space between the curb and the cement sidewalk; that this pile obstructed the sidewalk and violated the ordinance and other provisions of law; that it constituted a nuisance; that piling the boxes on the parkway space was negligence which was

the proximate cause of plaintiff's injuries; that "it is true that some considerable time prior to the injuries hereinafter referred to, two of the defendant's crates or boxes became displaced, and hidden in, the aforesaid growth of weeds in the space between the cement walk and the property line and across the five foot pavement from where the pile of the defendant's crates was kept and stacked. It is not in evidence that any agent of defendant moved said boxes."

[2] Thus it appears that the trial court did not place any reliance on the testimony of Mrs. Galway but rejected it. That this is the construction of the findings intended by the trial judge is evidenced in a written opinion filed by him (which we may refer to in order to discover the process of reasoning used by him) wherein it is said: "A considerable time prior to the accident, two of these boxes had escaped from the pile and became hidden in the growth in the space between the cement walk and the property line over the five foot pavement from where the pile was stacked. The immediate means by which this occurred, whether human or natural, is not evidenced."

[3] Assuming that piling the boxes on the parkway space was contrary to law and negligence, plaintiff has failed to prove that negligence a proximate cause of his injuries. There is a reasonable inference that the boxes were moved by some unknown agency. If the boxes had not been moved, plaintiff would not have been injured. Thus some intervening act of negligence, probably by some unknown person, occurred which was the proximate cause of the injury and not the negligence of the defendant.

[4] Plaintiff argues, if we understand him correctly, that as the evidence shows that defendant created a nuisance in a public street in violation of the ordinance and state law, his right to recover was complete without further proof on his part. This argument is answered in *Thomas v. German General, etc., Co.*, supra [168 Cal. 183, 141 P. 1188], as follows:

"And where the negligence is predicated upon the failure to perform a duty commanded by statute or ordinance, the same rule applies. Says Thompson: 'In all these cases it must appear that the violation of the ordinance was the proximate cause of the injuries received.' 6 Thompson on Negligence, § 7868. And says Cyc. (29

Cyc. 489): "The same rules are to be applied in determining the question whether an act is the proximate cause, whether such act is in violation of a statute or of some duty under general principles of law. In determining whether particular acts of negligence can be considered the proximate cause of injury, no distinction can properly be made between acts which constitute negligence because they are in conflict with statutory laws, and acts which are condemned as negligence under the general principles of law governing the conduct of men in relation to each other."

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.



65 Cal.App.2d 81

In re DEPEW'S ESTATE.

DEPEW v. IMLER et al.

BUHLER v. SAME.

Civ. 14369.

District Court of Appeal, Second District,
Division 3, California.

June 26, 1944.

1. Courts Ⓒ202(5)

An order made in probate denying a motion to vacate sale of personal property belonging to estate was not appealable under provision of Probate Code relating to appealable orders. Probate Code, § 1240; Code Civ.Proc. § 473.

2. Executors and administrators Ⓒ329(1)

A sale of automobile belonging to estate was proper under provision of Probate Code authorizing sale of personal property which would incur loss or expense by being kept, where it appeared that administratrix was forced to sell automobile because she could not make monthly payments, automobile was expensive to keep and was depreciating in value. Probate Code, § 770.

3. Executors and administrators Ⓒ375

Where section 755 of the Probate Code required confirmation of sales of property

of estate except as provided by sections 770 and 771, action of administratrix in filing verified return of sale and petition for approval subsequent to time limitation contained in section 755 did not constitute an admission by administratrix that attempted sale of property could only be had under sections 755 and 756.5, and that therefore title did not pass under section 770 authorizing sale of perishable and depreciating property without necessity for confirmation. Probate Code, §§ 755, 756.5, 770, 771.

4. Executors and administrators Ⓒ375

The fact that Section 756.5 of Probate Code, requiring confirmation of sale of personal property of estate, was amended in 1943 so as to provide that it did not apply to Section 770, authorizing sales of perishable and depreciating property without necessity for confirmation, did not establish that section 756.5 had previously applied to section 770, since amendment was likely made merely to avoid confusion. Probate Code, § 756.5, as amended by St. 1943, p. 1332, and § 770

5. Executors and administrators Ⓒ375

Where administratrix filed a "petition for confirmation and sale of personal property under section 770 Probate Code" stating that she was forced to sell automobile because she could not make monthly payments, automobile was incurring too much expense and was depreciating in value, title to automobile passed to purchaser, although sale had not been confirmed, and subsequent order of court selling automobile to another person at a ten per cent. higher price was void. Probate Code, § 770.

Appeals from Superior Court, Los Angeles County; William R. McKay, Judge.

Proceeding in the matter of the estate of Frank G. Depew, deceased, wherein Alta H. Depew, administratrix, filed a petition for confirmation of sale of personal property under section 770 of the Probate Code to Raymond Henry Buhler. From an order of the superior court sitting in probate under which the property involved was sold by the court to Don Imler, and from an order denying the motion of the administratrix to vacate and set aside that sale, the administratrix and the first purchaser, Raymond Henry Buhler, appeal.

Order by which the property was sold by the court reversed and cause remanded with instructions, and the purported appeal from the order to vacate and set aside the sale dismissed.

Glenn M. Hershner, of Van Nuys, for appellant Alta H. Depew.

Cook & Johnson and Wiley J. Shannon, all of Van Nuys, for Appellant Raymond Henry Buhler.

Everett H. Smith, of Los Angeles, for Respondent Don Imler.

DESMOND, Presiding Justice.

[1] This is a case where two appellants seek to reverse two orders made by the superior court sitting in probate. The first is an order by which a Packard automobile was sold by the court to the respondent, Don Imler; the second is an order of the same court denying the motion of appellant, Alta H. Depew, made under the provisions of section 473, Code of Civil Procedure, to vacate and set aside that sale. Since this second order was made in probate no appeal from it will lie under the provisions of section 1240 of the Probate Code. See *Estate of O'Dea*, 1940, 15 Cal.2d 637, 104 P.2d 368. We proceed, therefore, to consider the merits of the appeal from the other order.

Appellant Depew, as administratrix of the estate of Frank G. Depew, had sold, within a few months after decedent's death, a Packard automobile, property of the estate, to Raymond Henry Buhler, the other appellant here. Mr. Depew had undertaken to purchase this automobile under a monthly installment plan calling for payment of \$68 per month upon the balance due under the terms of a chattel mortgage. Default in the payments occurred in the month of decedent's death, February, 1943, and the succeeding month of March. According to the stipulation and agreed statement of facts filed in the case, the estate had no funds with which to pay the delinquent installments and the mortgagee, Pacific States Loan Company, had threatened to take possession of the automobile and sell it under the provisions of the chattel mortgage; in order to prevent such action and save the estate harmless from loss, the automobile was sold to Buhler at the price of \$1100, under the terms of section 770 of the Probate Code of California; at or about April 9, 1943, Buhler paid the two delinquent installments

and borrowed enough money from a local bank to pay off and discharge the lien of the mortgage and make a payment of cash to the administratrix in the sum of \$336. The expenditures which he made upon the automobile, including the payment to the administratrix, amounted to the selling price, \$1100. The automobile had been appraised at \$1050.

In June of 1943, the administratrix filed a "Petition For Confirmation of Sale of Personal Property Under Section 770 Probate Code." In that petition she stated that she "was forced to sell said automobile for the reason that she could not make the monthly payments that were due the finance company on said car, and said automobile was incurring too much expense for petitioner to keep same, and it was also depreciating in value."

Section 770 appears in the article of the Probate Code entitled, "Sale of Personal Property," and permits the sale, without notice, of "Perishable property and other personal property which will depreciate in value if not disposed of promptly, or which will incur loss or expense by being kept * * *". The same section provides that the title to said property shall pass without confirmation "but the executor, administrator or special administrator is responsible for the actual value of the property unless, after making a sworn return, and on a proper showing, the court shall approve the sale." There was no necessity in this case of filing the petition at the time when it was filed, but if the court had taken favorable action and approved the sale to Buhler upon the return made by means of the petition, the administratrix would have been relieved, by that action, of responsibility for any value above the amount received. Upon the filing of this petition, a hearing date was fixed for July 8th, 1943, and notice thereof posted, although no request for a hearing was made. On that date, and in open court, a bid for the automobile was submitted by respondent Imler in the sum of \$1210, being 10% above the amount for which the sale had been made to Buhler, and the judge then presiding in probate, made the first order appealed from, entitling it "Order Approving Sale of Personal Property Likely To Depreciate In Value." Neither the administratrix nor her attorney nor the appellant Buhler were present at the bidding and approximately one week later the administratrix filed her petition asking that

the order of sale to Imler be vacated and set aside on the ground that because of her mistake, inadvertence, surprise and excusable neglect she did not have the court sign an ex parte order approving the sale of the car, "this petitioner and her said attorney believing that no further bids for said car could be made, since she had sold same under section 770 of the Probate Code. That petitioner herein did not want any further bids to be made on said Packard car for the reason that she had already sold same, conveyed title to it, and delivered possession of it to the buyer, and had petitioner known that the Court would allow further bids to be made she would not have even petitioned the above Court to approve said sale, since all of the heirs of the above estate were satisfied with the sale of said car as petitioner had made." The petitioner incorporated in her petition to vacate the sale by the court a prayer "that petitioner's petition to approve sale of said Packard sedan auto, filed on June 22, 1943, and set for hearing by clerk of above Court on July 8, 1943, be stricken from the files [etc.]" The motion for relief made under section 473, Code of Civil Procedure, was denied by the court on August 13, 1943, and shortly thereafter, on August 26th, the court authorized the clerk of the superior court to receive from Don Imler the sum of \$1210 in full payment for the Packard automobile; "in the event said Don Imler does not obtain said possession and clear title thereto, said sum of Twelve Hundred Ten Dollars, (\$1,210.00), shall forthwith be returned to him." On the following day the possession of the car was taken from Buhler by the Marshall of the Municipal Court of the City of Los Angeles in a claim and delivery suit instituted by Imler.

A single opening brief has been filed by both appellants, who state the gist of their case as follows, on page 10 thereof: "It is apparent from the foregoing [recital from the agreed statement of facts] that it was the intention of said administratrix to sell said automobile without notice and without confirmation and to pass the title to said car to the purchaser, Raymond Henry Buhler, under the provisions of Section 770 of the Probate Code and that she did so for the purpose of saving the estate from loss through the foreclosure of the outstanding chattel mortgage; that every act required by law to pass the title on such a sale was fully complied with; that said purchaser intended to

buy said automobile under the provisions of said section and did every act required in order to acquire title thereto and has materially altered his position in reliance upon acquiring the title thereto under the provisions of said Section 770; that the Court recognized that a sale under the provisions of Section 770 was justified in this case, but instead of approving or disapproving the sale as in said section authorized, undertook to reopen the sale and pass title to property, title to which had already passed out of the estate, and confirm the sale to a new purchaser. We submit, therefore, that the title to said automobile passed by the sale thereof to Raymond Henry Buhler and that the order of said Court confirming the sale to Don Imler was void and beyond the jurisdiction of the Court to make, and being void, said order should have been vacated by the Court upon the motion of the administratrix, or by the Court of its own motion when the matter was called to its attention."

[2] The respondent answers as follows: "* * * by filing the return of sale and petition for approval, the administratrix brought herself squarely within the purview of Sections 755 and 756.5 of the Probate Code. There is nothing in the record which demonstrates that the automobile in question was perishable or that the attempted sale was necessary under Section 770. Therefore, the Court in accepting the bid of respondent, must only have concluded that the property was that which could be sold only under Sections 755 and 756.5. The question of whether property is of the type necessary to be sold under Section 770 is one of fact for the Probate Court, and in the absence of any evidence to the contrary in the record (which is the situation in the case at bar), every intendment must be in favor of the finding, implied or actual, of the trial court." We cannot agree that there is nothing in the record which demonstrates that the sale of the automobile in question was necessary under section 770, for that section provides specifically for the sale of personal property "which will incur loss or expense by being kept." Counsel has failed to notice the caption of the petition, which we have heretofore quoted, and the contents of that petition, which we have also quoted, from which it appears that the administratrix was forced to sell the automobile because she could not make the monthly payments and

the automobile was incurring too much expense for petitioner to keep it and that it was also depreciating in value. Furthermore, the minutes of July 8, 1943, read as follows: "Depew, Frank G. * * * Return of Sale of Personal Property—Sold in open Court to Don Imler for \$1210.00 being the highest & best bid (*Sec. 770*)."
(Italics added.) Also in the transcript we find the following: "In the Matter of the Estate of Frank G. Depew, Deceased. No. 220661 Order Approving Sale of Personal Property Likely to Depreciate in Value. The return and petition for approval of sale of personal property likely to depreciate in value herein, of *Alta H. Depew, as administratrix of the estate of said deceased*, by Glenn M. Hershner, her attorney, coming on this 8th day of July, 1943, for hearing by the Court, and the Court finding that all notices of said hearing have been given as required by law; It is Ordered, by the Court that the sale of 1942 Packard Club Sedan automobile, 8 Cylinders, made in open Court to Don Imler, for the sum of \$1210.00 cash, is hereby approved." (Italics added.)

[3] The respondent further argues that: "The very filing of the verified return of sale and petition for approval is unquestionably an admission by the administratrix that the attempted sale could only be had under Sections 755 and 756.5, and therefore that title did not pass under Section 770." In this connection, we quote section 755 of the Probate Code: "*Order of confirmation of sale: Notice*. Except as provided by sections 770 and 771 of this code, all sales of property must be reported to the court and confirmed by the court before the title to the property passes. The report must be verified. Such report and a petition for confirmation of the sale must be made within thirty days after each sale. The clerk shall set the petition for hearing by the court and give notice thereof for the period and in the manner required by section 1200 of this code." According to the agreed statement in this case, the sale of the automobile to Buhler took place on or about April 9, 1943, and the record shows that the return to the court and request for approval of same was filed on June 22, 1943, considerably more than sixty days after the sale instead of within thirty days as provided in section 755. Consideration of this section, especially the clause, "Except as provided by sections 770 and 771 of this code," and the time limit for presenting a

return, does not lead us to believe that "the Court in accepting the bid of respondent, must only have concluded that the property was that which could be sold only under Sections 755 and 756.5" Nor do we feel that it furnishes any ground for the statement that the filing "of the verified return of sale and petition for approval is unquestionably an admission by the administratrix that the attempted sale could only be had under Sections 755 and 756.5, and therefore that title did not pass under Section 770."

[4] Section 756 of the Probate Code, immediately following section 755, has relation not to sales made under section 770 and 771, but generally to sales of personal property in which confirmation by the court is required before title can pass. In such a case, section 756.5 provides means for the acceptance of a higher bid in the discretion of the court. This last named section was added to the Probate Code by the Statutes of 1939 and, apparently to avoid confusion, the Legislature at its session in 1943, St.1943, p. 1332, amended section 756.5, effective at a date subsequent to the sale in this case by adding the following: "This section shall not apply to personal property sold at public auction nor to personal property sold under the provisions of Section 770 of this code."

The appellants argue in their brief that the Legislature in adopting section 756.5 in 1939, did not expressly repeal, amend or modify sections 755, 770 and 772 of the Probate Code and that a repeal by implication cannot be grounded upon that amendment. The respondent, according to his brief, "does not contend that the enactment of Section 756.5 in 1939 was intended as a repeal by implication or any other manner of Section 770," but he insists that the enactment of section 756.5 in 1939, and its reenactment in 1943, with the additional language which we have just quoted, "can only mean that prior to the amendment of 1943, Section 756.5 *did* apply to property sold under Section 770, otherwise why did the legislature specifically exclude *only* the one section, to-wit: Section 770?" We have already given the answer to this question which occurs to us, namely, to avoid confusion.

[5] It is apparent from the agreed statement of facts that the administratrix in this estate was in the difficult position, immediately after Mr. Depew's death, of find-

ing, as soon as possible, a buyer who could secure the necessary priority and assume the obligations attaching to the Packard car and pay a price that would be reasonable in view of the appraisal of \$1050. Therefore, as stated in the agreed statement of facts, "in order to prevent such action [foreclosure of the chattel mortgage] and save said estate harmless from loss," she accepted the bid of Buhler and transferred title and possession to him at that time. Although the petition filed by the administratrix indicated that the sale was made under section 770, that fact apparently escaped the notice of the trial court when he ordered the sale to Imler. In our opinion, this last order was void since title to the car had already passed to Buhler and the only matter submitted by the petition addressed to the court was whether the sale of the automobile for \$1100, made under section 770 of the Probate Code, should be approved.

The order is reversed and the cause remanded to the superior court with instructions to vacate the order of July 8, 1943, and to determine whether or not the reported sale of the automobile under section 770, Probate Code, shall be approved. The purported appeal from the order denying relief under section 473, Code of Civil Procedure, is ordered dismissed.

SHINN and PARKER WOOD, JJ., concur.



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CULLIGAN v. LEIDER et al.

Civ. 12627.

District Court of Appeal, First District,
Division 1, California.

June 23, 1944.

As Corrected July 11, 1944.

1. Appeal and error ☞404

Trial court's order correcting clerk's minute order and reciting that minutes incorrectly stated order court actually made required assumption by appellate court that trial court was correcting clerical and not judicial error.

2. Appeal and error ☞440 Motions ☞58

Where clerk's entry of an order is not in accord with order actually pronounced by judge, error is clerical rather than judicial and trial court has inherent power to correct error to make records speak the truth even though matter is on appeal.

3. Courts ☞116(3)

That clerical error does not appear on face of record does not preclude court from correcting entry.

4. Appeal and error ☞440 Courts ☞114

Under inherent power of court of record to make a correction nunc pro tunc or otherwise of clerical errors in record, order of Superior Court correcting clerical error after an appeal had been taken was not void because not expressly made nunc pro tunc, and District Court of Appeal was required to decide case on record as corrected.

5. Vendor and purchaser ☞135(1)

Where vendors held land from their grantor with certain reservations for water and sewer lines "now in existence" and grantor reserved right to designate location of rights of way for easements for further sewer and water lines, roving easements not located were not "existing" within deposit receipt given purchaser providing that property would be clear except existing easements of record.

See Words and Phrases, Permanent Edition, for all other definitions of "Existing".

6. Evidence ☞455

Where deposit receipts given by vendor to purchaser provided that property be clear except existing easements of record and there was ambiguity in use of the word "existing", parol evidence was admissible to interpret use and meaning of such word.

7. Evidence ☞455

Where contract is ambiguous, evidence dehors the instrument itself may be considered to determine meaning of language used in instrument.

8. Vendor and purchaser ☞341(3)

In purchaser's action to recover deposit made under agreement to purchase realty which required vendor to provide a marketable title within a specified time, conflicting evidence sustained finding that the

vendor failed to clear title of certain encumbrances within time specified and authorized judgment for purchaser.

9. Vendor and purchaser ⇨130(2)

Where deposit agreement gave purchaser option of demanding and receiving back deposit and being released from all obligation if title to property should not prove marketable and vendor should fail to perfect title within a specified time, property was not "marketable" if there was any reasonable doubt relative to litigation regarding title.

See Words and Phrases, Permanent Edition, for all other definitions of "Marketable Title".

10. Vendor and purchaser ⇨133

Where contract for sale of realty calls for a perfect title, purchaser is entitled to a title free from reasonable doubt and fairly deducible of record.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Thomas J. Culligan, Jr., against S. J. Leider and another to recover the amount of a deposit made by plaintiff under a written agreement to purchase realty, wherein defendants cross-complained. From a judgment for plaintiff, defendants appeal.

Affirmed.

Ross & Ross, of Redwood City, and Duncan A. McLeod, of San Francisco, for appellants.

Kirkbride & Wilson, of San Mateo (Arthur J. Harzfeld, of San Mateo, of counsel), for respondent.

WARD, Justice.

This is an appeal by defendants from a judgment awarding plaintiff \$5,000, the amount of a deposit made by him under a written agreement to purchase real property.

The property had been deeded to defendants and to Moe H. Levitt and Frances M. Levitt by the Citizens National Trust & Savings Bank of Los Angeles, under date of November 20, 1939, the deed "Reserving unto the grantor, its successors and assigns, the easements for water lines, sewer lines and septic tanks as now in existence on said hereinbefore described real property; also reserving unto the grantor, its successors

and assigns, rights of way for easements for sewer and water lines across the hereinbefore described real property, the location of which rights of way grantor reserves the right to designate." The defendants subsequently acquired the interest of the Levitts in the property.

In the spring of 1941, plaintiff, who for some years had been engaged in the business of buying tracts of land, subdividing and building, became interested in the purchase of a portion of the property through the efforts of a real estate agent, Robert Marshall. A deposit receipt and agreement dated August 5, 1941 was signed by all parties, plaintiff depositing with defendants in connection therewith, \$5,000 on account of the purchase price of \$60,000. This receipt provided "Cash on the consummation of this transaction. Said property to be free and clear of all liens and encumbrances save and excepting current taxes and restrictions and easements of record." It also provided "that in the event said purchaser shall fail to pay the balance of said purchase price or complete said purchase as herein provided, the amounts paid hereon shall, at the option of the seller, be retained as liquidated and agreed damages. That in the event the title to said property shall not prove marketable and said seller shall not perfect, or be able to perfect same within ninety (90) days from this date, the purchaser shall have the option of demanding and receiving back said deposit and shall be released from all obligations hereunder." This deposit receipt was on August 15th voided by the parties, who had in the meantime caused Marshall, the real estate agent, to prepare a second deposit receipt. This was dated August 12th and was mailed to defendants by Marshall with a letter bearing the same date. Marshall's letter stated that the deposit receipt was enclosed "in the form that you wanted."

With reference to the easements, the second deposit receipt provided "Said property to be free and clear of all liens and encumbrances save and excepting current taxes, restrictions and existing easements of record." The word "existing" had not been a part of the first deposit receipt.

There was also enclosed with the communication and deposit receipt the preliminary report of the abstract company, and Marshall called defendants' attention to the exception therein noted pertaining to the reservation by the bank of the rights of

way above mentioned, stating in his letter in that regard: "You can appreciate that this is now an encumbrances (sic) that must be removed before the property is in a position to be transferred, therefore suggest that you secure from The Citizens National Bank a quitclaim deed covering this item."

It appears from the record that defendants received the above letter from Marshall dated August 12, 1941, with its enclosures, on the 13th. The parties met in plaintiff's office on the 15th of August and the second deposit receipt was duly executed, its date of August 12th being changed to August 5th to coincide with the date of the original agreement. The first deposit receipt was, as stated, cancelled.

The property had been used as a golf course and the roving easement did not interfere with its use by defendants. On the other hand, until the bank should designate the exact location of the utility easements the land, from a practical standpoint, was useless for subdivision and housing purposes.

The defendants executed and deposited with the title company in escrow a deed to plaintiff, but failed to clear the title of "liens and encumbrances save and excepting current taxes, restrictions and existing easements of record" notwithstanding Marshall had the period of performance extended an additional thirty days. Nor did plaintiff ever deposit with the title company the balance of the purchase price, although he offered to do so at any time, even upon the termination of the one hundred twenty day period, upon performance by defendants of the terms of the contract on their part.

During the next several months a great deal of correspondence was exchanged, and conferences and discussions had, between attorneys representing the parties in an effort to obtain from the Los Angeles bank a quitclaim deed with reference to the easements.

On December 9, 1941, the title company advised the real estate agent that defendants had withdrawn the deed and other papers from escrow, and defendants' attorney notified plaintiff that the deed had been withdrawn for "failure to proceed in good faith with the closing of the deal * * * The sum heretofore deposited by you * * * is being retained * * * in accordance with the deposit receipt."

Shortly thereafter plaintiff made a demand upon defendants for the return of the \$5,000 paid on account, and later commenced this action to recover such deposit.

With reference to the letter from Marshall to defendants and cross-complainants, dated August 12th, which letter specifically set forth the reservation of the easements to the bank and stated that such encumbrance "must be removed before the property is in a position to be transferred," which letter was accompanied by the second deposit receipt and the preliminary report of the title company, it is defendants' contention that the deposit receipt was received by them the next day, but that the letter came some time afterward. There is testimony that the letter of transmission accompanied the documents, and the court so found. When the parties met on the 15th of August and signed the second deposit receipt, presumably defendants were acquainted with the terms of the document, emphasized by the communication from Marshall.

Defendants' cross-complaint to quiet title prayed that they be declared to be the owners in fee of the property, and that plaintiff has no right, title or interest therein. As plaintiff does not claim any interest in the property the judgment in this respect is immaterial on appeal.

As stated, judgment was ordered for plaintiff in sum of \$5,000 with interest. It also decreed that defendants and cross-complainants are entitled to possession of the property free of any claim by plaintiff.

The trial court found that the location of the easements had not been designated and therefore constituted an encumbrance which should have been removed by the sellers. Appellants contend that the reservation that the grantor bank shall have the right to locate easements for sewer and water lines across the property falls within the provisions of the deposit receipt "excepting * * * existing easements of record."

Some confusion appeared in the record relative to appellants' motion to strike out all evidence attempting to vary the terms of the written contract and all evidence in reference to damages.

Parol evidence bearing on the circumstances surrounding the execution of the contract had been introduced by plaintiff subject to defendants' motion to strike on the ground that such evidence varied

the terms of a written instrument. At the conclusion of the case, defendants renewed their motion, and also moved that all evidence with reference to damages be stricken. The record, as originally before this court, simply showed a clerk's minute order as follows: "Motion Granted."

While the appeal was pending in this court, but before the case had been submitted, plaintiff obtained an order from the trial court, after proper notice and hearing, correcting the record. This order is signed by the trial judge. It recites that the statement in the minute order, "Motion Granted," incorrectly stated "the intention and order of the Court actually made pursuant to defendants' motion to strike appearing in said minutes; it having been the intention and order of the Court to strike only such evidence as referred to damages sustained by plaintiff and cross-defendant other than damages sustained by reason of retention of the deposit of \$5,000.-00." The Court then made this order:

"Now, therefore, it is hereby ordered that the minutes of the Court * * * be, and the same are, hereby corrected so that the words 'Motion Granted' be changed to read as follows:

"It is hereby ordered that the above motion to strike out evidence be, and it is hereby, granted insofar only as it refers to evidence in reference to damages, other than damages sustained by plaintiff and cross-defendant by reason of the retention by defendants and cross-complainants of the deposit of \$5,000.

"The Court finds that no evidence has been introduced by plaintiff and cross-defendant to vary the terms of the written contract, and on said grounds hereby orders that no evidence, other than that in reference to damages, as aforesaid, be stricken out.

"It is further ordered that the Clerk of this Court correct the said minutes in accordance herewith."

[1,2] It must be assumed that the trial court was correcting clerical and not judicial error since the judge recites that the minutes "* * * incorrectly state * * [the] order of the Court actually made * * *." *Bastajian v. Brown*, 19 Cal.2d 209, 120 P.2d 9. Where the clerk's entry is not in accord with the order actually pronounced by the judge, the error is clerical rather than judicial. In the *Bastajian* case the court said (page 216 of 19 Cal.2d,

page 12 of 120 P.2d): "* * * where the judgment as signed does not express the actual judicial desire or intention of the court at all, but is contrary thereto, the signing of such purported judgment is a clerical error rather than a judicial one." The court has inherent power to make its records speak the truth even though the matter is on appeal. *Carter v. J. W. Silver Trucking Co.*, 4 Cal.2d 198, 47 P.2d 733; *Wilson v. Nichols*, 55 Cal.App.2d 678, 131 P.2d 596; *Carson v. Emmons D. & S. Moving Co.*, 18 Cal.App.2d 326, 64 P.2d 176.

[3] That the clerical error did not appear on the face of the record does not preclude the court from correcting the entry. *King v. Emerson*, 110 Cal.App. 414, 288 P. 1099, 294 P. 768; *Carter v. J. W. Silver Trucking Co.*, supra.

[4] The argument made by appellant that the order is void because not expressly made *nunc pro tunc* is without merit in view of the following statement from *Carpenter v. Pacific Mut. Life Ins. Co.*, 14 Cal.2d 704, 707, 96 P.2d 796, 798: "It is the long-settled rule that courts of record in this state have inherent power to make a correction, *nunc pro tunc* or otherwise, of clerical errors and misprisions in their records, in order that such records conform to the facts and speak the truth." (Italics added.)

The record, as corrected, therefore is the one upon which this court must decide the appeal.

[5] The view of the trial court—that since the roving easements had not been located they did not in fact exist under the agreement herein must be upheld. There is some ambiguity in the use of the word "existing."

[6] The second deposit instrument refers to encumbrances, restrictions and existing easements. The defendants held the property from the Los Angeles bank with certain reservations for water lines, sewer lines and septic tanks "now in existence." There was also reserved unto the grantor, its successors, etc., the right to designate the location of "rights of way for easements for further sewer and water lines." Whether "existing" referred to easements as previously located, or the right to designate such locations was an important question. Parol evidence was admissible, not to vary, but to interpret the use and meaning of the word in the document.

[7] The holding in *Body-Steffner Co. v. Flotill Products*, Cal.App., 147 P.2d 84, is applicable to this case. The court said (page 88 of 147 P.2d): "The true interpretation of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered an exception, or, perhaps, a corollary to the general rule above stated, that when any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself." *Sandford v. Newark, etc., R. Co.*, 37 N.J.L. 1, 4, as quoted in *Balfour v. Fresno C. & I. Co.*, 109 Cal. 221, 225, 41 P. 876."

[8] In the present case the court found "That defendants have failed to clear said title of said encumbrance within 120 days after the execution of said agreement." The evidence in question showed that the previous attorney for defendants upon receipt of the deposit agreement wrote in long hand: "check accepted subject to checking the description on the property * * *." The original deposit receipt was not satisfactory and resulted in the drawing of a second document. A letter which accompanied the deposit receipt and preliminary report from the title company called attention to the easements which "must be removed before the property is in a position to be transferred." There is testimony that plaintiff would not purchase the property subject to the easements, and so the first deposit receipt was executed. After the second receipt was executed both parties endeavored to clear the property of the roving easement, but were unsuccessful. The evidence in some respects is conflicting, but the trial court resolved the conflict in favor of plaintiff.

[9,10] The deposit agreement contained a provision that in the event the title to the property should "not prove marketable and the said seller shall not perfect * * * same * * * the purchaser 'shall have the option of demanding and receiving back said deposit and shall be released from all obligation hereunder.'" If there was any reasonable doubt relative to litigation regarding the title, then the property was not marketable and respondent was entitled to a return of the \$5,000 de-

posit. *Muller v. Palmer*, 144 Cal. 305, 77 P. 954. In *Allen v. Globe Grain & Milling Co.*, 156 Cal. 286, 290, 104 P. 305, 307, the court said: "It is settled law in this state that, where the provisions of a contract for the sale of real estate are such as to call for a 'perfect title,' the purchaser is entitled to a title free from reasonable doubt and fairly deducible of record. See *Gwin v. Calegaris*, 139 Cal. 384, 73 P. 851, and cases there cited; *Peckham v. Stewart*, 97 Cal. 147, 31 P. 928. See, also, *Title [& Document Restoration] Co. v. Kerrigan*, 150 Cal. [289], 305, 88 P. 356, 8 L.R.A., N.S., 682, 119 Am.St.Rep. 199, [11 Ann.Cas. 465]. The provisions in the contract in the case at bar were, as we have seen, for a 'valid title,' for a title that was not 'defective,' for a 'perfected' title in the event that on examination the title was found to be defective. It was expressly provided 'that, if the title is defective and it cannot be perfected within the time above specified, this contract will thereupon become null and void.' These provisions practically called for a 'perfect title' to the same extent as if the precise words 'perfect title' had been used. When these provisions are read in connection with the provision for 'examination of the title,' which clearly referred to an examination of the public records, we cannot doubt that the parties were stipulating for 'a good title by the record.' See *Gwin v. Calegaris*, supra [139 Cal. 384, 73 P. 851]." Under all of the circumstances and the law applicable to the facts plaintiff was entitled to the return of the deposit.

The option designated as a deposit receipt contained a clause fixing the amount of liquidated damages and a provision that if the property was not marketable the purchaser should have the option of "receiving back" the deposit and should be "released from all obligations." *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17, relied upon by appellants, merely holds that a purchaser may not maintain an action to recover a deposit paid under a contract for the purchase of land when default by him is unexcused. It holds that under such circumstances a vendor may rest on his contract and retain to his own use the money previously paid by the vendee. In brief, the rights of the parties are determined by the contract. In the *Glock* decision (page 4 of 123 Cal., page 714 of 5 P., 43 L.R.A. 199, 69 Am.St.Rep. 17) it was

stated that the averments praying for equitable relief were "without the slightest averment or the shadowiest proof in excuse of plaintiff's breach of contract." In the present case the agreement contained the provision that upon failure of the seller to perfect the title within a specified time the purchaser had a right to demand the return of the deposit. The gist of the decision in the Glock case is there was no excuse for the purchaser's default. In the present case the failure of the purchaser to deposit the full amount was excused by the inability or refusal of defendants to tender a marketable title. We do not deem it necessary to distinguish other cases cited by appellants based upon the Glock case.

There is no claim by appellants herein that if damages had been fixed in an amount other than as specified in the contract the judgment would have been rendered in a less sum. All evidence covering actual damages was on motion of defendants stricken from the record. We are therefore precluded from discussing that phase of the case.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.



65 Cal.App.2d 1

BRODIE v. BARNES et al.

Civ. No. 14260.

District Court of Appeal, Second District,
Division 3, California.

June 19, 1944.

Appeal and error ☞ 1207(4)

In action to impress equitable liens on life insurance policy and other property for amount embezzled from plaintiff by insured, where appellate court reversed portion of judgment requiring payment to plaintiff of entire amount of insurance policy, with instructions to ascertain total amount of premiums thereon and amount of premiums paid by insured from embezzled funds during limitation period and grant plaintiff pro tanto interest in policy,

trial court, on new trial, erred in rendering second judgment declaring plaintiff entitled to entire proceeds of policy not exceeding sum embezzled.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by C. K. Brodie, doing business as Brodie Brothers, a successor to Brodie Brothers, Inc., against Evadna L. Barnes, also known as Mrs. W. B. Barnes, and others to impress equitable liens on a life insurance policy and other property for reimbursement of a sum embezzled from plaintiff by insured. Judgment for plaintiff, and defendants appeal.

Reversed, with directions.

See, also, 149 P.2d 900.

Francis R. McKenna, of Montrose, for appellants.

Don Lake and James R. Jaffray, both of Los Angeles, for respondent.

BISHOP, Justice pro tem.

This is the second time this action has been under review on appeal. The opinion on the first appeal, reported in *Brodie v. Barnes*, 1942, 56 Cal.App.2d 315, 132 P.2d 595, so adequately reveals the nature of the action, its background, and the judgment that had been entered by the trial court, that we need do no more than note that the action was one wherein the plaintiff, in order to reimburse himself for some \$5,000 that Barnes had embezzled from him, sought to impress equitable liens upon a \$2,000 insurance policy and upon some other property which Barnes had purchased. Judgment, entered in plaintiff's favor, was reversed, but only to a limited extent and for a limited purpose. The action taken by the appellate court was unequivocal. In its opinion that court observed that of the premiums paid upon the policy over the years, only a part were paid out of the \$3,365.03 which had been embezzled since May 29, 1936, that being the first day of the period of embezzlement not outlawed by the statute of limitations, according to the conclusion of the trial court. Following its observation, the appellate court continued with these two statements (56 Cal.App.2d at page 322, 132 P.2d at page 599): "There is no finding as to the total amount of the premiums that were paid into the policy, nor is there any

finding as to the total amount of the premiums that were paid with misappropriated funds. Nevertheless, the trial court by its judgment ordered the insurance company to pay the total amount of the insurance policy over to plaintiff on the theory that there was a constructive trust of the entire policy. This was error." "That portion of the judgment providing that plaintiff should be paid the entire insurance policy is reversed with instructions to the trial court to ascertain the amount of the total premiums on the policy and the amount of such premiums paid since May 29, 1936, and to grant plaintiff a pro tanto interest in the policy; the balance of the judgment is affirmed."

Plaintiff, of the opinion that the appellate court had erred in its determination that he was entitled only to a pro tanto interest in the policy, instead of seeking redress by a petition for a hearing in the Supreme Court, sought and obtained it at the hands of the trial court. On the new trial which followed the partial reversal of the judgment, instead of following the instructions of the appellate court, those concerned had their attention centered around the nature of the insurance policy, and the trial resulted in the conclusion that the policy was not one which should be prorated according to the premiums paid, and that a judgment just like that reversed should be entered declaring that the plaintiff was the owner of and entitled to recover the proceeds of the \$2,000 policy, "not to exceed the sum of \$3,365.03." The trial court had no authority to try other issues than those directed upon the reversal, or to enter a judgment different in nature from that prescribed, and the defendants, rightly feeling themselves aggrieved, have appealed.

At the time of the oral argument of this appeal the parties stipulated that premiums totaling \$269.40 had been paid upon the policy, of which sum only \$80.84 had been paid since May 29, 1936. We find these to be the facts, and reverse the judgment as entered April 28, 1943, with directions to the trial court to modify its judgment of March 11, 1941, by granting to plaintiff an 80.84/269.40 interest in the proceeds and avails of the life insurance policy instead of a 100% interest.

DESMOND, P. J., and PARKER WOOD, J., concur.

BRODIE v. BARNES et al.

Civ. No. 14365.

District Court of Appeal, Second District,
Division 3, California.

June 19, 1944.

Assistance, writ of ☞3

Liens ☞7

In action to impress equitable liens on life insurance policy and insured's realty for amount embezzled from plaintiff by insured, judgment ordering sale of realty by sheriff and payment to plaintiff of net proceeds up to amount embezzled, less amount secured to him from insurance, did not make sale conditional on ascertainment of amount received from insurance policy, so that writ of assistance was properly issued at plaintiff's request and sale to him was regular, though what portion of judgment would not be paid by proceeds of policy had not been determined.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by C. K. Brodie, doing business as Brodie Brothers, a successor to Brodie Brothers, Inc., against Evadna L. Barnes, also known as Mrs. W. B. Barnes, and others to impress equitable liens on a life insurance policy and other property for reimbursement of a sum embezzled from plaintiff by insured. From an order vacating a sheriff's sale of realty under a judgment for plaintiff, defendants appeal.

Reversed.

Francis R. McKenna, of Montrose, for appellants.

Don Lake and James R. Jaffray, both of Los Angeles, for respondent.

BISHOP, Justice pro tem.

A judgment entered March 11, 1941, in this action, decreed "that plaintiff is the owner of and entitled to recover the proceeds and avails of that certain Policy of Insurance No. 23738 W-1167 from defendant John Hancock Mutual Life Insurance Company, not to exceed the sum of \$3,365.03 and plaintiff's costs herein; that the hereinafter described real property be sold by the Sheriff of said Los Angeles County,

and the proceeds thereof, after payment of costs and expenses of sale be paid to plaintiff to the amount of \$3,365.03 less the amount secured to plaintiff from said Insurance above mentioned, and the balance be paid to the defendant, Evadna L. Barnes; * * *."

On April 8, 1941, a Writ of Enforcement of Judgment Ordering Sale of Real Property was issued by the clerk of the trial court, addressed to the sheriff, and the sheriff sold the real property, described in the judgment and writ, for \$300. The plaintiff was the purchaser.

An appeal was taken from this judgment, and it was reversed, in part (*Brodie v. Barnes*, 1942, 56 Cal.App.2d 315, 132 P.2d 595), but not as to the part ordering the sale of the real estate. After the reversal, a new trial was held and a judgment entered April 28, 1943, which had the effect of setting aside the reversal, for the new judgment was but a reiteration of the old. (See *Brodie v. Barnes*, 149 P.2d 899, decided by us this day.) A few days before the new judgment was entered plaintiff served notice that he was going to move to set the sale of the real estate aside upon the sole ground, appearing not in his notice of motion but in the supporting affidavit, that by the terms of the judgment the ascertainment of the proceeds of the insurance policy was a condition to be performed before it could be known whether or not a sale of said real property should be made. Plaintiff made his motion, as noticed, and it was granted. It is from the order vacating the sale that the defendants appeal.

We are of the opinion that the judgment did not make the sale of the real estate conditioned upon an ascertainment of the amount to be received from the insurance policy. This being so, the writ of assistance was properly issued, presumably at the request of the plaintiff who was the judgment creditor, and the sale, to the plaintiff, was regular. No ground appears which justified setting the sale aside. The insurance policy called for a payment of \$2,000. The amount of plaintiff's judgment was \$3,365.03. The amount bid by plaintiff for the real estate was \$300, resulting in a credit on the judgment of only \$270.65, due to costs of sale. There seems no occasion for plaintiff's belated concern that the sale might not be necessary and should not have been held until it was de-

termined what portion of the \$3,365.03 judgment would not be paid by the proceeds from the \$2,000 life insurance policy.

The order vacating the sale is reversed.

DESMOND, P. J., and PARKER WOOD, J., concur.



C. I. T. CORPORATION v. PANAC et ux.*

Civ. 12564.

District Court of Appeal, First District,
Division 1, California.

June 22, 1944.

Rehearing Denied July 22, 1944.

Hearing Granted Aug. 17, 1944.

1. Bills and notes ☞520

In action on note for contract price of repairs and renovations to be made by payee company on makers' dwelling houses, evidence was sufficient to support trial court's finding that makers were defrauded by representatives of payee, which failed to perform work.

2. Appeal and error ☞1011(1)

In action on notes, alleged by defendants to have been procured by fraudulent misrepresentations of payee's agent, District Court of Appeal, on appeal from judgment for defendants on issue of fraud, will refrain from stating as matter of law that trial court's finding on conflicting testimony that defendants were free from negligence in signing notes was not sustained by sufficient evidence.

3. Bills and notes ☞373

At common law, deception of signer of negotiable instrument as to character thereof, without negligence on his part, constituted real defense to action thereon by bona fide holder, but signer might be estopped by his negligence to deny knowledge of character of instrument.

4. Statutes ☞147

In enactment of statutory provisions concerning negotiable instruments, and particularly in codification of rights of holders thereof and adoption of Uniform Nego-

* Subsequent opinion 154 P.2d 710.

tiable Instruments Law, it must be assumed that provisions covering defenses previously recognized at common law, such as that of fraud in procuring signature of instrument without signer's negligence, would have been included, if intended to be continued. Civ.Code, §§ 3136, 3138.

5. Bills and notes ☞373, 452(4)

Fraud is a defense against holder of promissory note not in due course, but is not available defense to holder in due course, unless he had actual knowledge of defect or such knowledge of facts that his acceptance of instrument amounted to bad faith. Civ.Code, §§ 3136, 3137.

6. Bills and notes ☞315, 365(1)

An assignee of negotiable instrument takes it subject to any defenses which maker might interpose against payee, but under law merchant and code provisions, holder thereof in due course, without notice of defect in prior parties' title, holds it free from any such defect and defenses available to such parties among themselves, except "real" or "statutory defenses," as distinguished from "personal defenses", that is, defenses between original parties, and "appellate court defenses", which are those acceptable to judicial officer interpreting statute by consideration of expediency and prudence. Civ.Code, §§ 3097, 3103, 3104, 3109, 3136-3139, 3205.

See Words and Phrases, Permanent Edition, for all other definitions of "Appellate Court Defense", "Personal Defense", "Real Defense" and "Statutory Defense".

7. Bills and notes ☞373

Freedom of makers of negotiable instrument from negligence in signing it is neither "real" nor "personal defense," under either common law or statute, against claim on note by holder in due course.

8. Courts ☞95(2)

California courts cannot properly follow other states' judge-made law, recognizing defenses, not originating in statutes, against negotiable instruments, on assumption that state Negotiable Instruments Law covers such defenses, as such law did not adopt Uniform Negotiable Instruments Law in toto or word for word, but was phrased to conform to state legislature's own ideas. Civ.Code, § 3097 et seq.

9. Bills and notes ☞373

Generally, fraud is no defense as against holder of negotiable instrument in

due course, in absence of statutory provision.

10. Bills and notes ☞337

To be "holder of negotiable instrument in due course", holder must have had no knowledge of defect or infirmity in prior parties' title thereto, nor knowledge of facts, disregard of which would have amounted to bad faith in acquiring instrument, at time of its negotiation. Civ.Code, § 3137 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Holder in Due Course".

11. Bills and notes ☞373

A holder of negotiable instrument in due course owes no duty to show that maker thereof was negligent in executing instrument in order to recover thereon.

12. Bills and notes ☞365(1)

In action on notes by holder thereof in due course, defendant makers were in no position to set up as defense any equities between them and payee of notes, even if makers were free from negligence in executing them. Civ.Code, §§ 3137, 3138.

13. Bills and notes ☞339

Commercial documents, such as negotiable instruments, being used in lieu of money, assignees thereof need not inquire into and investigate every circumstance bearing on original execution of instruments and take cognizance of all equities between original parties thereto before accepting them.

PETERS, P. J., dissenting.

Appeal from Superior Court, Contra Costa County; Harold Jacoby, Judge.

Action by the C. I. T. Corporation against Martin Panac and wife on two notes. Judgment for defendants, and plaintiff appeals.

Reversed.

Francis W. Collins, of Crockett, for appellant.

Francis P. Healey, of Martinez, and John Jewett Earle, of Oakland, for respondents.

WARD, Justice.

Plaintiff brought this action to recover from the defendants the amount of two promissory notes, negotiable in form, executed by them in favor of Home Improvement Company in payment of certain repairs

and renovations to be performed by the payee upon two dwelling houses owned by the defendants. The notes were payable in monthly installments, to commence sixty days after their respective dates. They were endorsed by the payee to the plaintiff which, in its complaint, claimed to be their holder for value in due course. The defendants denied that the plaintiff was such holder and, as a separate defense, pleaded fraud on the part of the payee in the procurement of the notes by one William Hart, agent of the payee.

On the first issue the trial court found in favor of the plaintiff; on the issue of fraud it found in favor of the defendants, and rendered judgment that plaintiff take nothing by its action.

Plaintiff appeals from the judgment, contending that the findings on which it is based are not supported by the evidence—in fact are contrary thereto.

Specifically the findings attacked by the appellant are that the defendants are illiterate and unable to read or write the English language; that William Hart gained their trust and confidence; that he falsely and fraudulently represented that a contract for repairs and renovations only was being signed by them; that Hart knew they were illiterate and unable to read or write English; that they were ignorant of the fact that they were affixing their signatures to promissory notes, had no means of knowing they were signing such and had no intention of doing so and would not have done so had they known that the instruments were promissory notes; that they were prevented from seeking independent advice and counsel although they requested to be allowed to do so, and, finally, that they were not guilty of negligence in executing the notes.

At the trial both defendants took the stand as witnesses. Mrs. Panac testified that while she had come to this country at the age of nine years, she had never attended school either in this country or in her native Italy; that she could sign her name and copy; that while she "read very little" she had taught herself the Constitution, having obtained her citizenship approximately eight years prior to the trial. With reference to her ability or desire to read, the following appears in the record:

"The Court: What is this word? You can see all right Mrs. Panac? A. Yes, I can see.

"Q. You have a book on the Constitution, haven't you? A. Yes, but you know.
* * *

"Q. Is that the book that you pay 50¢ for? A. Yes, I go the year—

"Q. Did you read those questions and answers? A. Yes, but I forgot all about already.

"The Court: When did you become a citizen? A. About eight years ago. I forgot because I—

"Q. Do you want to read this for me? A. I can't read it very well.

"Q. Just tell me what you think it says, right across there. * * * Do you know what that means? A. No."

Asked by the court whether she drove an automobile, she stated: "Yes.

"The Court: How can you read the signs? A. Yes, I can read the signs because I learned later for the Constitution.

"The Court: But the signs, what has that got to do with the Constitution? A. Yes, I can read the signs, because it is big, you know."

The Panacs had acquired several pieces of real property, some of which were income producing, and they had acquired some experience in the execution of papers as evidenced by Mrs. Panac's reiteration that she wished to consult their attorney, and that "I signed the signature, but I don't want to sign first." Martin Panac testified that he could not read very much nor pronounce well. A daughter of Emelia gave testimony to the effect that "all my life I have been reading, and answering" all her mother's letters, and that on several occasions had been called upon by Martin Panac to read to him notices received from real estate offices and other letters, and to answer them for him. Martin, when giving his testimony, was handed one of the exhibits in the case, called a notice of completion, and which had been signed by him as part of the transaction. It contained the words printed in bold type, "Notice to borrower—Do not sign this certificate until the work is satisfactorily completed." He was directed to read it, and did so with fair accuracy. Asked what the words meant, he gave their meaning correctly. When pressed he stated: "No, I didn't see it."

On the question of whether the defendants reposed trust and confidence in Hart, the representative of Home Improvement

Company, payee of the promissory notes, and who not only negotiated the transaction resulting in the giving of the notes but who also secured their execution, there is evidence tending to show that Hart was introduced to the Panacs by a friend of theirs, one Krajcr, for whom Home Improvement Company had done repair work similar to that proposed to be done for defendants. Krajcr had been defendants' friend and neighbor for many years and recommended Hart to them highly. Emelia testified that for this reason she was inclined to think that Hart "was all right." Martin testified that he reposed trust and confidence in him, adding that he was very cordial, a "lovely sort of a man," a good salesman and gave you the impression that he was your best friend. Emelia also testified that her husband before signing the documents remarked to Hart: "I see you was in the war * * * I trust you * * * I going to sign." At this point the record shows a question asked by the court: "Then did your husband sign?" to which she answered: "He sign and he make me sign * * * He says, 'Listen, sign Emelia,' he says, 'You see if he [Hart] do something wrong, you see that leg,' he said, 'crippled.' He said, 'I make another leg a cripple.'"

Hart, after having been introduced to the defendants by their friend Krajcr, with the statement that he was doing a fine job on his house, accompanied the defendants to the premises upon which repairs and some renovations were to be made. Hart made notes of the details of the work to be done, entering them in a memorandum book—sometimes referred to by the defendants in their testimony as the "black book." They then went to the home of the Panacs, and there Hart prepared a document which purported to embody the understanding arrived at on the work to be performed and the cost thereof. He presented it to the defendants with a request that they sign it. Both demurred to doing so at once, Mrs. Panac stating that she could not read it and wished to see an attorney before signing. Hart assured her that it was not necessary to see an attorney; that the contract had to be signed at once in order to get the work started; that he had to send a man to the job on the following day, and he offered to read the paper to her. In doing so he read the items of work entered in his note book, stating they were in the agreement, and again urged that the defendants sign. They still objected and this time their scruples

were overcome by Hart's assurance that all the work agreed upon would be done to their satisfaction and that it was necessary to start it at once. Martin Panac thereupon affixed his signature to the contract, with the above quoted remark—"I see you was in the war * * * I trust you"—and directed his wife to do the same. Hart then presented to them another paper, divided into three parts by perforated lines, one part being an application for credit, the second a form of promissory note, and the third a declaration that the work for which the credit was required had been satisfactorily completed. To this paper the defendants placed their signatures at the points indicated by Hart upon his assurance that it was part of the contract for the work to be done and without having Hart read it to them. He testified relative to the transaction that he said to Hart: "Now, listen, you got one leg broken, but I going to break the other one if you don't come through." The second note was executed under the same circumstances. At the time these signatures were thus obtained the price for some of the items of the work had not yet been ascertained or agreed upon. There were present during these proceedings two other persons beside the friend of the Panacs, Krajcr, but neither of the defendants requested any of them to read aloud the documents or to explain the contents thereof. The defendants testified that they understood from Hart that the work was to be paid for in monthly installments to commence sixty days after its completion, but had not contemplated giving notes. The work was never completed notwithstanding vigorous efforts made by the plaintiff and the defendants to induce Home Improvement Company to do so, with the consequence that when the first installment became due on the notes the defendants refused to pay.

Defendants do not contend that the conclusion of law based upon the finding that plaintiff is in fact "a holder in due course of said promissory notes" could have been otherwise. No evidence was introduced that C.I.T. had actual knowledge that the Panacs had been defrauded or any knowledge of a defect in the instruments or of any fact that would justify a finding that plaintiff's acceptance of the instruments amounted to bad faith on their part.

[1] There is sufficient evidence to support a finding that in the failure to perform the work defendants were defrauded by rep-

representatives of Home Improvement Company.

[2] As between the original parties the defendants could have pleaded the defense of fraud. The trial court determined that, notwithstanding the possession of some knowledge of the English language on the part of defendants, their neglect to call upon others present to read to them the documents, and their failure to insist on their request for time to seek independent legal advice, the defendants were free from negligence. This finding is based upon conflicting evidence and inferences drawn therefrom very favorable to defendants. A reading of the record alone might well disapprove this finding, but, bearing in mind that the trial court had an opportunity to view the witnesses, note their demeanor, etc., we refrain from stating as a matter of law that there is insufficient evidence to uphold it. Regardless of the finding, however, the judgment should be reversed upon the main issue in the case.

There is a line of cases holding that "the fact that a party whose signature is obtained by a fraudulent representation that the instrument is of a different character from the one that he believes he is signing is an illiterate person is material when such fraud is pleaded as a defense in an action against a bona fide purchaser. The maker or the acceptor must, however, have been guilty of no negligence and must generally have taken advantage of such reasonable means as lay at his hand. Some cases would seem to establish the rule that one who cannot read is negligent in trusting to the representations of the other party to the transaction as to the contents of an instrument which he signs, where he can easily procure the instrument to be read by third persons who are known to him." 10 C.J.S., Bills and Notes, § 499, p. 1101.

The court found that the notes were subject to fraud in the execution, upon the theory that defendants believed that in signing papers at the places indicated by Hart they were affixing their signatures to a contract for repair and renovation and to "nothing else." The court also found that defendants affixed their "said signatures to promissory notes" but "had no intention of signing and executing the same." The evidence shows that defendants knew they were signing a contract to renovate and repair certain premises. They testified that the repairs and renovations were to be paid for commencing sixty days from completion of

the work. The defendants admitted the genuineness of their signatures.

[3] Brannan's Negotiable Instruments Law, 6th ed., pp. 623, 624, as annotated and rearranged by Beutel, sets forth as follows the rights of a holder in due course of a negotiable instrument to sue (note the sections referred to are similar though not in each instance identical with the California codified provisions):

"At common law a real defense was held in most jurisdictions to exist in those cases in which a person, without negligence, has signed an instrument, which was, in fact, a negotiable instrument, but was deceived as to the character of the instrument and without knowledge of it. In such cases, there is no contract because there was no consenting mind, but the signer may be estopped by negligence to deny knowledge of the character of the instrument which he has signed. If he was not negligent he is not liable. * * *

"In Wisconsin, Minnesota, and Illinois (sec. 57) [Calif. Civil Code, sec. 3138] the N.I.L. or other legislation expressly makes fraud in the factum a real defense, supra, pp. 30 to 32. The Uniform Act does not cover the question in so many words. It is possible, however, that such conduct is 'fraud' within sec. 55 [Calif. Civil Code, sec. 3136] and hence causes merely a 'defective' title, or that it is one of the 'defenses' under sec. 57. It might also be assimilated to want of delivery, which was made an equitable defense by sec. 16 [Calif. Civil Code, sec. 3097]. Either possibility would change the common law and protect a holder in due course. In further support of this position it should be noted that the other real defenses are covered by the act and a broad interpretation of sec. 55, especially the last clause 'under such circumstances as amount to a fraud' certainly includes all kinds of fraud in factum. Since this is so it is hard to believe that the framers overlooked this particular defense. The equities are all in favor of such an interpretation, since the defrauded party really caused the situation and should be the one to suffer. * * *

"Under the old common law view 'fraud' in sec. 55 would be limited to fraud in the inducement, and 'defenses' in sec. 57 restricted to defenses which were equitable at common law, while fraud in the factum would continue to be a real defense analogous to forgery under sec. 23. Such is the result of a number of cases which have

arisen since the N.I.L., most of which do not cite the act, but there is a strong line of well reasoned cases contra."

We are confronted with the following: Plaintiff is a holder in due course of the negotiated instruments; defendants were defrauded but, according to the trial court, not chargeable with negligence on their execution. It appears that the trial court determined the case upon the now well known Wisconsin rule—which has been adopted by other states. In some instances the opinions appear to be judicial adoptions of the Wisconsin statute rather than judicial decisions based upon the law of the state wherein the controversy arose.

[4] We have previously noted that under the common law in most jurisdictions a defense was available if one, without negligence, signed a negotiable instrument being deceived as to its character. In the enactment of provisions of law covering this subject, and particularly in the codification of the rights of a holder of a negotiable instrument and the adoption of The Uniform Negotiable Instruments Law, it must be assumed that if the defenses previously recognized in the common law were to continue provisions covering such defenses would have been included.

[5] "Fraud" is a defense against a holder of a promissory note not in due course (*Landreth v. Ducommun*, 8 Cal.2d 694, 68 P.2d 231), but it is not an available defense to a holder in due course unless the holder had actual knowledge of the defect, or such knowledge of the facts that the holder's acceptance of the instrument amounted to bad faith. Civil Code, sec. 3137; *Appel v. Morford*, 62 Cal.App.2d 36, 144 P.2d 95; *Howell v. Dowling*, 52 Cal.App.2d 487, 126 P.2d 630; *James Mills Orchard Co. v. Bank of America*, 137 Cal.App. 299, 30 P.2d 626, 32 P.2d 342; *Goodale v. Thorn*, 199 Cal. 307, 249 P. 11; *Eames v. Crosier*, 101 Cal. 260, 35 P. 873; *Nuckolls v. Bank of California*, 10 Cal.2d 278, 74 P.2d 271. California has never adopted any other test. To follow Wisconsin it would be necessary to amend Civil Code section 3136 in substance as the provision reads in the Wisconsin statute. In California and in Wisconsin the negotiable instruments law provides: The title of a person who negotiates an instrument is defective within the meaning of this title when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means,

or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud. In Wisconsin, St.1933, § 116.60, the following is added: "** * * and the title of such person is absolutely void when such instrument or signature was so procured from a person who did not know the nature of the instrument and could not have obtained such knowledge by the use of ordinary care.*" *Klosterhuber v. Wisconsin State Bank*, 218 Wis. 191, 260 N.W. 644, 646. With reference to the above the court said (260 N.W. at page 646): "The italicized portion of the statute was added to section 55 of the Uniform Negotiable Instruments Act before that act was adopted by the Legislature in 1899 (chapter 356). Wisconsin is the only state that has incorporated that language into the Uniform Negotiable Instruments Act. The Legislature intended thereby to preserve the well-established common law of this state."

This is not a problem in which the courts of last resort of a state, irrespective of statutory provisions, have followed the provisions of the statutes of another state and in the absence of legislative action those courts may say that from such inaction it may be assumed that the legislature concluded that the previous or present provisions are sufficient to sustain the decisions of the foreign state.

Several cases indicate that judicial view in California is to the contrary of that in Wisconsin. The facts in *Bedell v. Her-ring*, 77 Cal. 572, 20 P. 129, 11 Am.St.Rep. 307, are not identical but similar in that there was a representation that an instrument presented for signature was a contract of agency. The defendant actually signed a promissory note without knowing its contents. The court in that case found that the defendant did not exercise ordinary care in regard to the character of the paper. The judgment in favor of an innocent third person as the holder of the note was affirmed. In the *Bedell* case, where the contentions were similar to those of the present case, the court said (77 Cal. at pages 573, 574, 20 P. at page 130, 11 Am.St.Rep. 307): "It is not necessary here to pass definitely upon the broader question discussed in the briefs, whether or not payment of a negotiable note in the hands of an innocent indorsee, who received it before maturity, can be avoided, under any circumstances, on the ground that it was procured by fraud. It is ap-

parent that to apply to such an instrument the principles which establish the essentials of an ordinary contract as between the original parties—as, for instance, that there must be consent of the parties and a sufficient consideration; that where there was no intention to sign, there was, in law, no signature; that fraud vitiates a contract *ab initio*, etc.—would be to undermine the whole structure of commercial law, and ‘shake paper credit to its foundation.’ The former decisions of this court seem to be in the direction of holding that in such a case payment cannot be avoided for fraud in the original procurement of the note.” See, also, *First Nat. Bk. of Iowa City v. Trognitz*, 14 Cal.App. 176, 111 P. 402.

[6] One difficulty in determining the rights of a holder of a negotiable instrument is the confusion that may arise relative to the method by which he acquired it. If by assignment he takes it subject to any defenses that the maker might interpose against the payee, while under the well recognized “law merchant,” and in California under the provisions of the code, a holder in due course of a negotiable instrument without notice of defect, sec. 3137, holds “free from any defect of title of prior parties, and free from defenses available to prior parties among themselves,” sec. 3138. As previously stated, defendants herein do not contend that there was notice to plaintiff of any defect, or knowledge of such facts as would make its acquisition of the instruments an act of bad faith.

It seems necessary to repeat that in California a holder in due course takes title free from defect and free from defenses available to prior parties, sec. 3138, unless the defense may be asserted against a holder irrespective of innocence. Such a defense may be referred to as a real—statutory—defense. A real defense, so far as the holder in due course is concerned, should also be distinguished from a defense that is personal—that is, a defense between the original parties. Likewise, a statutory or real defense should be distinguished from an appellate court defense—that is, one acceptable to a judicial officer, who interprets the statute, taking into consideration expediency and prudence, and thereupon states what the law should be. This method has been adopted in some states holding contrary to California.

A holder in due course of a negotiable instrument acquires it free from any defect

of title of prior parties and free from defenses available to prior parties among themselves, sec. 3138, but California does not protect a holder in due course from a real or statutory existent defense. A holder in due course, not a party to an alteration, may enforce payment of an instrument, genuine as to signature, according to its original tenor, Civil Code, sec. 3205, but when a signature is forged it is inoperative in the hands of a third person or any party against the person whose name has been forged unless the latter person “is precluded from setting up the forgery or want of authority,” sec. 3104. Want of capacity, as in the case of an infant, may exonerate from liability, but endorsement or assignment “by an infant passes the property therein,” sec. 3103. “Absence or failure of consideration is matter of defense as against any person not a holder in due course” sec. 3109. Where “the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him * * * is *conclusively* presumed,” sec. 3097. (*Italics added*).

Whatever defenses may exist under the common law or statutory rule, California by codification has been careful to state the real and the personal defenses. Section 3136 provides: “The title of a person who negotiates an instrument is defective within the meaning of this title when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.” The personal or original defenses are available “In the hands of any holder other than a holder in due course,” sec. 3139. Payment for the full amount may be enforced by a holder in due course, sec. 3138, unless there is actual knowledge of the defect or knowledge of such facts from which a reasonable inference may be drawn that in acquiring the instrument he was not acting in good faith.

[7] Freedom from negligence on the part of the makers of a negotiable instrument has never been regarded in California in following the common law rule, or made by statute a defense, real or personal, against a claim of a holder of a negotiable instrument in due course. If the legislature had intended such defense it would undoubtedly have so provided in no uncertain terms, as the courts of this

state have not, at any time, recognized such a defense.

The following cases were all decided prior to the adoption by California of The Negotiable Instruments Law. There is no doubt of the California rule. If the legislature did not deem it advisable to incorporate some provision similar to that in Wisconsin, surely the judiciary should not interfere. In *First Nat. Bk. of Iowa City v. Trognitz*, supra [14 Cal.App. 176, 111 P. 403], the court found that the defendant "was misled when he signed the instruments and did not intend to execute anything more than a mere memorandum form to be retained * * * in connection with the purchase of goods." The defendant in fact signed four negotiable instruments, which contained blanks later filled in. At page 180, of 14 Cal.App., at page 403 of 111 P., the court said: "Where negotiable paper of the kind here sought to be recovered on is issued in blank, it is no protection to the acceptor to say, as against the claim of an innocent holder for value before maturity, that he did not intend to create any liability against himself." In *Hellmann v. Potter*, 6 Cal. 13, 15, the court said: "A party who gives his power of attorney to another authorizing the latter in general terms 'to manage and transact all business matters of every nature and description in which I may be interested,' and 'to make, execute and deliver promissory notes, bills or bonds,' will be held liable for all such securities executed in his name by his attorney, where they have reached the hands of an innocent holder, although they may have been made for the private individual purposes of his attorney. Where one of two innocent parties must suffer, it must fall on him who has trusted most." In *Rich v. Davis*, 4 Cal. 22, reaffirmed and approved in *Rich v. Davis*, 6 Cal. 141, the court said (4 Cal. at pages 22, 23): "The principle has been long settled that, when a partner makes a note in the name of the partnership, it will render all the partners liable to a bona fide holder, although it has no relation to the partnership business, and the other partners were wholly ignorant of the transaction, and were even intentionally defrauded by their partner. See *Chitty on Bills*; *Story on Prom. Notes*; *Story on Part*; 3 Kent." In *Haight v. Joyce*, 2 Cal. 64, 66, 56 Am.Dec. 311, it was said: "Although want or illegality of consideration may be inquired into in a suit upon a bill or note between the original parties, by

the general mercantile law, where these securities have passed into the hands of third persons without notice, the maker is estopped from setting up such defense. This peculiar system of credit is favored by the law; and a rule requiring the indorsee of every bill or note to inquire into the consideration, would retard commercial transactions, and, in the language of Lord Kenyon, 'shake paper credit to its foundation.'" See, also, *Fuller v. Hutchings & Sweetzer*, 10 Cal. 523, 70 Am.Dec. 746; *Poorman v. Mills & Co.*, 39 Cal. 345, 2 Am.Rep. 451; *Smith v. Silsby*, 55 Cal. 470.

[8] If it be assumed that the Negotiable Instruments Law covered defenses not originating in legislative enactments but recognized in some other states, and that California might with propriety follow such judge-made law, we are confronted with the situation that California has not adopted in toto or word for word The Negotiable Instruments Law, but has phrased its code sections to conform to its own ideas after study not only of general but of specific provisions and possible defenses.

[9] There is a rule in some jurisdictions that where one is induced to sign a negotiable instrument under the belief or, as has been loosely stated, the impression that an instrument of a different character is being signed, the defense of fraud is available against a holder in due course in the absence of an estoppel in pais or one based on negligence. "But there is authority to the contrary to the effect that the defense is not available against a holder in due course, even though the person fraudulently induced to sign the instrument was free from negligence. The availability of the defense is based upon statute in some jurisdictions." 8 Am.Jur., sec. 589, p. 296. The general rule is that in the absence of statutory provision fraud is not a defense as against a holder in due course. 10 C.J.S., Bills and Notes, sec. 499, pages 1097, 1101.

[10-12] The California statute is plain upon the subject. In this state in order to be a holder in due course it is essential that the holder at the time the instrument was negotiated did not have knowledge of the defect or infirmity or knowledge of such facts which if known and disregarded would have amounted to bad faith in acquiring the instrument. And in this state there is no duty cast upon such a holder

to show that the maker in executing the instrument is chargeable with negligence. It follows from what we have said that the defendants were not in a position to set up as a defense in this case any equities existing between them and the Home Improvement Company even if, as found by the court, they were free from negligence in executing the notes.

[13] Commercial documents such as negotiable instruments are used in lieu of money. "To require each assignee, before accepting them, to inquire into and investigate every circumstance bearing upon the original execution and to take cognizance of all the equities between the original parties, would utterly destroy their commercial value and seriously impede business transactions." *Adolph Ramish, Inc., v. Woodruff*, 2 Cal.2d 190, 40 P.2d 509, 514, 96 A.L.R. 1146.

The judgment is reversed.

KNIGHT, J., concurs.

PETERS, Presiding Justice (dissenting).

I dissent.

The question presented on this appeal can be simply stated: Where a person who is himself free from negligence is induced by fraud to sign a negotiable instrument not knowing it to be such, and in the reasonable belief that it is a document of an entirely different nature, is such fraud a defense good against a holder in due course? The majority opinion holds that such fraud in the execution, like fraud in the inducement, is a mere personal defense which may not be asserted successfully against a holder in due course. Such holding, adopted by the majority, is contrary to the common law rule, both in England and in this country, is contrary to the cases decided under the English Bills of Exchange Act, is contrary to the overwhelming majority of cases decided under the Negotiable Instruments Law, is contrary to the views expressed by most legal writers in this field, and is contrary to basic principles of the law of contracts.

The facts need not be discussed in detail. The majority opinion concedes, expressly or impliedly, that the following basic findings are supported by substantial evidence:

1. That appellant is a holder in due course of the negotiable notes in question;

2. That Hart, the representative of the Home Improvement Company, payee of the notes, was guilty of fraud in the execution in securing respondents' signatures to the notes; and

3. That the respondents reasonably placed trust and confidence in Hart, and were not negligent in not knowing that the documents were in fact promissory notes.

These findings are amply supported. The respondents signed the promissory notes and a notice of completion before any work was started and before the price as to certain items were agreed upon. This they did upon Hart's representations that they were merely signing a contract to do the work. They did not know they were signing promissory notes. They were practically illiterate, and had no real understanding of the written word. They placed trust and confidence in Hart and in their supposedly close friend, Krajer, who introduced them to Hart. The majority opinion fails to state that, unknown to respondents, Krajer was an agent of Hart's, and was working for him on the promise of a substantial commission if he could get respondents and others to hire Hart as a contractor. Hart purportedly read the contract to respondents, but failed to include the notes in such reading. Respondents wanted independent legal advice but were thwarted by Hart. Under these circumstances, the trial court was justified in finding that respondents were not negligent and that Hart was guilty of fraud in the execution.

The type of fraud here involved has been referred to as fraud in *esse contractus*, fraud in the *factum*, fraud in the inception or fraud in the execution, to distinguish it from fraud in the inducement, which is a mere personal defense. At common law the cases were practically unanimous that fraud in the execution was a real defense. The leading English case is *Foster v. Mackinnon* (1869) L.R. 4 C.P. 704. That case unequivocally held that, in the absence of negligence on the part of the maker, such fraud was a defense against a holder in due course. This rule was followed by practically every American jurisdiction where the problem was considered prior to the drafting and adoption of the Uniform Negotiable Instruments Law, with the possible exception of West Virginia and Connecticut. See cases collected 36 L.R.A. 434; 11 Am.St.Rep. 318; 35 L.R.A., N.S., 776.

In England the Bills of Exchange Act was adopted in 1882. So far as the problem under discussion is concerned, the sections of that act are almost identical with those of the N.I.L. In *Lewis v. Clay* (1897), 67 L.J.Q.B. 224, it was declared that fraud in the execution, in the absence of negligence, was an absolute defense, and that the adoption of the English statute in no way changed the rule of *Foster v. Mackinnon*, supra. This is still the English law.

In United States, the N.I.L. was drafted by John J. Crawford in 1896. Over the years, at different times, every American state has adopted the act, not always verbatim, but in substance. California was one of the latest states to adopt the act, it being adopted in this state in 1917, Stats. of 1917, p. 1531, Chap. 751. There have been many cases decided by the various states since they adopted the N.I.L. The overwhelming weight of authority is to the effect that the adoption of the N.I.L. in no way changed the common law rule, and that both before and after the adoption of that uniform statute, fraud in the execution was, and remained, a real defense.

The applicable rule under the N.I.L. is stated as follows in 10 C.J.S., Bills and Notes, p. 1100, § 499(b): "Although there are some decisions to the contrary [citing one case each from Connecticut and West Virginia], the weight of authority holds that, if a person * * *, intending to sign an instrument of an entirely different character, * * * places his signature to a negotiable instrument, the mistake as to the terms or character of the instrument being caused by the fraud, deceit, or misrepresentations of another, and not being due to laches or negligence on the part of the signer, the latter is not liable on the instrument, although it has passed into the hands of a bona fide holder for value." In the footnotes relatively recent cases from Illinois, Indiana, Michigan, Minnesota, Missouri, North Carolina, Oklahoma and Texas are cited in support of that rule. In 8 Corpus Juris, p. 790, § 1049, the same rule is stated and many earlier cases, not only from the above states, but also from Arkansas, Iowa, Kentucky, Maine, Nebraska, New York, Ohio, Washington and Wisconsin, are cited in support thereof.

The identical rule, supported by many cases, is stated as follows in 8 Am.Jur. p. 295, § 589: "The majority rule is that fraud whereby one is induced to sign a ne-

gotiable instrument believing that he is signing an instrument of a different character is a defense, even against a holder in due course, in the absence of an estoppel in pais or one based on negligence."

Mr. Brannon, as the quotation set forth in the majority opinion indicates, does approve the minority rule. The great majority of legal writers in this field, however, advocate the majority rule. See Britton on Bills and Notes (1943) p. 566, § 130; Burdick, Real and Personal Defenses in Actions on Negotiable Paper, 3 Cornell Law Quarterly, 171; 2 Daniels on Negotiable Instruments, 7th Ed., p. 1075, §§ 991, 992; 4 Williston on Contracts, Rev.Ed., p. 3337, § 1159; Danforth, Illegality under the Negotiable Instruments Law, 92 Cent. L. Jour. 27; Green, Real Defenses and the Negotiable Instruments Law, 9 Tulane Law Rev. 78; Rosson, Bills and Notes—Fraud in the Inception—Negotiability and Real Defenses, 6 Ore. L.Rev. 160; Britton, Fraud in the Inception of Bills and Notes, 9 Cornell Law Quarterly 138; Notes, 12 Va.L.Rev. 324; 6 Tex.L.Rev. 114; 12 Tex.L.Rev. 228; 13 Mich.L.Rev. 601; 29 Yale Law Journal 797.

The many courts and legal writers above referred to have not approved the rule that fraud in the execution, where the maker is not negligent, is a real defense, by blindly following the common law rule. Cogent and compelling reasons exist for this approval. It must be remembered that the N.I.L. is not an entirely new statute, nor did it purport to repeal the entire law of contracts. It purported to codify the fundamental rules of the law merchant, and where there was a conflict to adopt what was considered to be the better rule. Where the N.I.L. has no express provision, or where its meaning is ambiguous, cases decided under the law merchant and fundamental rules of contract should be looked to in arriving at a proper interpretation. *Wettlaufer v. Baxter*, 137 Ky. 362, 125 S. W. 741, 26 L.R.A.,N.S., 804; *Trustees of American Bank v. McComb*, 105 Va. 22, 54 S.E. 14; *Haddock, Blanchard & Co. v. Haddock*, 118 App.Div. 412; 103 N.Y.S. 584, affirmed in 192 N.Y. 499, 85 N.E. 682, 19 L.R.A.,N.S., 136; *Parsons v. Utica Cement Co.*, 82 Conn. 333, 73 A. 785, 135 Am.St.Rep. 278; see cases collected 12 Va. L.Rev. 324.

So far as the present problem is concerned, the N.I.L. has no express provision covering the subject. There are pro-

visions, however, which tend to show that the drafter of the act intended fraud in the execution to be a real defense.

Section 57 of the N.I.L., Section 3138 of the Civil Code, provides that the holder in due course holds "free from any *defect of title* of prior parties, and free from *defenses* available to prior parties among themselves." (Italics added.) When a party, without negligence, signs a document by reason of the fraud of another, and honestly and reasonably believes it to be something else other than a negotiable instrument, the document, when executed, is not merely voidable—it is void. Fraud in the execution prohibits any valid contract from coming into existence. Fraud of this type is not a mere "defense" nor a mere "defect of title," such as is referred to in § 57. It is a factor which renders the instrument non-existent as a binding obligation. Section 57 also provides that a holder in due course may enforce payment "against all parties liable thereon." The maker of a totally void instrument was never "liable" thereon. The sections dealing with the liabilities of the maker, § 60, N.I.L., § 3141, Civ.Code, of the drawer, § 61, N.I.L., § 3142, Civ.Code, of the acceptor, § 62, N.I.L., § 3143, Civ.Code, and of the endorsers, § 66, N.I.L., § 3147, Civ. Code, all provide that by making, drawing, accepting or endorsing the instrument such persons "engage" to pay the instrument according to their respective contracts. This clearly indicates that there must be an assent to be bound, otherwise there is no contract. There is no difference in theory between such a situation and an outright forgery, which is admittedly a real defense. Reality of consent underlies all contractual relationships. See Britton, Bills and Notes (1943) at p. 586; 12 Va. L.Rev. 324; Green, Real Defenses and the Negotiable Instruments Law, 9 Tulane L. Rev. 78, at p. 82. Underlying these concepts is the thought that a negotiable instrument is a specialized form of simple contract. Where, because of fraud in the execution, no contract in the form of a negotiable instrument has ever come into existence, no liability or rights attach to the instrument. The document comes into the world stillborn. Negotiation alone cannot breathe life into it.

The majority opinion refers to the doctrine that where the signer is free of negligence fraud in the execution is a real defense, as an "appellate court defense," and as "judge-made law," and argues that

this rule is a creature solely of the courts. Quite to the contrary, as has already been pointed out, the rule is based on a proper interpretation of the act, and upon basic rules in the law merchant and in the law of contracts in existence long before the act was adopted. The majority opinion also refers to this rule as the "Wisconsin rule." Does this imply that the rule originated in that state? If so, the implication is contrary to the fact. The rule originated nearly a half century before Wisconsin adopted the statute expressly making fraud in the execution a real defense. Many cases had been decided in England and in this country before Wisconsin adopted its statute. Wisconsin merely codified existing law. The fact that Wisconsin saw fit to thus put into express terms the rule of the existing cases does not necessarily mean that this addition changed the existing law. It is much more reasonable to imply that Wisconsin merely codified the existing rule and clarified what otherwise might be an ambiguity. There is another consideration that supports the conclusion that the majority rule should be adopted in this state. As already pointed out, California did not adopt the N.I.L. until 1917. By that year all but two or three of the other states had adopted the uniform act. See table, 5 Uniform Laws Annotated, p. XIII. At that time the great bulk of the cases above referred to, which have adopted the majority rule, had been decided. It is far more reasonable to imply that the legislature intended to adopt the rule approved by the overwhelming weight of authority, than to assume that it intended to approve the rule adopted by a small minority. It is an elementary rule of construction that in adopting the statute of a sister state, the interpretation of that statute by the sister state is included. Moreover, there is a strong public policy in favor of uniform interpretation of uniform statutes. Otherwise, the whole purpose of such acts is thwarted.

The majority opinion urges that to adopt the rule advocated in this dissent will be to "undermine" the whole structure of commercial paper. That is the familiar cry raised every time the question of whether a particular defense is a real or personal defense is involved. The obvious answer is that under the common law, and in the great majority of states in this country, the rule is as is here advocated, and yet commercial institutions seem to

struggle along without too much difficulty. The limitation, which denies the defense to one who has been guilty of negligence, is ample protection to such institutions.

The majority opinion refers to many California cases. Not one of them involved the point here under discussion. The problem has never been decided by a California appellate court, either before or after the adoption of the N.I.L. In *Bedell v. Herring*, 77 Cal. 572, 20 P. 129, 11 Am. St.Rep. 307, quoted from at length in the majority opinion, a person did sign a document without knowing it was a negotiable instrument. Unlike the instant case, the trial court found that the "defendant signed said note voluntarily, and without exercising the ordinary care in regard to the character of the paper signed which a prudent business man would and should exercise." 77 Cal. at page 573, 20 P. at page 130. The only holding of the court is that where the signer is negligent he cannot set up fraud in the execution against a holder in due course. That is sound law. The court expressly refrained

from passing on the question here involved, stating (77 Cal. at page 573, 20 P. at page 130): "It is not necessary here to pass definitely upon the broader question discussed in the briefs, whether or not payment of a negotiable note in the hands of an innocent endorsee, who received it before maturity, can be avoided, *under any circumstances*, on the ground that it was procured by fraud." What the court said in the next few sentences—quoted in the majority opinion—was obviously dicta. From the cases cited by the court in support of this dicta it is apparent that the court was confused as to the distinction between fraud in the inducement and fraud in the execution. Most, if not all, of the cases cited deal with fraud in the inducement. The last sentence of this dicta that: "The current of American authorities seems to be in the same direction," is just contrary to the actual fact. None of the other California cases cited in the majority opinion or in the briefs even remotely involved the problem here under discussion.

For the foregoing reasons, in my opinion, the judgment should be affirmed.

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24 Cal.2d 374

PEOPLE v. BAA.

Cr. 4509.

Supreme Court of California.

June 22, 1944.

1. Conspiracy ⚡47

Homicide ⚡250

Robbery ⚡24(1)

In prosecution for murder, conspiracy to rob, and robbery, evidence supported conviction.

2. Criminal law ⚡622(2)

Where, at time defendant moved for and was granted a separate trial, only three of five alleged conspirators were before superior court, defendant was not granted a trial separate from fourth alleged conspirator, and their joint trial was not a nullity. Pen.Code, § 1098.

3. Criminal law ⚡622(1)

Granting defendant a trial separate from some codefendants while requiring a joint trial with others is not an inconsistency rendering joint trial a nullity. Pen.Code, § 1098.

4. Criminal law ⚡622(1)

Under statute, a joint trial of codefendants is contemplated, and a separate trial is a privilege and not a matter of right. Pen.Code, § 1098.

5. Criminal law ⚡1147

In absence of showing of an abuse of discretion, appellate court will not interfere with ruling of trial court.

6. Criminal law ⚡1166(6)

Where defendant had his own counsel, his rights were carefully guarded, and evidence relating to other coconspirator was restricted to him, defendant was not prejudiced by having his case tried jointly with other coconspirator. Pen.Code, § 1098.

In Bank.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Charles Ivan Baa was prosecuted for murder, conspiracy to rob, and robbery. From a judgment imposing the death penalty, an appeal is automatically taken.

Judgment affirmed.

Irvin J. Kahn, of San Diego, for appellant.

Robert W. Kenny, Atty. Gen., Ralph W. Scott, Deputy Atty. Gen., and Thomas Whelan, Dist. Atty., and H. P. Mack, Deputy Dist. Atty., both of San Diego, for respondent.

GIBSON, Chief Justice.

This is an automatic appeal from a judgment imposing the death penalty.

Count one of the information charged appellant and Preston Jones, both negroes, with the murder of Tom Din Toy, a Chinese. Count two charged them with having conspired with Robert Denton, Grant Harris and Willie Davis to rob Toy. Count three charged appellant and Jones with the robbery of Toy. Appellant and Jones represented by separate counsel, were jointly tried on all three counts.

The deceased was robbed and shot about 1:30 o'clock in the morning as he entered the hallway of the Service Hotel in the city of San Diego. The night clerk at the hotel testified that he heard a noise in the entrance way, followed by a flash and report of a gun. He saw the man who fired the shot bend over the victim and then run out of the hallway. Five minutes after the shooting he identified the jacket then being worn by appellant as similar to the one worn by the person who did the shooting.

A sergeant in the United States Marine Corps testified that just prior to the shooting he saw three men cross the street in front of the Service Hotel. Two of the

men were about 15 feet in back of the third one. All three entered the hallway, there was a shot, and two of the men ran out to the street and separated. Appellant ran between automobiles parked near the hotel.

Two police officers heard the shot and saw two men run from the Service Hotel entrance. One of the officers saw appellant attempt to hide under an automobile parked at the curb near the hotel, and immediately took him into custody. The second officer pursued the other man who escaped.

Two detectives who came on the scene shortly after the shooting testified that while lying wounded on the hotel steps Toy pointed at appellant and said, "That is him, that is him," to which accusation appellant made no reply. On the way to the police station, appellant, according to these witnesses, stated that "the Chinaman wouldn't have got shot if he had handed over the money."

A gun containing one exploded cartridge was found at the curb near the hotel. A chambermaid in a San Diego hotel, where appellant lived under the surname of Alexander, identified the gun as one she had seen under a pillow in his room.

Appellant testified that while going home on the night of the shooting he met one Jim Stewart, who said to him: "I am going your way, I have got to collect some money up there from a fellow." As they neared the Service Hotel, Stewart, referring to a man approaching the entrance, said, "Well, there goes the fellow that owes me the money * * * come on and go with me." Stewart followed the man (Toy) into the hotel, saying to appellant: "Wait right here, I'll go up and get the money." Immediately afterward appellant heard a scuffle, a shot, and a call for help. Entering the hallway appellant found Stewart and Toy scuffling and tried to part them. Toy grabbed the appellant and Stewart ran away. As soon as he could get free, appellant ran into the street and seeing two officers with drawn guns he threw himself under an automobile parked at the curb. Although appellant had known Stewart for some time and had seen him almost nightly during the month preceding the shooting, he was unable to say where he lived or worked. No one answering appellant's description of Stewart was ever apprehended in connection with the crime.

[1, 2] There can be no question that the evidence is sufficient to support the judgment. The sole contention urged by appellant on this appeal is that he was improperly denied a separate trial from the codefendant Jones. The proceedings in the superior court against Jones and Davis were suspended and they were taken before the juvenile court. Jones was later brought back to the superior court for plea and arraignment. In the interim, appellant had moved for a separate trial, which was granted. When Jones was again remanded to the superior court and arraigned, he moved before a different judge for a trial separate from appellant, which motion was denied. So far as the record reveals, appellant, who was present with counsel in court at the time Jones made his motion, did not then mention his prior motion and the order thereon, nor did he then make a motion for a separate trial from Jones. Because his motion for a separate trial had been theretofore granted, appellant now urges that his joint trial with Jones "was a nullity." But, at the time appellant moved for and was granted a separate trial, Jones had not been brought back to the superior court for plea and arraignment, and apparently only appellant, Denton and Harris, three of the five alleged conspirators, were then before the superior court. Under the circumstances, it must be concluded that appellant was not granted a trial separate from Jones.

[3-5] There is no inconsistency in granting a defendant a trial separate from some codefendants while requiring a joint trial with others. Section 1098 of the Penal Code provides in part: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant." Under the statute, a joint trial is contemplated, and a separate trial is a privilege and not a matter of right. *People v. Rocco*, 209 Cal. 68, 73, 285 P. 704. In the absence of a showing of an abuse of discretion, an appellate court will not interfere with the ruling of the trial court. *People v. Eudy*, 12

Cal.2d 41, 45, 82 P.2d 359; *People v. Perry*, 195 Cal. 623, 631-633, 234 P. 890.

[6] Furthermore, it does not appear that appellant was prejudiced in any way by having his case tried jointly with that of Jones. At all times appellant had the assistance of his own counsel, his rights were carefully guarded, and evidence relating solely to Jones was restricted by the rulings and instructions of the court.

The judgment is affirmed.

SHENK, CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.



65 Cal.App.2d 156

KIRMAN et al. v. BORZAGE.
Civ. Nos. 14282, 14283.

District Court of Appeal, Second District,
Division 3, California.

July 11, 1944.

Hearing Denied Sept. 5, 1944.

1. Licenses ☞39

In undertaking to do plumbing work for which compensation was sought, a copartnership was a "contractor" within statute requiring a contractor's license, and to maintain action the copartnership was required to show that it had the license. St.1939, pp. 384, 388, §§ 7025, 7026, 7028, 7029, 7031, 7067, 7068(b), 7071, 7076.

See Words and Phrases, Permanent Edition, for all other definitions of "Contractor".

2. Licenses ☞39

In action by copartners for labor and material furnished under plumbing contract, testimony of one of the partners that he had been licensed as a master plumber and that he had a license to do general plumbing business as a contracting plumber, without disclosing whether the city or the state issued the license, was insufficient to establish that such partner was duly licensed. St.1939, p. 384, §§ 7026, 7028, 7031.

3. Licenses ☞39

Where a copartnership appeared as a contractor under a plumbing contract, the fact that one of the partners had a contractor's license did not satisfy statutory

requirement that the copartnership obtained such license as a "person." St.1939, pp. 384, 388, §§ 7025, 7028, 7029, 7067, 7068(b), 7071, 7076.

4. Licenses ☞39

Where copartners suing for labor and material furnished under plumbing contract failed to establish that the contractor's license required by statute had been obtained, no recovery could be allowed. St. 1939, p. 384, §§ 7026, 7028, 7031.

5. Appeal and error ☞1178(6)

In action for labor and materials furnished under plumbing contract where a judgment for plaintiffs was reversed with directions to permit plaintiff to amend her complaint to allege, and to introduce evidence to show, that plaintiffs were licensed as contractors under statute, and under the evidence neither the amount awarded to plaintiff or the amount sought clearly appeared to be the just amount, further proceedings in trial court would not be limited to issue of contractor's license. St.1939, p. 384, §§ 7026, 7028, 7031.

6. Appeal and error ☞790(3)

Where judgment for plaintiff was reversed on defendant's appeal, plaintiff's appeal because of alleged inadequacy of judgment was dismissed as moot.

Appeals from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Mary Kirman and G. Paul Kirman, copartners doing business under the fictitious firm name and style of George W. Kirman Company, against Rena B. Borzage to recover for labor and materials furnished under a contract for plumbing work on defendant's premises. Plaintiff recovered a judgment for \$2,000 from which defendant appeals and plaintiffs appeal on ground of inadequacy of judgment.

Reversed on defendant's appeal, with directions, and plaintiff's appeal dismissed.

Charles Murstein, of Los Angeles, for appellant.

Henry M. Lee, of Los Angeles, for respondents.

BISHOP, Justice pro tem.

Plaintiffs are disappointed in the amount of their judgment; they sued for the principal sum of \$3,679.61 and have ap-

pealed because they claim that the judgment which was entered, one for \$2,000, is for a sum less than that required by the evidence. The defendant also has appealed, her contention being that it was error to render judgment in the plaintiffs' favor for any amount. We find ourselves in agreement with defendant's contention.

[1] Plaintiffs alleged and proved that they were a copartnership, engaged in the plumbing business. They alleged and proved that on the 3rd day of September, 1941, they entered into a contract with the defendant by which they undertook to furnish the labor and material necessary to perform, and they did perform, rather extensive plumbing work in connection with a house, garage, swimming pool, and other places on her property. But they neither alleged nor proved that they had a license from the State of California to engage in the business or act in the capacity of a contractor. Plaintiffs were plainly a "contractor," within the purview of section 7026, of the Business and Professions Code, St.1939, p. 384, and they acted in the capacity of a contractor in undertaking to do and in doing the work for which they seek compensation. It was unlawful, therefore, for plaintiffs to do the work, if they were unlicensed, section 7028, Business and Professions Code, and so long as they fail to allege and prove that they had a license, they are precluded from a judgment in this action by the provisions of section 7031, Business and Professions Code, which reads: "No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract." *Phillips v. McIntosh*, 1942, 51 Cal.App.2d 340, 124 P.2d 835; and see *Alvarado v. Davis*, 1931, 115 Cal.App.Supp. 782, 6 P.2d 121; *Holm v. Bramwell*, 1937, 20 Cal.App.2d 332, 67 P.2d 114; *Sheble v. Turner*, 1941, 46 Cal. App.2d 762, 117 P.2d 23. The public policy involved here has been determined by the legislature; it is not a subject of debate in the courts.

[2, 3] Plaintiffs contend that they proved at the trial that the necessary license had been obtained, but we find this not to be so. It is true that one of the plaintiffs

testified that he had been licensed as a master plumber, and that he had a license to do general plumbing business as a contracting plumber, but whether the state, or the city, issued the license, was not disclosed. Of greater consequence, the fact that one of the plaintiffs had a license does not suffice where the copartnership appears as the contractor. Sections 7025, 7028, 7029, 7067, 7068(b), 7071, and 7076 plainly indicate that a copartnership, if acting in the capacity of a contractor, is required to have a license as a person, and that this requirement is not satisfied by the issuance of a license to one of the partners.

[4, 5] Plainly, then, it was error to award the plaintiffs a judgment for any amount. This conclusion brings us to the problem of the details of the judgment we should render. If the defendant's appeal were all that we had before us, we might be inclined to reverse the judgment with directions to limit the new trial to the single issue of the existence of the license, as was done in *Siemens v. Meconi*, 1941, 44 Cal.App.2d 641, 112 P.2d 904. But we also have plaintiffs' appeal before us, and it raises a strong doubt as to the correctness of the amount awarded. No price was agreed upon between the plaintiffs and the defendant for the work that she wanted done; indeed the extent and details of the work, which consisted of repairs and remodeling, were not known initially, but developed as the work progressed. The compensation to which plaintiffs became entitled, therefore, was the reasonable value of the labor and material they furnished to the defendant together with a reasonable sum, for overhead, supervision, profit, or by whatever other name it may be called. Plaintiffs produced evidence that the total of these items was \$3,679.61 and earnestly contend that the defendant produced no evidence to the contrary. Were this clearly so, we might take steps to modify the judgment to conform to plaintiffs' prayer, if the possession of a license could be established. It clearly appears, however, that the trial judge had good reason to conclude that plaintiffs' total was too high. For example, they included in their account the services of helpers to the extent of just over four hundred hours. They paid these helpers at the rate of sixty cents per hour, but charged the defendant \$1.50. The trial court was quite justified in concluding that there had been an overcharge here, one not reasonable.

The defendant lists a number of items such as this, but their total does not appear to justify a reduction of \$1,679.61 from plaintiffs' total, the amount which would be necessary to enable us to affirm the round sum of \$2,000 which constituted the judgment. The fact that the trial judge visited the scene where the work was done does not make this a case where we should presume that there is ample evidence beyond that disclosed in the record, to sustain the findings as to the reasonable value of labor and materials, for the reasonable value of work upon materials now hidden away in walls and underground cannot be obtained from a view of the walls and ground. To sum up, we are of the opinion that neither \$2,000 nor \$3,679.61 clearly appears to be the proper amount to be awarded, so that we find it inadvisable to limit further proceedings in this case to a discovery of the fact respecting the issuance of a contractor's license to plaintiffs.

[6] The judgment in plaintiffs' favor having been rendered contrary to the express provisions of a penal statute, is reversed, with directions to the trial court to permit the plaintiffs to amend their complaint, if they be so advised, to allege that they were licensed as contractors when they undertook to perform and performed the work for which they are seeking compensation. The judgment having been reversed on defendant's appeal, plaintiffs' appeal is moot, and is dismissed.

DESMOND, P. J., and PARKER WOOD, J., concur.

Hearing denied; CURTIS and CARTER, JJ., dissenting.



65 Cal.App.2d 208

ROHR v. JOHNSON.
CIV. No. 3343.

District Court of Appeal, Fourth District,
California.
July 12, 1944.

I. Judges ⇨49(1)

Under statute relating to disqualification of judge to act, not only must there be a showing of bias or prejudice, but it must then be determined, as matter of law, whether by reason thereof a fair and im-

partial trial cannot be had. Code Civ.Proc. § 170, subd. 5.

2. Judges ⇨49(2)

In action to recover property given to defendant at time when donor was allegedly incompetent, judge was not disqualified to try case involving questions whether donor was incompetent when gift was made and whether gift was induced by undue influence because he stated before argument he knew defendant and thought he was honest. Code Civ.Proc. § 170, subd. 5.

3. Judges ⇨51(2)

Matter of disqualification of a trial judge should be raised when facts relied on are first discovered, and, in any event, before matter involved is submitted for decision, and plaintiff could not raise question after cause was submitted and decided. Code Civ.Proc. § 170, subd. 5.

Appeal from Superior Court, San Diego County; Jacob Weinberger, Judge.

Action by Gelia A. Rohr, an incompetent person, by her guardian, Katherine A. Sweet, against Edwin Johnson to recover personal property claimed to have been given to defendant by plaintiff at a time when she was incompetent. From a judgment for defendant, plaintiff appeals.

Affirmed.

Hubbell & Matherly, of Escondido, for appellant.

John A. Hewicker, of San Diego, for respondent.

BARNARD, Presiding Judge.

This is an action to recover for approximately \$1500 worth of personal property claimed to have been given to the defendant by Gelia A. Rohr at a time when she was incompetent. This appeal is presented on an agreed statement. However, after all briefs were filed the appellant filed a clerk's transcript.

The complaint alleged that the defendant came into possession of this property while occupying a confidential and fiduciary relationship with Gelia A. Rohr, and that she was then incompetent. It is not directly alleged that the defendant exercised any undue influence in regard to the matter, but there is a suggestion to this effect in an allegation that by reason of her being incompetent she reposed great trust

and confidence in him. The answer denied all allegations of the complaint except those relating to the appointment of a guardian.

It appears that after all evidence was presented, and before argument, the trial judge made a statement in which he said:

"May I say this: the question in my mind is this—I have not any idea whatsoever that Mr. Johnson conspired to get anything away from the old lady; I do not entertain that notion for a second. I know Mr. Johnson. I know what kind of a man he is: I think he is a high minded, intelligent, honorable citizen."

He then pointed out that there still remained for him to determine whether Gelia A. Rohr was mentally competent at the time she made this gift and whether the defendant was acting in a fiduciary capacity at the time he accepted the gift. He then said: "I am not doubting his honesty of purpose whatsoever. I think he accepted this in good faith. He may or may not be in a position to retain it—I don't know—I have not decided the case yet." He then asked for the citation of any authorities the parties might have to sustain their contentions.

Thereafter, the court found that on April 24, 1942, Gelia A. Rohr, in the presence of two witnesses, gave a portion of the property involved to the defendant as a gift; that in August, 1942, being about to discontinue housekeeping, Gelia A. Rohr asked the defendant to sell certain of her furniture (a part of the property involved here); that the defendant sold this furniture and paid the proceeds to her; that she was not mentally incompetent at the times in question but on the contrary was competent and in full control of her mental faculties; that when the property was turned over to the defendant she fully understood her act and the effect thereof, and did so with the full knowledge that it was being delivered as a gift; that no undue influence was at any time exerted over her by the defendant or by anyone on his behalf; and that on October 5, 1942, Gelia A. Rohr was by an order of court declared to be an incompetent person and a guardian was appointed. Judgment was entered in favor of the defendant.

The plaintiff filed an affidavit and a notice of intention to move for a new trial on the grounds that the evidence was insufficient to justify the finding that the plaintiff was not under the undue influence of the defendant, and that the remarks of the trial judge disclosed that he was biased

in favor of the defendant. The trial judge filed an affidavit stating that he had made the remarks in question for the purpose of pointing out what he regarded as the material issues to the end that counsel, knowing his views, could direct their argument to the problems considered important for a fair and impartial decision in the matter; denying that he was at any time biased for or against any party; and alleging that he was not prejudiced or biased in any manner and that he believed he could render a fair and impartial decision on the motion.

By stipulation, the matter of the disqualification of the trial judge to hear the motion for a new trial was heard before another judge and the motion for disqualification was denied. Thereafter, an order was entered denying the motion for a new trial, and the plaintiff has appealed from the judgment.

The appellant contends that the judge was disqualified because he had an undisclosed knowledge of the other party and that a new trial should have been granted on the ground of bias.

[1] Subd. 5 of section 170, C.C.P., provides that a judge is disqualified to act in a matter when it is made to appear probable that by reason of his bias or prejudice a fair and impartial trial cannot be had before him. Under this statute not only must there be a showing of bias or prejudice but it must then be determined, as a matter of law, whether by reason thereof a fair and impartial trial cannot be had. *Briggs v. Superior Court*, 215 Cal. 336, 10 P.2d 1003.

The claim of bias here is based on the fact that the judge knew the defendant and thought that he was honest. If this, standing alone, were held to be sufficient to establish prejudicial bias many judges would be of small use in their home counties. The mere fact that a judge entertains a general belief in the honesty of someone he knows is neither unusual nor indicates that he has such a fixed opinion as to impair his ability to weigh any evidence involving the acts of that person. None of the evidence produced at this trial is before us. It may have been such as to merely confirm any good opinion of the respondent's honesty previously held by the judge. It does not here appear that there was any conflict between the testimony produced by the respective parties or that the judge was in any way called upon

to decide which of two sets of witnesses was telling the truth. At best, any showing of bias is not strong and it is very questionable whether the showing thus made could be held sufficient to show the existence of bias.

If we assume the showing to be sufficient in that regard the question remains whether a probability appears that a fair and impartial trial could not be had. The "gift" here in question was made five and a half months before the lady was adjudged incompetent. The only issues presented by the pleadings were whether she was incompetent at the time the gift was made and whether that gift was induced by undue influence on the part of the respondent. The honesty of the respondent had nothing to do with the first of these issues, which appears to have been the main one. The question of his honesty was possibly but not necessarily involved in the second issue. Undue influence in the legal sense may be exercised by an honest person through persistent importunities. Estate of Ricks, 160 Cal. 467, 117 P. 539.

[2] Apparently, there was little dispute here as to the facts and no conflicting facts are pointed out as sufficient to support findings contrary to those made. The record indicates that the real questions submitted to the court were as to the legal effect of the facts established, that is, whether those facts showed that this lady was incompetent at the time and whether they were sufficient to establish that the gift was the result of undue influence. So far as here appears the honesty of the respondent was not very much involved. The statement of the judge indicates that he was considering these questions as matters of law and that before making up his mind he desired the assistance of counsel. On the record before us, it cannot be held as a matter of law that it appears probable by reason of anything here shown that a fair and impartial trial could not be had, or that it was not had.

[3] A further consideration is that the matter of the disqualification of a trial judge should be raised when the facts relied on are first discovered and, in any event, before the matter involved is submitted for a decision. Nothing was done when the remarks in question were made, nor until after the cause was submitted and decided. A party should not be al-

lowed to gamble on a favorable decision and then raise such an objection in the event he is disappointed in the result.

A question similar to that here presented was raised in connection with the motion for a new trial and a different judge held that the trial judge was not disqualified. The affidavits there used are in the record before us and they sustain that finding. Nothing here appears to require or justify a contrary conclusion on this appeal with respect to that question of fact.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.



65 Cal.App.2d 118

ROBINSON v. ROBINSON.
Civ. 14437.

District Court of Appeal, Second District,
Division 2, California.

July 3, 1944.

1. Divorce ⇨249(3), 254

Court, in divorce action, can only dispose of community property and cannot dispose of separate property of one of the parties or carve out life estate therein.

2. Divorce ⇨249(3)

Where no issue was made in divorce action concerning ownership of real estate in that wife specifically alleged that the realty was separate property of husband, court had no jurisdiction to award wife a life estate therein.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action to quiet title by Lewis Robinson against Theresa Robinson, in which defendant filed a cross-complaint. From a judgment for defendant and an order denying a motion for new trial, plaintiff appeals.

Judgment reversed and purported appeal from order denying new trial dismissed.

Willis O. Tyler, of Los Angeles, for appellant.

Thomas L. Griffith, of Los Angeles, for respondent.

W. J. WOOD, Justice.

In this action to quiet title plaintiff has appealed from a judgment awarding to defendant a life interest in the real property which is the subject of the litigation.

An interlocutory decree was awarded to Theresa Robinson, defendant herein, on June 10, 1942, she having theretofore commenced an action against plaintiff for separate maintenance in which she later changed her prayer to ask for a divorce. In the divorce action she listed various properties of the parties, some of which she alleged to be community property. She specifically alleged that the real estate which is the subject of the present litigation was the separate property of the plaintiff herein, Lewis Robinson. A cross-complaint was filed in the divorce action and the court in its interlocutory decree of divorce ordered the plaintiff herein to pay to defendant herein the sum of \$12.50 per month until the further order of the court and also gave her "the right to remain in and to continue to reside and enjoy possession of the premises she now occupies at 1609 East 110th Street, Los Angeles." A part of the community property was awarded to each of the parties. In the final decree of divorce, which was entered on June 17, 1943, no reference was made to the real property involved in this action.

The present action was commenced on January 12, 1943. By its judgment entered on October 5, 1943, the court decreed that plaintiff is the owner in fee of the land described in the complaint, "subject however, to a life estate therein of defendant Theresa Robinson during her natural life to use the improvement thereon consisting of a dwelling known as 1609 East 110th Street, Los Angeles, California."

[1,2] The power of the court in disposing of the property of the parties in a divorce action is limited to their community property. In such a proceeding the court has no power to dispose of the separate property of one of the parties, nor to carve out a life estate therein. *Roy v. Roy*, 29 Cal.App.2d 596, 85 P.2d 223. In the divorce action of the parties to the present litigation no issue was made concerning the ownership of the real estate in question, for it was specifically alleged by the wife that the realty was the separate property of the husband. The court therefore was without jurisdiction to award to the wife a life estate therein.

The judgment is reversed. The purported appeal from the order denying a motion for a new trial is dismissed.

MOORE, P. J., and McCOMB, J., concur.



65 Cal.App.2d 114

KING v. GRIFFITH CO. et al.

Civ. 14377.

District Court of Appeal, Second District,
Division 2, California.

July 3, 1944.

Rehearing Denied July 27, 1944.

Hearing Denied Aug. 30, 1944.

1. Negligence ⇨32(2)

One engaged in performing work on premises of another is an "invitee", to whom the owner of premises, or one in control thereof, is not liable for injuries which result from a danger which is as obvious to invitee as it is to owner.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee".

2. Negligence ⇨32(1)

Property owner has the duty to exercise ordinary care, but if the dangerous condition of premises is obvious the owner is entitled to assume that invitee will perceive that which would be obvious to him upon the ordinary use of his own senses.

3. Negligence ⇨42

Where workman employed by subcontractor was injured in attempting to step over a sewer ditch which had been dug by another subcontractor on premises where workman was employed, and the danger of attempting to cross the ditch was obvious neither the contractor who constructed the ditch nor person in charge of premises was liable for injuries sustained.

4. Appeal and error ⇨1041(2)

In action for injuries sustained by subcontractor's employee in attempting to step across a sewer ditch which had been dug by another subcontractor on premises where plaintiff was employed, refusal to permit plaintiff to amend his complaint and to offer proof as to defendant's negligence in failing to brace the sides of the ditch was not error, since, even if negligent in that regard, plaintiff in attempting to cross ditch with knowledge that the bracing had been omitted was guilty of contributory negligence barring recovery.

Appeal From Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Myron T. King against Griffith Company and others for injuries received in falling into a ditch constructed by defendant on premises where plaintiff was employed. Defendant's motion for a nonsuit was granted and, from the judgment entered, plaintiff appeals.

Affirmed.

Kenneth J. Murphy, of Los Angeles (Henry E. Kappler, of Los Angeles, of counsel), for appellant.

James V. Brewer, of Los Angeles, for respondents.

W. J. WOOD, Justice.

Plaintiff commenced this action to recover damages for injuries which he received when he fell into a ditch at the reception center for evacuated Japanese at Manzanar, California. At the conclusion of plaintiff's evidence the court granted defendants' motion for a nonsuit and plaintiff has appealed from the judgment entered thereafter.

The reception center at Manzanar in April, 1942, was being prepared as rapidly as possible by the United States government for the reception of the Japanese who were being evacuated from the coastal areas. The general contractor for the work was Griffith Company, a corporation, and defendants Vincent and Pringle held a sub-contract under which they were to excavate trenches for the laying of sewer pipe. Plaintiff was an employee of Asbestos Roofing and Insulation Company, holder of a sub-contract for the roofing and papering on the buildings.

The camp for the Japanese was built in blocks of buildings on a gentle slope from the mountains toward the main highway. The streets were being located on this slope approximately 400 feet apart and at intersections of about 600 feet intersecting streets were being prepared to run parallel to the highway.

Under their contract defendants were engaged in digging trenches with a machine known as a ditch digger. Plaintiff, an experienced roofer, had been working on this job for about two weeks before the accident in question and during that time he had crossed over a number of ditches dug by defendants without difficulty. At ten o'clock in the morning of April 27, in attempting to step across a ditch which was approximately 2 feet in

width and from 4 to 6 feet in depth he fell to the bottom of the ditch and was injured by striking a pipe which had been placed therein. He carried in his hand a bucket half filled with cement. His fall was caused by the cave-in of the edge of the trench for about eighteen inches at an angle of approximately 45 degrees. Several of plaintiff's fellow workmen had crossed the ditch ahead of him. One of them, Mr. Dressel, had crossed about six feet in advance of plaintiff. When plaintiff approached the ditch he stopped at approximately one and one-half feet from its edge and as he started to cross the edge of the ditch gave way.

In his complaint plaintiff alleged that defendants were negligent in that they maintained the ditch in a dangerous and defective condition "in this that no cross-overs or platforms were provided as a covering for said ditch or trench to enable workmen including this plaintiff to cross over said ditch in safety." It was shown in evidence that the ditch in question was from three-fourths of a mile to a mile in length and that the accident occurred at a point approximately one-third the distance from its easterly end. One of the defendants testified that it was a general requirement on Federal work "to keep open intersections where proposed streets were * * * for the crossings of the other contractors".

[1-3] Plaintiff was in the position of an invitee at the location of the accident. The owner of the premises, or the one in control of the premises, is not liable for injuries to an invitee which result from a danger which is as obvious to the injured party as it is to the owner. The owner has the duty to exercise ordinary care but if the dangerous condition of the premises is obvious the owner is "entitled to assume that such invitee will perceive that which would be obvious to him upon the ordinary use of his own senses." *Funari v. Gravem-Inglis Baking Co.*, 40 Cal.App. 2d 25, 29, 104 P.2d 44, 46, and cases there cited; *Kolburn v. P. J. Walker Co.*, 38 Cal.App.2d 545, 101 P.2d 747; *Shanley v. American Olive Co.*, 185 Cal. 552, 197 P. 793. The application of this rule compels the conclusion that the trial court did not err in granting the nonsuit. Plaintiff had crossed the ditch which had been dug by defendants on a number of occasions. The accident occurred at about 10 o'clock in the morning and the ditch was plainly

visible. Plaintiff knew that others had crossed just ahead of him and for this reason could take particular notice of the soil to see if it had become loose or in danger of falling upon repeated crossings. Indeed, it can be well argued that plaintiff was in even a better position than defendants to know whether the ditch was then in an unsafe condition. Rather than walk to the end of the ditch or to take the time to throw in dirt to make a better crossing, plaintiff chose to step across the ditch, following Dressel, who had crossed immediately ahead of him. In doing so he assumed the risk of making the crossing.

[4] Plaintiff complains of the refusal of the trial court to permit him to present proof that the sides of the trench had not been shored or braced and to permit him to amend his complaint after the commencement of the trial specifically alleging negligence of defendants in this regard. Defendants objected to evidence on the subject of failure to brace the trenches, claiming that a new cause of action would thereby be set up after the expiration of the Statute of Limitations. However, regardless of this objection, it is clear that the court was justified in the action taken, for, if it could be shown that defendants were negligent in the matter of omitting the bracing, it is apparent that plaintiff in crossing the trench with knowledge that the bracing had been omitted was guilty of contributory negligence.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CURTIS, CARTER, and SCHAUER, JJ., dissenting.



65 Cal.App.2d 125

PEOPLE v. DORRANCE et al.

Cr. 2290.

District Court of Appeal, First District,
Division 1, California.

July 8, 1944.

1. Criminal law ☞1169(12)

Where state's witness, who participated in robbery with defendants, testified as to matter contained in written record of oral statement to police inspector, and defendants cross-examined witness as to

circumstances under which statement was made and as to some of the contents thereof, and inspector testified that statement was read to defendants who stood mute, admission of statement did not prejudice defendants. 1

2. Witnesses ☞199(1)

Where attorney for two defendants was called by third defendant for consultation with a view to retaining attorney, conversation during such consultation was privileged notwithstanding that attorney refused employment, and attorney could not testify to statement made during such consultation to impeach testimony given by third defendant as a witness for people.

3. Criminal law ☞511(2)

Testimony of victim of robbery together with that of other witnesses as to identity of perpetrators was sufficient to corroborate testimony of an accomplice and sustain conviction. Pen.Code, § 1111.

4. Criminal law ☞511(1)

Where testimony of an accomplice is relied upon, corroborating evidence, although it must do more than create a suspicion of guilt, is sufficient even though it is slight and, when standing by itself, entitled to but little consideration. Pen.Code, § 1111.

5. Criminal law ☞1178

Points on appeal not supported by either argument or authority may be disregarded.

Appeal from Superior Court, City and County of San Francisco; Peter J. Mullins, Judge.

Secundino Dorrance and Alonzo Dorrance were convicted of first-degree robbery, and they appeal.

Affirmed.

Alfred J. Hennessy, of San Francisco, for appellants.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

KNIGHT, Justice.

The appellants, Secundino Dorrance and Alonzo Dorrance, were found guilty by a jury of the crime of first degree robbery.

The victim of the robbery was Ernest Neil, a sailor of the United States Navy, stationed at Treasure Island; and the

robbery was committed shortly before midnight on July 29, 1943, in the rear of a parking lot, a short distance from a saloon known as George's Cave, on Eddy Street between Leavenworth and Jones Streets, in San Francisco. Neil was knocked down by blows on the head inflicted with Coca Cola bottles, and then beaten with the bottles about the head so severely that he was confined in bed in a hospital for five days and required two blood transfusions. He suffered a severe gash on the head, a broken nose, and blackened eyes, and his fingers were smashed when he tried to protect himself by putting his hands on his head. While he was thus being beaten his wallet containing \$40 was stolen from his back pocket.

Earlier that evening Neil visited the saloon with another sailor, and they picked up an acquaintanceship with two women, Ila Hain, aged 19 years, and a Mrs. Villela. The women were acquainted with appellants, and had met them earlier that day in a saloon near the waterfront, and tried to borrow some money from appellants. Appellants promised to meet them that evening at George's Cave and let them have the money. After the sailors met the women in George's Cave they drank with and talked to them for some time, and during that time the appellants were standing at the other end of the bar. The sailors asked the women to go to a room with them. One of the women said it would be all right, that she was going to get a quart of whiskey and take the sailors to a room. Both women went out, but Ila Hain returned alone in about fifteen minutes. The other woman had given Ila Hain a note saying for them to go to a hotel room and she would meet them there. Ila Hain told the sailors she had promised to buy appellants a drink, so they gave her a dollar and she went down to the other end of the bar and talked with appellants and gave them the dollar. Appellants asked her if Neil had any money, and she replied: "I guess so, he is buying my drinks." Thereupon appellants told her to get Neil outside and "we will take care of that." She and Neil left George's Cave about ten minutes to twelve, and were followed out by appellants. She led Neil through a parking lot to the back fence. There was a board off the fence, and as she started to go through the fence she pretended that she had caught her hair; whereupon appellants caught up with Neil and struck him on the head with the bottles. He fell to the ground and

put his hands over his head and started moaning, but appellants continued to strike him. As soon as he was knocked to the ground Ila Hain ran to the corner, got in a cab and went home. She testified that she lured Neil away from George's Cave and through the parking lot so that appellants could take his money.

Ila Hain was arrested and charged jointly with appellants as a principal in the commission of the robbery. She was arrested on August 8th, and on August 11th gave a statement by way of question and answer to Police Inspector Reznik, which statement was taken down by a police stenographer. In that statement Ila Hain related the circumstances leading up to the commission of the robbery as above narrated and naming appellants as the persons who assaulted and robbed Neil. At the time of the arraignment in September, 1943, appellants were represented by Attorney Hennessey, and the public defender appeared as counsel for Ila Hain. All three entered pleas of not guilty and the cause was set for trial on October 22, 1943. On the morning of the trial Ila Hain withdrew her former plea and entered a plea of guilty and asked for probation. The matter of probation was continued until November 15, and the trial proceeded as against appellants. Both appellants testified in their own behalf denying having committed the robbery, and they sought to establish an alibi, but this defense was rejected by the jury. Neil was not available as a witness at the time of trial because he was at sea, and the testimony given by him at the preliminary examination was read to the jury. Thereupon Ila Hain was called as a witness for the prosecution, and the testimony given by her followed closely the statement she had previously given the police.

[1] The statement so made was afterwards received in evidence over appellants' objection, and the trial court's ruling is assigned as error. We find no reason to set aside the verdict on that ground. The transcribed statement was signed by Ila Hain on August 12th, before Police Inspector Butz, and shortly thereafter it was read to appellants by Inspector Butz in the presence of Ila Hain, and neither of appellants made any denial of the accusations made therein against them. Inspector Butz testified positively that both stood mute. Furthermore, prior to the time the statement was received in evidence appel-

lants' counsel cross-examined Ila Hain as to the circumstances under which the statement was made; also as to some of the contents thereof; and during the cross-examination as to its contents the court reminded counsel that such examination was opening the way for the introduction of the statement in evidence. In any event, appellants could have suffered no prejudice by reason of the statement having been received in evidence because all of the facts and circumstances set forth therein were covered by the oral testimony given by the party making the statement, with full opportunity afforded the appellants to cross-examine.

[2] On cross-examination of Ila Hain, counsel for appellants asked her if while she was in jail awaiting trial and before she changed her plea she did not tell him that she was going to "stand on" the statement she had given to Inspector Reznik because he had promised her probation. She denied having so told counsel, and thereafter counsel offered himself as a witness for the defense for the purpose of relating the conversation he claims took place with her at that interview; and the court ruled that whatever she may have said to him at that time was privileged. Under the facts as disclosed by the record the court's conclusion is doubtless supported by Wigmore on Evidence (3rd Ed., vol. 8, sec. 2304, p. 587) wherein the author states the rule to be that when the communication is made pending negotiations for retaining the attorney it is privileged, notwithstanding that the attorney's acceptance of the employment is eventually refused. Here, according to counsel's testimony, he went out to see Ila Hain because she had sent for him by phoning to his office, and that he went out to consult with her as an attorney—that it was not a social visit; that she told him that she did not want to be represented by the public defender "but wanted separate counsel"; that after going over the case with her he told her he could not represent her because the statement she had given to Inspector Reznik "conflicts" with his clients and "crossfires on them." He was then asked the direct question: "* * * If she had told you she would abandon this particular statement would you have represented her," and he replied, "I would." It is quite evident from the foregoing that whatever Ila Hain may have said to counsel leading up to his refusal to act as her attorney was privileged in that it was said pending negotiations for his em-

ployment as her attorney. None of the cases cited by appellants are in point. In the case of *People v. Heart*, 1 Cal.App. 166, 81 P. 1018, the interview in question was had by the attorney with the defendant's wife and not with the defendant, which took it out of the privileged communication rule.

[3,4] Nor is there any merit in appellants' contention that the testimony given by Ila Hain was not sufficiently corroborated to meet the requirements of section 1111 of the Penal Code. As held in *People v. Negra*, 208 Cal. 64, 280 P. 354, 356, while the corroborating evidence must do more than create a suspicion of guilt, it is nevertheless sufficient even though it "be slight and, when standing by itself, entitled to but little consideration." *People v. McLean*, 84 Cal. 480, 24 P. 32. And continuing, the court said: "The law does not require that the evidence necessary to corroborate the testimony of an accomplice shall tend to establish the precise facts testified to by the accomplice; and strong corroborative testimony is not necessary to support a judgment of conviction founded on the testimony of an accomplice. Even though circumstantial and slight, the evidence is, nevertheless, sufficient if it tends to connect the accused with the commission of the offense. *People v. Martin*, 19 Cal.App. 295, 125 P. 919. * * * It is not necessary that the corroborating evidence should go so far as to establish by itself, and without the aid of the testimony of an accomplice, that the defendant committed the offense charged. *People v. Solomon*, 6 Cal. Unrep.Cas. 305, 58 P. 55." The more recent case of *People v. Davis*, 210 Cal. 540, 293 P. 32, holds substantially to the same effect. Furthermore, it has been held that such independent evidence may consist of contradictory statements made by the accused, or his silence in the face of accusatory statements, or of false statements made with respect to matters connected with the commission of the crime. *People v. Taylor*, 70 Cal.App. 239, 232 P. 998. Here the evidence shows among other things that Neil got a "good look" at appellants as they were standing at the end of the bar in George's Cave, and his identification of them afterwards at police headquarters in the presence of Ensign Hunt as the persons who assaulted and robbed him, together with the testimony of the manager of George's Cave that when Ila Hain and Neil left the place the ap-

pellants followed immediately behind them, was legally sufficient to satisfy the requirements of the law. Moreover, the evidence shows that when appellants promised to meet the women at George's Cave that night, one of them stated that he "wished he had a blackjack, there was a lot of money floating around there."

[5] The remaining points made by appellants are not supported by either argument or authority, and therefore under well settled rules they may be disregarded. See 4 Cal.Jur. 10-Yr. Supp. p. 941.

After an examination of the entire record including the evidence, we are satisfied that no reversible error has been shown, and that the verdict has not resulted in a miscarriage of justice. The judgments of conviction and the order denying the motion for new trial are affirmed.

PETERS, P. J., and WARD, J., concur.



65 Cal.App.2d 160

PEOPLE v. NEAL

Cr. 2287.

District Court of Appeal, First District,
Division 2, California.

July 12, 1944.

1. Criminal law ⇨1038(3)

Defendant could not complain of trial court's failure to instruct that crime of abduction for defilement could not be committed if complaining party consented and that previous unchastity of complaining party might be material to issues raised, in absence of a request therefor. Pen.Code, § 265.

2. Criminal law ⇨1044

Defendant could not complain of failure to strike out testimony of witness, where no motion was made to that effect.

3. Criminal law ⇨1171(1)

Remark of district attorney, while endeavoring to elicit testimony from witness, to effect that someone wanted to compound a felony or thwart justice, did not constitute reversible error on ground that remark implied that witness was in

league with someone to defeat identification of the accused.

4. Criminal law ⇨1045

Remark of district attorney while endeavoring to elicit testimony from witness, even if improper, did not constitute reversible error, where no ruling was asked for by defendant and no ruling was made thereon.

5. Criminal law ⇨1038(3)

Defendant could not complain of trial court's failure to give instruction that testimony of an accomplice should be viewed with distrust, where no such instruction was requested.

6. Criminal law ⇨1173(2)

Failure to comply with statute by giving instruction to effect that testimony of an accomplice should be viewed with distrust would not be reversible error. Code Civ.Proc. § 2061, subd. 4.

7. Criminal law ⇨1038(2), 1044

Defendant could not complain of trial court's failure to inform jury that written statements shown to witness while he was on stand and later read in evidence by prosecution were introduced solely for purpose of impeachment, where no objection or motion was made in trial court purporting to present the point.

8. Criminal law ⇨824(10)

Trial court should give a cautionary instruction in rape prosecutions, regardless whether it is asked.

9. Criminal law ⇨1173(2)

In prosecution under an information charging rape, contributing to delinquency of a minor, and abduction for defilement, where there were four witnesses who testified as to the transactions allegedly constituting the offenses, error, if any, in failing to give proper cautionary instruction was not prejudicial. Pen.Code, §§ 261, 265; St.1937, p. 1033, § 702; Civ.Code, § 3510.

10. Abduction ⇨16

Where prosecution involved charge of abduction for defilement, an instruction relating to previous chastity of prosecutrix was not required. Pen.Code, § 265.

Appeal from Superior Court, City and County of San Francisco; Robert McWilliams, Judge.

Ray Neal was convicted of rape, of contributing to delinquency of a minor, and of abduction for defilement, and he appeals.

Affirmed.

Nathan C. Coghlan, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and Ralph W. Scott, Deputy Atty. Gen., for respondent.

STURTEVANT, Justice.

The district attorney filed informations against three defendants, Ray Neal, Robert Sams, and Louis May. In each of the informations each defendant was accused of five different offenses. Three counts were accusations of rape, sec. 261 of the Penal Code, one was an accusation of contributing to the delinquency of a minor, sec. 702 of the Welfare and Institutions Code, St.1937, p. 1033, and one was an accusation of abduction for defilement, sec. 265 of the Penal Code. The charges against Neal and the charges against Sams were consolidated for the purposes of a trial. The jury returned five verdicts against the defendant Neal and he has appealed from the judgment.

The evidence demonstrated that one Janet McAngus, a previously married woman, seventeen years old, voluntarily, and apparently at her own solicitation, accompanied defendant and two friends to a bar on May 12, 1943. There is some dispute as to the amount of liquor consumed. Janet contended that they were not drunk. Some disturbance was created in the bar and Janet testified that Neal dragged her out by her hair. The boys testified that she did not wish to leave the bar because she wanted to continue drinking, but she was becoming noisy and they wanted to leave. They denied using force upon her.

Janet testified that she left the bar screaming and continued screaming as the car drove down Mission Street and into the Bayview hills. On cross-examination she admitted however that although the car traversed a populated area, apparently no attention was attracted by her screams. The boys deny she made any outcry whatever.

When they arrived at their destination in the hills, Sams and May, the other boys, left the car and Neal had intercourse with the complaining witness. Janet testified she was lying on the seat of the car; that the car doors were open; that she was dressed

in slacks and one leg of the slacks was removed, and that her underpants were also removed but were not torn.

Neal then left the car and Sams returned and had intercourse with the witness. She testified she was disrobed and lying down when he entered the car.

Sams then left the car and May entered. He attempted to have intercourse but when Janet asked him to stop he did so.

The boys then drove Janet to the home of a boy friend of hers and waited until she was admitted. They then drove off. A week or so after the alleged offense she voluntarily went out with May.

Janet told no one what had occurred until about two weeks later and after Sams' wife and Neal's girl friend had quarreled with her. She then made a complaint.

In his first point the appellant contends that as to the fourth count in the information the court instructed the jury as follows.

"The defendants are each charged in the fourth count of the information against them with having violated Section 265 of the Penal Code. That section provides, so far as it is here involved, that every person who takes any woman unlawfully, against her will and by force, menace or duress, compels her to be defiled is punishable as provided by that section. I think that the section is self-explanatory by its terms and that further instruction with reference to its meaning is not necessary."

[1] The appellant claims: "The jury were nowhere told that whereas in a rape case it is legally impossible for a female under the age of eighteen years to consent to the commission of the act charged, the crime described by Section 265 of the Penal Code could not be committed if the complaining witness were willing and consented to be conveyed by the defendants to the place where it is claimed she was raped. Nor were they informed, as we submit they ought to have been, that her previous unchastity might be material to the issues raised in such case." If appellant desired an instruction to that effect he should have asked for one. Omitting to do so he waived the point. *People v. Selk*, 46 Cal.App.2d 140, 115 P.2d 607.

[2] The prosecution called Joseph Glebmann, the proprietor of the saloon where the parties obtained their drinks. It is patent that he was called for the purpose

of identifying some or all of said persons. It transpired he was a most voluble person. His testimony was not helpful to either the plaintiff or to the defendants. He volunteered that before the trial he was approached by a man and woman whom he designated as father and mother and who had asked him not to identify the persons who had been in his barroom. In his testimony he used the name N-e-a-l or N-e-i-l. The record does not show whether by that name he referred to the persons who approached him or to one of the defendants. The defendants now complain because said testimony was not stricken out. It is a sufficient answer to state that no motion was made to that effect.

[3, 4] While the witness Glebmann was on the stand and the district attorney was endeavoring to elicit his testimony, the district attorney made a remark to the effect that someone wanted to compound a felony or thwart justice. The appellant argues that said remark implied that the witness was in league with someone to defeat the identification of the accused. There are several answers. In the first place a reading of the transcript does not disclose that the remarks of the district attorney had any such meaning. Furthermore, if the remarks did have such meaning no objection was made, no ruling was asked for, and no ruling was made thereon. The incident mentioned did not under these circumstances constitute reversible error. *People v. Giminiani*, 45 Cal.App.2d 535, 540, 114 P.2d 392.

[5, 6] Louis May was called as a witness by the prosecution. He delineated the facts that transpired during the evening of May 12, 1943. The appellant complains because the trial court did not give an instruction to the effect that the testimony of an accomplice should be viewed with distrust. C.C.P. § 2061, sub. 4. However no such instruction was requested. Furthermore failure to comply with the provisions of section 2061, sub. 4, C.C.P. is not reversible error. *People v. Wardrip*, 141 Cal. 229, 74 P. 744.

[7] While the witness May was on the stand he was shown certain written statements which he had signed. Later those written statements were, on stipulation of the parties, read in evidence by the prosecution. The appellant claims said written statements were hearsay and that it was the duty of the trial court to inform the jury that such evidence was introduced solely

for the purpose of impeachment. It is a sufficient reply to state no objection or motion was made in the trial court purporting to present the point.

[8] It will be conceded that it is settled law in prosecutions for rape, whether it is asked or it is not asked, the trial court should give a cautionary instruction. *People v. Adams*, 14 Cal.2d 154, 93 P.2d 146; *People v. Putnam*, 20 Cal.2d 885, 129 P.2d 367. The appellant complains because one was not given in the instant case. To that complaint there are several answers. The court did, of its own motion, give a cautionary instruction which was as follows:

"It is further immaterial whether force was used or was not used by the defendants upon the complaining witness in order to have such act of sexual intercourse with the complaining witness.

"While it is the law that the testimony of the prosecutrix Janet McAngus should be carefully scanned by you, still this does not mean that her evidence alone is never sufficient to convict.

"If you believe the prosecutrix and are satisfied from all the evidence in the case beyond a reasonable doubt of the defendants' guilt, then you should so find.

"It is not essential to a conviction in this case as against either defendant that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular acts constituting the offense or offenses charged in the first count. It is sufficient if you believe from her evidence and all of the other testimony and circumstances or proof in the case beyond a reasonable doubt that the crimes therein charged have been committed."

No other instruction was asked. An approved form of a cautionary instruction is set forth in *People v. Adams*, 14 Cal.2d 154, at page 164, 93 P.2d 146, at page 151, as follows:

[9] "That a charge of this nature is particularly difficult for a defendant to clear himself of. No charge can be more easily made, and none more difficult to disprove. From the nature of the case, *the complaining witness and the defendant are generally the only witnesses*. The law does not require in this character of case that the prosecuting witness be supported by another witness or other corroborating circumstances, but does require that you ex-

amine her testimony with caution." (Italics ours.)

However in the case at bar the facts were testified to by Janet, May, Sams and Neal. There were four witnesses. The facts therefore lent no foundation for the application of the rule. When the reason for a rule ceases, so should the rule. Civ. Code, § 3510. It follows that the error, if any, was not prejudicial. *People v. Lucas*, 16 Cal.2d 178, 105 P.2d 102, 130 A.L.R. 1485.

[10] Not stated as a point, but merely in passing, the appellant complains that an instruction relating to the previous chastity of the prosecutrix was not given. No such request was made; and when, as here, we are considering the provisions of section 265 of the Penal Code, such an instruction

is not required. *State v. Fernald*, 88 Iowa 553, 55 N.W. 534, 535.

Mr. Coghlan, as attorney for the appellant, presented the case in this court but did not try the case in the trial court. He has presented a most painstaking brief. Among other cases he cites and relies on *People v. Ephraim*, 77 Cal.App. 29, 245 P. 769, and *People v. Gilliland*, 39 Cal.App.2d 250, 103 P.2d 179. They are not helpful. In both cases a foundation was laid in the trial court by appropriate objections and motions. In the record before us there was neither objection nor motion and no ruling was made by the trial court on which the alleged errors are based.

The judgment is affirmed.

NOURSE, P. J., and SPENCE, J., concur.

24 Cal.2d 406

NEEL et al. v. BARNARD et al.
L. A. No. 18453.

Supreme Court of California.
July 5, 1944.

1. Trusts Ⓒ25(1)

Plaintiffs' transfer of realty encumbered by trust deeds to defendant under agreement giving defendant irrevocable power to sell, lease, or otherwise dispose thereof in such parcels, for such prices, and on such terms as defendant might deem proper, and to use proceeds to pay the encumbrances, created a "voluntary trust" and made defendant a "trustee" and not a mere "mortgagee in possession" notwithstanding defendant's letter constituting part of agreement stated that defendant declined to enter into any trust agreement. Civ.Code, §§ 852, 2216, 2219, 2221, 2222.

See Words and Phrases, Permanent Edition, for all other definitions of "Mortgagee in Possession", "Trustee" and "Voluntary Trust".

2. Trusts Ⓒ25(1)

No particular language is necessary to create a trust, nor need the word "trust" or "trustee" be used. Civ.Code, §§ 852, 2216, 2219, 2221, 2222.

3. Executors and administrators Ⓒ449
Pleading Ⓒ430(2)

The rule prevailing where an issue not made by pleading is tried by consent did not apply to defendants' contention that claim of plaintiffs was not within scope of complaint nor of claim presented by plaintiffs to estate of deceased defendant, where defendants made timely objection to evidence on which plaintiffs based their claim. Probate Code, § 709.

4. Executors and administrators Ⓒ224

An action for accounting under deceased trustee's written agreement to sell plaintiffs' realty and other property conveyed to trustee and to account for proceeds, and for damages for breach of the agreement, in going beyond an attempt to follow and reclaim specific property and in asserting general liability against deceased trustee, was subject to Code provision requiring filing of claim where action is pending at decedent's death. Probate Code, § 709.

5. Pleading Ⓒ34(5)

A complaint which in first cause of action sought only accounting by trustee for

property conveyed to him under trust agreement authorizing him to sell property to pay plaintiffs' debts, and in second cause of action sought damages for failure to sell for amounts sufficient to liquidate plaintiffs' indebtedness and leave them a specified balance and for making certain sales for less than value of properties, without specifically alleging repudiation of trust, could not by implication be construed as including repudiation of trust by trustee.

6. Executors and administrators Ⓒ431(2)

The rule that holder of claim against an estate cannot maintain action thereon unless claim is first presented means that he cannot maintain action on any claim not first presented for allowance, and that in any action brought he can recover only on a claim presented and rejected. Probate Code, § 709.

7. Executors and administrators Ⓒ448, 449

A claimant's cause of action against estate of deceased trustee arises on claim in form in which it has been presented, and he is not permitted to prove a cause of action different from that stated in the claim nor to amend his complaint so as to set up any other cause of action. Probate Code, § 709.

8. Executors and administrators Ⓒ227(1)

A claim against decedent's estate must sufficiently indicate the nature and amount of demand to enable executor and probate judge to act advisedly on it. Probate Code, § 709.

9. Appeal and error Ⓒ179(1)

Where plaintiffs' claim as filed against deceased trustee's estate for accounting and complaint in action on the claim contained no allegation of trustee's repudiation of trust and consequent liability of trustee's estate for the then value of trust property, plaintiffs' contention as to repudiation would not be considered by reviewing court. Probate Code, § 709; Civ.Code, §§ 852, 2216, 2219, 2221, 2222.

10. Trusts Ⓒ191(3)

Under contract requiring trustee within reasonable time to sell realty conveyed to him by beneficiaries, but giving trustee large amount of discretion regarding prices, terms and conditions of sale, trustee's mere failure to make a sale of particular tract at adequate price, viewed from present standpoint, did not necessarily establish trustee's breach of duty.

11. Trusts ⇨191(3)

Where written contract created trust under which trustee was empowered to sell land conveyed to him by beneficiaries for purpose of paying beneficiaries' indebtedness, in such pieces, for such prices, and on such terms and conditions as trustee might deem proper, trustee was given absolute discretion as to matters referred to, and exercise thereof could not be reviewed by any other person or tribunal on considerations going to soundness of judgment exercised by trustee, in absence of fraud or bad faith. Civ.Code, § 2269.

12. Trusts ⇨305

In action against trustee for accounting under contract authorizing trustee to manage and sell parcels of realty on such terms and at such times as trustee, within his discretion, should determine, evidence did not show that trustee, in refusing offer to purchase property at price subsequently shown to be adequate, did not exercise an honest judgment, and his estate was, therefore, not liable for damages for such refusal.

13. Trusts ⇨305

In action against trustee by beneficiaries of trust for accounting and for damages, finding that trustee had no opportunity to sell property involved at such prices as would have liquidated plaintiffs' indebtedness as provided by contract creating trust, or on such terms as trustee properly fixed, determined in effect, that a reasonable time for sale of property had not elapsed.

14. Evidence ⇨265(2)

In action against trustee for accounting and for breach of trust agreement in failing to sell realty for benefit of beneficiaries, trial court was not bound to accept trustee's admission in letter that he was holding land for higher price as conclusive of fact stated, even though not directly contradicted.

15. Trusts ⇨305

Even if offer was made to trustee for purchase of realty which trustee held for sale for benefit of beneficiaries of trust, it would be presumed that trustee exercised his judgment upon it and deemed price offered too low, and court could not say that he acted fraudulently or in bad faith in declining to sell.

16. Trusts ⇨191(3)

Even if lands held by trustee under agreement to sell at prices sufficient to pay debts of beneficiaries of trust and leave a substantial surplus could have been so sold by trustee, trustee's failure to sell would not necessarily establish his bad faith or breach of duty if refusal to sell was because of belief that market would improve, in absence of evidence that beneficiaries ever urged trustee to sell at best prices obtainable or that they were not satisfied to rely on his judgment.

17. Trusts ⇨191(3)

Where, under agreement under which beneficiaries had conveyed lands to trustee for management and sale thereof and to pay beneficiaries' indebtedness, beneficiaries had no right to control trustee's discretion as to time or conditions of sale, fact that beneficiaries made no protest against his failure to make sale indicated that beneficiaries did not then question either trustee's good faith or his good judgment.

18. Trusts ⇨191(3)

The exercise of mistaken judgment by trustee vested with large discretion in the sale of realty and terms and conditions of sale is not necessarily "unreasonable judgment", nor is it equivalent of "bad faith", as respects right to charge trustee or his estate.

See Words and Phrases, Permanent Edition, for all other definitions of "Bad Faith" and "Unreasonable Judgment".

19. Appeal and error ⇨1008(1)

In action against trustee for accounting under agreement empowering trustee to sell lands to pay beneficiaries' indebtedness and to pay any balance and to reconvey any unsold property to them, evidence on issue of trustee's good faith in refusing or failing to sell property, or in selling at an inadequate price, presented questions for trial court.

20. Appeal and error ⇨1010(1)

Trial court's fact findings supported by adequate evidence cannot be disturbed.

21. Trusts ⇨231(2)

Where agreement creating trust was executed because of trustee's promise not to humiliate plaintiffs by recording notice of default under trust deed securing money he had advanced and plaintiffs' ex-

pectation that proceeds of sales by trustee would be greater than could be obtained at foreclosure sales, and trustee, to avoid recording of notice of default, necessarily acquired notes secured by trust deed, and his purchase of notes secured by other trust deeds was perhaps necessary to avoid foreclosure sales, trustee was not guilty of breach of trust on theory that he "acquired an interest adverse to the trust," within statutory prohibition. Civ.Code, § 2233.

See Words and Phrases, Permanent Edition, for all other definitions of "Acquired an Interest Adverse to the Trust".

22. Trusts ⇨305

On an accounting, trustee has burden to establish correctness of his accounts.

23. Trusts ⇨305

It is duty of trustee to support every item of his account by satisfactory evidence or the item must be disallowed.

24. Trusts ⇨305

The rule requiring trustee to support every item of his account or have the item disallowed goes merely to items in the account, and does not require trustee to anticipate and defend against charges of malfeasance not arising from anything on face of accounts, but grounded on other matters, and does not relieve plaintiff suing trustee for fraud and malfeasance from sustaining the burden of proving his charges.

25. Trusts ⇨305

A trustee is entitled to benefit of presumptions of regularity and good faith when his account is attacked.

26. Trusts ⇨305

Where deceased trustee's executor presented his account and produced evidence that items of receipts and disbursements were correct in amount and were for proper purposes, trustee was entitled to benefit of presumption of good faith, and court properly made in its findings a complete account based on such account, as against contention that trustee should have been required to justify affirmatively his failure to make sales of trust property under contract creating trust.

Action by Henry H. Neel and others against Charles Barnard for an accounting as trustee under an agreement between the parties and for damages, wherein defendant filed a cross-complaint. The named plaintiff and named defendant having died after commencement of the action, Thomas W. Neel, as executor of the last will of Henry H. Neel, deceased, was substituted as plaintiff for the deceased plaintiff, and Morris H. Barnard was substituted as executor of the last will of Charles Barnard, deceased, and Bertha Barnard Alvord, as executrix of the last will of Gertrude Irene Hall Barnard, deceased wife of original deceased defendant, was also made defendant. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Prior opinion, 143 P.2d 513.

Don G. Bowker, of Tujunga, and Henderson & Churchill and James C. Hollingsworth, all of Ventura, for appellants.

Rogers & Rogers, of Ventura, and John H. Alvord and Newlin & Ashburn, all of Los Angeles, for respondents.

PER CURIAM.

A petition for hearing in this case was granted to the end that further consideration be given to the contentions of the appellants. On such consideration, we agree with the disposition of the appeal by the District Court of Appeal of the Second Appellate District, Division Three, and adopt as the opinion of this court the opinion of that court prepared by the Honorable Hartley Shaw, Justice pro tem. It is as follows:

"This action was commenced by Henry H. Neel, Thomas W. Neel, his son, and Dessie L. Neel, wife of Thomas, against Chas. Barnard. After the action was begun, plaintiff Henry H. Neel and defendant Chas. Barnard died, the executors of their respective estates were substituted for them, and the executrix of the deceased wife of Barnard was also made a defendant. In discussing the case we shall use the terms 'plaintiffs' and 'defendants' to refer to the original parties, except as otherwise specially stated. The present plaintiffs appeal from a judgment in favor of the present defendants.

"This action arose from a contract between the plaintiffs and the defendant by which, as plaintiffs claim and the trial court found, the defendant became a trustee for

In Bank.

Appeal from Superior Court, Ventura County; L. N. Turrentine, Judge assigned.

plaintiffs, and was based upon certain claimed breaches of duty by defendant as such trustee. The contract consisted of a letter written by defendant to H. H. Neel and T. W. Neel, two of the plaintiffs, dated December 23, 1930, and a more formal agreement naming all the plaintiffs as parties of the first part and defendant as party of the second part, dated December 26, 1930, and signed by all of them. The letter transmitted the agreement to plaintiffs and referred to it in such fashion as to make both, as the trial court found, parts of the one contract between the parties. Also a part of the transaction was a deed, dated December 26, 1930, by which the plaintiffs conveyed to defendant, without qualification or restriction of any sort, their real property hereinafter mentioned.

"At and prior to the time of executing this contract plaintiffs were the owners of approximately 245 acres of valuable farming land in Ventura County, mostly used for the purpose of producing walnuts, with some of it in beans and other crops. Only 10 acres of this land were owned by plaintiffs Thomas W. Neel and Dessie L. Neel, the balance being the property of plaintiff Henry H. Neel, who was a widower. At the time of this transaction this land was subject to trust deeds for money loaned to the plaintiffs, a large part of it by the defendant but some of it by others, amounting, with advances also secured by the trust deeds, to \$228,260.92, as of March 31, 1931, according to the recitals of the agreement above mentioned, which projected the balances to include interest to that date. Payment of this sum and interest thereon was in default, in part, the trust deeds were subject to foreclosure, and plaintiffs were looking for some mode of refinancing their debts or otherwise saving themselves from the complete loss of their property which seemed impending.

"The letter and agreement above mentioned recited the facts regarding the loans, the incumbrances and the default in all the detail necessary to a complete statement, provided for the execution of the deed above referred to, and declared that plaintiffs had received no consideration for the deed. By the agreement the plaintiffs gave the defendant 'full authority and power irrevocable to sell, lease or otherwise dispose of any part of or all of said real property, or any interest or estate therein, in such pieces or parcels, and for such prices and upon such terms and conditions

as the party of the second part may deem proper, and to enter into contracts, and execute all papers as may be proper or necessary in order to carry out and consummate said sale or sales, and upon receipt of the purchase price, either in cash or part of the purchase price in cash and the payment of the remainder to be secured by a mortgage or deed of trust upon the property so sold, to execute and deliver to the respective purchaser all necessary and proper contracts, bonds and deeds of conveyance for the lands so sold which are or may be necessary or proper to fully carry out and complete the transfer of the property so sold and to be in such form and under such conditions as the party of the second part may deem proper.' Plaintiffs also authorized the sale of personal property used on the realty and of water stock appurtenant to it. In the agreement plaintiffs stated their 'confidence and trust in the integrity and honesty' of defendant and their belief, by reason thereof, that 'the disposition and sale of said real property and the payment of their indebtedness * * * can be more expeditiously accomplished, at less cost, expense and for a greater value than can possibly be made' on a foreclosure sale and that the proceeds of sale will probably be in excess of the debts 'if the management and sale of said real property is intrusted to' defendant. The defendant agreed 'that when the proceeds from the sale of said real property is ample and sufficient to pay the indebtedness herein described, and the advances, costs and expenses in the care and management of said real property, he will then make a full report and accounting' to the plaintiffs 'of all the receipts and disbursements made and upon approval and acceptance of said report' the defendant will reconvey to plaintiffs 'all the real property remaining unsold, if any; * * * and upon acceptance and approval of said final report * * * he shall be released and discharged from all confidence created by the acceptance of said grant to said real property.' Another term of the agreement was that the proceeds of sales and the income from the property 'shall be applied to the payment of the indebtedness herein described, the interest to accrue thereon, and the disbursements made by * * * [defendant] in the care and management of said real property, and for no other purpose.' It was also agreed that defendant was to receive compensation for his services. Pursuant to this contract defend-

ant took possession of the property described in it and has held and operated that property ever since, except two parcels which he sold.

[1,2] "Defendant contends that this agreement did not create a trust, but merely made of defendant a mortgagee in possession. The trial court, however, treated defendant as a trustee and we are satisfied that this view of the matter is correct. It is true the defendant, in his letter, referred to the fact that the deed was without limitation or qualification, saying also 'I decline to enter into any trust agreement, or declaration of trust'; but in this respect he was like Byron's maid who 'whispering "she would ne'er consent," consented.' The defendant was not even named as the lender and beneficiary in some of the trust deeds recited in the agreement, and many of the notes originally made to him as payee had at the date of the agreement been transferred to others. The powers given him by the contract far exceeded those of a mortgagee in possession. The relationship created by the contract has all the earmarks of a voluntary trust and must be so regarded. There is a transfer of property by plaintiffs to defendant, motivated by their personal confidence reposed in him, for the purpose of enabling him to carry out certain purposes for the benefit of plaintiffs as well as the holders of the indebtedness, which is voluntarily accepted by defendant, and he assumes an obligation to carry out these purposes, subject of course to the discretion provided for in the agreement; all in writing. This is sufficient to create a voluntary trust and make defendant a trustee. Civ.Code, §§ 852, 2216, 2219, 2221, 2222. No particular language or terminology is necessary to create a trust; nor need the word 'trust' or 'trustee' be used. *Weiner v. Mullaney*, 1943, 59 Cal.App.2d 620, 631, 140 P.2d 704.

[3] "Many of the points made by appellants are based upon the claim, which permeates their briefs, that the defendant, a short time after the trust was created, repudiated and abandoned it, claimed the trust property as his own and from that time forward treated the property as if there were no trust and the conveyance to him had been absolute, the plaintiffs further asserting that by such conduct defendant committed a conversion of the trust property and must be charged with the value of the property as of the date of repudiation. In reply the respondents contend that

this claim of appellants is not within the scope of the complaint filed by plaintiffs or of the claim presented to the estate of the original defendant. These two points merge into one, for when, by reason of the death of the original defendant before the trial, it became necessary to file a claim against his estate (Prob. Code, § 709) the claim filed was simply a copy of the plaintiffs' complaint herein. There is no room here for the application of the rule that prevails where an issue not made by the pleading is tried by consent, even if that rule could be applied to a variance from the claim filed, for defendant made timely objection to the evidence on which appellants found their contentions in this matter.

"The complaint contained two statements of causes of action. The first alleged the creation of the trust, stating the surrounding circumstances including defendant's superior knowledge and skill in the management and sale of property such as that of plaintiffs and plaintiffs' great trust and confidence in defendant, setting forth copies of defendant's letter and of plaintiffs' deed to him and giving what the plaintiffs understood to be the legal effect of the agreement, a copy of which they alleged they had been unable to find. This stated legal effect, while lacking many of the details of the actual agreement, did not differ from it in any respect material to the present inquiry. This count also alleged that defendant had made two sales of described portions of the land plaintiffs had conveyed to him, and that he had received income, rents and profits from the land conveyed to him which were in excess of the costs of operation, that he had failed and refused to render an account and plaintiffs had demanded one. This count further alleged that defendant became trustee for the plaintiffs, that plaintiffs had done everything required of them by the contract, and that defendant had 'failed, refused and neglected to properly perform and discharge his duties as trustee, in that' he had failed and refused to account.

"The second statement of a cause of action began by incorporating the first. Then it alleged that by the contract between the parties it was agreed that defendant would 'diligently and expeditiously sell so much of said * * * properties as would liquidate and satisfy the said indebtedness then owed by the plaintiffs; that by reason thereof it was the duty and obligation of

the said Chas. Barnard to sell, transfer and dispose of so much of said real properties within a reasonable time as would liquidate said indebtedness; that there was at said time an active market for the disposal of said real property, and at such prices as would have liquidated said indebtedness then owed by plaintiffs and which would have left a balance either in money or property for the plaintiffs of approximately two hundred thousand dollars.' Then followed allegations that defendant had at various times not stated received bona fide offers from cash buyers for various parts of the property, which would have enabled defendant to sell the entire property for more than \$400,000, but he 'refused to sell, transfer and dispose of certain parcels of said * * * properties' and if he had sold them plaintiffs would have been restored to the occupation and possession of certain parcels of said real properties and would have received the rents, issues, incomes and profits therefrom, and all to plaintiffs' damage in the sum of two hundred thousand dollars.' The second count then alleged facts regarding each sale made by defendant, showing that in each case the sale had been made for much less than the market value, to plaintiffs' damage in the aggregate sum of \$37,619.28. Finally, it alleged that 'by reason of the failure, refusal and neglect on the part of said Chas. Barnard to sell and dispose of said real properties within a reasonable time after taking the record title thereto,' interest on plaintiffs' indebtedness had accumulated and increased in the sum of \$100,000, but if he had made sales within a reasonable time \$85,000 would have been credited thereon, to their further damage in the sum of \$85,000. Prayer was for an accounting, that upon the accounting defendant be required 'to pay, convey and deliver to said plaintiffs property cash that may be due them,' and for damages in the sum of \$322,619.28.

[4] "The action, as characterized by the complaint, goes far beyond an effort to follow and reclaim a specific fund or specific property. It asserts a general liability against defendant, to be satisfied out of the assets of his estate, whatever they may be, and arising out of the contract pleaded. It is therefore subject to the provisions of Probate Code, section 709, requiring the filing of a claim where an action is pending at the time of a decedent's death. See 11A Cal.Jur. 706, 711, 712. This conclusion is even more obvious as applied to ap-

pellants' theory of a repudiation of the trust, leading to a liability for the value of the property, for this theory involves an abandonment of the property by plaintiffs.

[5] "Neither of the causes of action stated in the complaint constituting plaintiffs' claim said anything of a repudiation of the trust. The first was solely and simply an action to obtain an accounting. The second added to the first four items of damage which plaintiffs sought to recover; that is, \$200,000 arising from defendant's failure and refusal to sell the property for enough to liquidate plaintiffs' indebtedness and leave them a balance of \$200,000; \$6,619.28 and \$31,000 caused by defendant's sales of two properties for less than their value; and \$85,000 for interest, which accrued on plaintiffs' debts by reason of defendant's delay in selling. We cannot see how any of these allegations even hints at, or can be regarded by any sort of implication as including, a repudiation of the trust by defendant, with concomitant claim to hold the property in his own right, free of any trust.

[6-9] "The provision that the holder of a claim against an estate cannot maintain an action thereon unless the claim is first presented is equivalent to a declaration that he cannot maintain an action upon any claim that he has not first presented for allowance, and that in any action brought he can recover only upon the claim which has been presented and rejected. This rule is settled by a long line of decisions. The claim as presented and passed upon is the foundation of the cause of action. The claimant's cause of action arises upon the claim in the form in which it has been presented; that is the only action he may maintain, and plaintiff is not permitted to prove a cause of action other than or different from that stated in the claim, or to amend his complaint so as to set up any other cause of action.' 11A Cal.Jur. 865-867; to same effect see cases cited in notes to Cal.Jur.

A claim must 'sufficiently indicate the nature and amount of the demand to enable the executor and judge in probate to act advisedly upon it.' *Thompson v. Koeller*, 1920, 183 Cal. 476, 485, 191 P. 927, 930. Applying these rules to the present case, we conclude that the plaintiffs' claim as filed did not cover their present claim of a repudiation of the trust and a consequent liability of defendant's estate for the then

value of the trust property. There was nothing in it to suggest that any such liability was to be asserted, and the executor was therefore not put in a position to act advisedly upon the claim as now made. For this reason we dismiss the claim of repudiation from our attention in giving further consideration to the appeal.

"The complaint and the claim do, however, clearly present the point that it was the duty of defendant to sell the trust property, or so much of it as was necessary, in a reasonable time, that he failed to do so, and that by reason of such failure the plaintiffs suffered damage. The trial court put a construction on the contract which contravenes plaintiffs' contention, in this finding: 'That it was not the duty or obligation of Chas. Barnard to sell, transfer and dispose of so much of the real property involved herein within a reasonable time as would liquidate said indebtedness, but that it was his duty to offer said properties for sale at what he deemed a reasonable and fair price in an endeavor and an attempt to liquidate said indebtedness within a reasonable time and have a substantial sum left over to pay to the Neels, or in case of a liquidation by sale of a part of the property, to return the remaining properties to the plaintiffs.' We shall not undertake to decide whether the construction thus put on the contract in regard to defendant's duty to sell within a reasonable time is correct; for assuming plaintiffs' construction to be the true one, that is, that it was the defendant's duty to make sufficient sales within a reasonable time to liquidate plaintiffs' indebtedness, other findings and other terms of the contract are such that an error in the finding just quoted would not lead to a reversal.

[10] "Much of plaintiffs' argument on this point is based on the further finding that the defendant had 'an opportunity to sell the 89 acre tract (part of the land conveyed to defendant by plaintiffs) for a net sum of \$133,000 (the offer of \$140,000 being subject to a 5 per cent real estate commission) which offer was made in January of 1931, and which was refused * * *.' This is coupled with the further finding that 'at said time and place defendant offered to sell said property to the same person for \$150,000 cash, which offer was likewise refused. That said offers and refusals were not made in violation of the terms of the contract, but in the exercise of an honest judgment and discretion made and exercised in good faith.' The

contract, while it may have required a sale within a reasonable time, conferred a large amount of discretion on the defendant regarding the prices, terms and conditions of sale. The question, what was a reasonable time, is inextricably bound up with his exercise of discretion in these matters, and the time might vary accordingly. Defendant's mere failure to make a sale, even if, as plaintiffs contend was the case here, the price was adequate, as viewed from the standpoint of the present and the information on market conditions and trends now available, does not necessarily convict him of a breach of duty as trustee, for his discretion would properly take other matters into consideration.

[11, 12] "By the formal agreement defendant is given power to sell the land 'in such pieces or parcels, and for such prices and upon such terms and conditions as the party of the second part [defendant] may deem proper,' and in the letter defendant stated 'I must have the total and absolute control of the entire property as to its care, management, recital [so reads the record; perhaps 'rental' is intended] and sale or as to the disposition of the proceeds from the income or the proceeds or as to the disposition of the proceeds from a sale, and certainly there must be no restriction as to a sale and conveyance under such terms and conditions, as I may deem proper for as to those matters, I am to be the sole judge.' By these provisions the defendant is given an absolute discretion, whose exercise cannot be reviewed or controlled by any other person or tribunal on consideration going to the soundness of the judgment exercised by him. Civ.Code, § 2269. No doubt his exercise of this discretion could be attacked for fraud or bad faith, but we discover no evidence which requires a finding of fraud or bad faith, contrary to the trial court's finding of good faith, in regard to the offer mentioned in the finding above quoted. This offer was made in January, 1931, within a month of the execution of the contract between plaintiffs and defendant. There is evidence that real estate values in the vicinity of this land dropped greatly in the latter part of 1931 and thereafter, but we find nothing to show defendant was not exercising an honest judgment when he refused the price offered him in January of that year.

[13-15] "Concerning the later failure of defendant to sell, the court found 'That

it is untrue that on or about December 26, 1930, or at any time thereafter, there was an active market for the disposal of said real property, but it is true that there were only occasional sales of like properties, similarly situated, and that there was not an active market for said properties at any time subsequent to December 26, 1930, and it is untrue that the defendants had an opportunity to sell any or all of said properties at such price as would have liquidated the indebtedness owed by plaintiffs to defendants and which would have left a balance either in money or property of plaintiffs of approximately \$200,000.00 or any other sums. That the two sales made by plaintiff were made in the due course of business and were the only one which could have been made other than an opportunity to sell the 89 acre tract * * * (here follows the finding already quoted regarding this offer). Upon examining the evidence we see therein sufficient support for this finding, which it seems unnecessary to set forth here, to the mere lengthening of this opinion. Conditions of depression during the time in question are so well known that little proof of them is necessary. This finding while it does not directly pass upon the question of reasonable time, does in effect dispose of it; for if the property could not have been sold, on such terms as defendant properly determined, a reasonable time for sale had not elapsed. Plaintiffs point to a letter of defendant written in January, 1931, stating that he had declined an offer for a 24 acre tract. No details of this offer appear except the price, and as to that the letter stated that defendant was holding the land for a higher price. Evidently the trial court did not accept this admission as proving the fact admitted, for it found that no such sale could have been made. The trial court was not bound to accept such an admission as conclusive of the fact, even though it was not directly contradicted. But even if the offer was made, it is to be presumed that defendant exercised his judgment upon it and deemed the price too low, and we cannot say he was guilty of fraud or bad faith in declining to sell.

[16-18] "Even if, as plaintiffs contend, the properties could have been sold for enough to pay the debts and leave a substantial surplus, defendant's failure to sell would not necessarily convict him of bad faith or breach of duty. It was not necessarily unreasonable for him to believe that

the market would improve, and the court may well have concluded that plaintiffs shared that belief. There was no evidence that plaintiffs ever urged defendant to close the properties out at the best prices obtainable or that they were not satisfied to rely upon his judgment. It is true that they had no right to control defendant's action, but the fact that they made no protest against his failure to make sales indicates that they did not then question either his good faith or his good judgment. Furthermore, mistaken judgment is not necessarily unreasonable judgment and of course neither is the equivalent of bad faith.

[19,20] "In regard to this issue of fraud and bad faith, which is raised as to all of defendant's acts in accepting and carrying out the trust, and particularly as against the court's finding 'That it is untrue that the defendant, Chas. Barnard, acting as trustee or otherwise under the contract herein, has failed, refused and neglected, or failed, refused or neglected, to properly perform and discharge his duty as trustee,' there are circumstances pointed out by plaintiffs which tend to cast some doubt on defendant's complete bona fides, and if the trial court had made findings in plaintiffs' favor on this issue, perhaps they could have been sustained. But on a consideration of all these matters and of the evidence as a whole we are of the opinion that the question was one for resolution by the trial court and that its decision in favor of defendant has adequate support in the evidence and cannot be disturbed by us. The record is so voluminous and consists so largely of documentary matter that it would unduly prolong this opinion to set forth even a synopsis of the evidence on this point; we have, however, considered everything to which our attention is directed by the parties, with the result already stated.

[21] "Complaint is made that defendant was guilty of a breach of trust because he acquired the notes secured by the various trust deeds incumbering the property deeded to him, this being called the acquiring of an interest adverse to the trust, which is prohibited by section 2233 of the Civil Code. The trial court found that this was done 'pursuant to the contract' between the parties, and we think this finding is supported. Defendant had been the payee of notes amounting to \$160,000 and secured by trust deeds of plaintiffs' land,

and had sold them to others with his endorsement, so that upon the default which is recited in the contract he could be compelled by the holders to take them up. The motives inducing plaintiffs to execute the contract, as expressly recited in the formal agreement, were the promise of defendant not to humiliate or embarrass them by recording a notice of default under the trust deed securing the money he had advanced and their expectation that the proceeds of sales by defendant would probably be greater than could be obtained at foreclosure sales and greater than the amount required to pay their indebtedness. The agreement also mentions disbursements to be made by defendant in the care and management of the property. The defendant's letter transmitting the agreement stated that 'all my future investments will be for the care and protection of the property' and that 'it will be necessary to invest much additional capital before we can complete the entire matter.' If defendant was to avoid the recording of a notice of default on the trust deed running to himself, he must, of necessity, obtain the notes secured by it; and the purchase of notes secured by other trust deeds would be advisable and perhaps necessary to avoid the foreclosure sales, in accordance with the purpose of the contract.

[22-26] "Plaintiffs further complain that defendant should have been required to assume the burden of proof on the accounting. At the trial defendant presented an account and produced evidence in support of the items contained in it, such as tended to show that the items of receipts and disbursements were correct in amount and that the disbursements claimed were for proper purposes, and on this evidence the court made and stated in its findings a complete account, which differed in some respects from that submitted by defendant. Plaintiffs' point here is not, as we understand it, directed at the proceedings on the account so stated and does not involve the claim that evidence is lacking to support the findings as to the items included by the court in its account. The contention is, rather, that the defendant should have been required to justify affirmatively his failure to make sales of the trust property. On an accounting for a trust, the trustee does have a burden to

150 P.2d—12½

establish the correctness of his accounts, but the rule does not go so far as plaintiffs claim. Their main reliance in support of the claim is *Purdy v. Johnson*, 1917, 174 Cal. 521, 527, 163 P. 893, 896. That was an action against trustees for an accounting and other appropriate relief. The trustees presented an account to the court, and were cross-examined by the plaintiffs there in regard to the items in it, but apparently produced no evidence in its support. Of this procedure the court said: 'We think the course pursued was irregular. * * * The entire trial was conducted upon the erroneous theory that the burden of proof was upon the beneficiary to point out the particulars in which the account was erroneous, and that she was bound to go forward and establish affirmatively the impropriety of the charges and credits which she assailed. Such is not the law * * * in fact, the burden is upon the trustees to prove that charges made by them are proper.' As a final statement of the rule in this respect the court declared, at page 531 of 174 Cal., at page 897 of 163 P., 'that it is the duty of the trustees to support every item of their account, and that, wherever they fail to support the correctness of a charge or credit by satisfactory evidence, the item must be disallowed.' All of this the defendant here did. This rule goes merely to items in the account. It does not require the trustee to anticipate and defend against charges of dereliction of duty and malfeasance which do not arise from anything on the face of his accounts but are grounded on other matters. It does not remove from a plaintiff who sues a trustee on charges of fraud and malfeasance the burden, which the law would cast on him in case of another defendant, of proving his charges. The trustee is entitled to the benefit of the presumptions of regularity and good faith. See *Estate of Vance*, 1940, 141 Cal. 624, 626, 75 P. 323; *Burke v. Maguire*, 1908, 154 Cal. 456, 468, 98 P. 21.

"Many other points are made and argued in the 762 pages of briefs filed herein, but they relate to the contention that there was a repudiation of the trust and to the weight of the evidence and a discussion of them here is not deemed necessary in a disposition of this appeal."

The judgment appealed from is affirmed.

**CALIFORNIA EMPLOYMENT COMMISSION
V. LOS ANGELES DOWN TOWN
SHOPPING NEWS CORPORATION.**

L. A. 18660.

Supreme Court of California.

July 5, 1944.

Rehearing Denied Aug. 4, 1944.

1. Master and servant ☞5

An "independent contractor" is a person who is engaged in an independent employment or occupation, responsible to his principal only for the result and not for the manner or means by which it is accomplished.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Contractor".

2. Master and servant ☞5

In determining whether an individual is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired, and, if the employer has the power to exercise complete control, whether exercised with respect to all details or not, an employer-employee relationship exists.

3. Master and servant ☞6

Employer's right to discharge at will without cause is strong evidence of employer's control over the manner and means of performing the work, on question whether relationship of employer and employee exist.

4. Taxation ☞59

Where publisher of a shopping news devoted to advertising merchandise had the right to and did exercise entire control of manner and time of distribution of the paper by minor carriers and had right to discharge at will, the carriers were not "independent contractors" but were "employees" within meaning of Unemployment Insurance Act. Gen.Laws 1937, Act 8780d, § 6.5.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee."

5. Taxation ☞59

Publisher of a shopping news which employed minors as carriers was liable for contributions under the Unemployment Insurance Act based upon amount of compensation paid even though some of the carriers did not earn enough to qualify

them for benefits under the Act. Gen.Laws 1937, Act 8780d, § 56, and Supp.1939, Act 8780d, §§ 7(d), 57.

6. Taxation ☞37

The Unemployment Insurance Act constitutes a valid exercise of the state's taxing power. Gen.Laws Supp.1935, Act 8780d, as amended.

7. Master and servant ☞78

The purpose of the Unemployment Insurance Act is not limited to the raising of revenue, but it is a remedial statute and as such must be liberally construed for the purpose of accomplishing its objects. Gen.Laws Supp.1935, Act 8780d, as amended.

8. Master and servant ☞78

The Unemployment Insurance Act was not enacted merely to provide unemployment insurance for the benefit of persons ordinarily in permanent employment in the distribution and production of consumption goods, who, due to economic conditions, are unemployed through no fault of their own. Gen.Laws Supp.1939, Act 8780d, §§ 1, 7(d), 57.

CURTIS and SHENK, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; O. K. Morton, Judge Assigned.

Action by California Employment Commission against Los Angeles Down Town Shopping News Corporation for unemployment fund contributions. From a judgment for plaintiff, defendant appeals.

Affirmed.

Prior opinion 139 P.2d 342.

Gibson, Dunn & Crutcher, Henry F. Prince, and Norman S. Sterry, all of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., and Forrest M. Hill and Doris H. Maier, both of Sacramento, for respondent.

EDMONDS, Justice.

Los Angeles Down Town Shopping News, owned by the appellant corporation, is a publication devoted to the advertising of retail merchants. It has no subscribers but, without charge, regularly on Wednesday and Saturday of each week, carriers leave a paper at each dwelling house within

certain designated territories. The Employment Commission (formerly the Unemployment Reserves Commission) has ruled that these carriers are employees within the meaning of the Unemployment Insurance Act (formerly the Unemployment Reserves Act, Stats. 1935, chap. 352, p. 1226, as amended; Deering's Gen. Laws, 1935 Supp., Act 8780d, as amended) and sued the publisher for the amount assertedly due as contributions to the unemployment fund. The corporation's appeal is from a judgment in favor of the commission.

The paper has been published since 1922, and at the date of the trial was distributed by about 1,000 boys, selected by the corporation, more than 90 per cent of whom were under 18 years of age. They had no written contract but were assigned to specific routes under an oral agreement terminable at the will of either the publisher or the carrier. Each boy was required to obtain a work permit from the school authorities. Compensation ranged from \$2.00 to \$2.50 per week, depending upon the route to which the boy was assigned.

The distribution area was divided into districts, each in charge of a manager responsible to the publisher's circulation manager. Reporting to the district manager were inspectors, each having approximately 10 routes under his jurisdiction. The inspector supervised the delivery of the paper by the carriers and required compliance with the rules and instruction of the publisher. Since 1938 there have been junior inspectors to assist in directing the delivery system.

The publisher's truck delivered the papers to specified places, where each carrier checked in with his junior inspector and received his allotment with a Shopping News bag. The boy was required to walk the route and could not use skates, a bicycle or other means of conveyance. The delivery rules specified how the paper should be placed at each residence and the boys were instructed not to walk on lawns, or in flower beds. They were permitted to have one helper, approved by the Shopping News. Each boy was required to complete the delivery of the papers on his route by 8 a. m. on Wednesdays and 9 a. m. on Saturdays. He then reported whether he was short or over in the number of papers delivered. The inspectors checked all complaints made regarding the manner in which papers were delivered and the boys were subject to

dismissal for failure to comply with the publisher's instructions.

Upon these facts, the superior court found that Los Angeles Down Town Shopping News Corporation had the right of potential and actual control over the carriers as to the manner and means of the performance of their work in connection with the distribution and delivery of the Shopping News and other advertising matter which was from time to time delivered by them. These carriers were not independent contractors, the court declared, and it concluded that the publisher was an employer within the meaning of the Unemployment Insurance Act, *supra*, and subject to its provisions during the years 1936, 1937 and 1938. Judgment accordingly was rendered in favor of the commission in the amount payable for the period not barred by the statute of limitations. Code Civ. Proc. § 338.

The appellant contends that the carrier boys were independent contractors and not in "employment" within the meaning of section 6.5 of the Unemployment Insurance Act, *supra*. And the term "employment" as used in that statute, says the publisher, must be read with the same meaning which it had generally under the law of California at the time the unemployment legislation was adopted. But if the boys were in "employment," the argument continues, the act is inapplicable to them because the express terms used by the Legislature evidence an intention to exclude from the operation of the enactment persons earning less than the minimum amount entitling them to benefits under its provisions, and particularly to school boys earning "pocket money" through part time employment. The commission takes the position that the act not only includes the persons who are employers or employees, as judicially defined at the time the act became effective, but also those in "any relationship where the income of an individual is dependent upon the will of another." If the act is limited in its application to the employer-employee relationship, the commission declares, the finding of the trial court, that such relationship existed, should be sustained, and the judgment affirmed upon the ground that the carriers in "employment" under the act, received remuneration which constituted "taxable wages."

[1-3] An independent contractor is a person who is engaged in an independent employment or occupation, responsible to

his principal only for the result and not for the manner or means by which it is accomplished. *Moody v. Industrial Acc. Comm.*, 204 Cal. 668, 269 P. 542, 60 A.L.R. 299. In determining whether an individual is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the power to exercise complete control, whether or not that potential control is exercised with respect to all details, an employer-employee relationship exists. *S. A. Gerrard Co. v. Industrial Acc. Comm.*, 17 Cal.2d 411, 110 P.2d 377; *Murray v. Industrial Acc. Comm.*, 216 Cal. 340, 14 P.2d 301; *Moody v. Industrial Acc. Comm.*, supra; *Hillen v. Industrial Acc. Comm.*, 199 Cal. 577, 250 P. 570; *Press Publishing Co. v. Industrial Acc. Comm.*, 190 Cal. 114, 210 P. 820; *Claremont Country Club v. Industrial Acc. Comm.*, 174 Cal. 395, 163 P. 209, L.R.A.1918F, 177; *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 156 P. 491, Ann.Cas.1917E, 390; *Rest.Agency*, § 2. And strong evidence of the employer's control is his right to discharge at will, without cause. *Globe Indemnity Co. v. Industrial Acc. Comm.*, 208 Cal. 715, 284 P. 661; *Press Publishing Co. v. Industrial Acc. Comm.*, supra; *Melone v. Industrial Acc. Comm.*, 9 Cal.App.2d 569, 50 P.2d 503; *Call Publishing Co. v. Industrial Acc. Comm.*, 89 Cal.App. 194, 264 P. 300.

[4] In the present case there is substantial evidence to support the findings of the trial court that the boys were employees within the meaning of the Unemployment Insurance Act, supra. As defined by that statute, the term "employment" means "service * * * performed for wages or under any contract of hire written or oral, express or implied." § 6.5, as amended in 1937, St.1937, P. 2056. The testimony clearly shows that the publisher of Shopping News had the right to entirely control the manner and time of its distribution. Although the carriers were allowed to cover their routes in the manner they chose with reference to the point of starting and ending, the corporation not only reserved the right to direct the boys' work in almost every other detail but it exercised that right. Moreover, a boy's employment was terminable either without cause or for noncompliance with the corporation's requirements as to delivery of the paper. Certainly, under these circum-

stances, there is no basis for a determination that the boys were independent contractors.

[5] Turning to the second point presented by the appellant, it is earnestly urged that if the boys who worked during the period specified by the complaint were "employees" within the meaning of the Unemployment Insurance Act, supra, the legislation is nevertheless inapplicable to them by reason of its express terms. In support of this contention, the publisher points to the provisions of the statute which state the basis for the legislation and specify the persons who are eligible for benefits from the unemployment fund.

Section 1 of the statute declares that, due to the lack of "permanent employment" by large numbers of persons, "by reason of which their purchasing power is unstable," those who contribute to the production and distribution of "consumption goods" are unable to purchase them and, since private charity and local relief are inadequate to prevent the harmful effects of unemployment, "this act is designed to accumulate a reserve to assist in protecting * * * against * * * unemployment * * *." By the amendment to this section adopted in 1939, p. 1968, the Legislature stated that the purpose of the unemployment insurance fund was to provide "benefits for persons unemployed through no fault of their own. * * *." Originally a worker was eligible to receive a weekly benefit whenever his wages were less than the amount to which he would be entitled if totally unemployed. Commencing in 1937, an employee must have earned at least \$156 for the preceding year in order to qualify for benefits. Since 1939, the base has been \$300. *Deering's Gen. Laws, 1937, Act 8780d, § 56*, and 1939 Supp. Act 8780d, § 57, and an "unemployed" person may earn as much as \$3.00 a week without affecting his right to benefits. The term "employment" is broadly defined, with certain specified exceptions such as agricultural labor, domestic work in a household, and public service.

The only provision concerning minors excludes from the definition of "employment" the "service performed by a child * * * in the employ of his father or mother" § 7(d), and unless it may be said that a person earning less than the amount entitling him to benefits is not an employee within the meaning of the statute, the publisher must pay contributions based upon the

wages of the carriers who worked for it during the years 1936, 1937 and 1938. The record shows that a few of the boys working for Shopping News had employment other than that as a carrier and earned total wages exceeding the minimum amount which determines eligibility. However, one who pays a worker wages amounting to less than that minimum is not excused from making contributions based upon the amount of such compensation, for it must be presumed that the Legislature has included within its enumeration of the services not included in the term "employment," all of the persons whose earnings shall not be subjected to the payment of contributions.

[6-8] The legislation constitutes a valid exercise of the state's taxing power (*Car-michael v. Southern Coal & Coke Co.*, 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245, 109 A.L.R. 1327; *Gillum v. Johnson*, 7 Cal.2d 744, 62 P.2d 1037, 63 P.2d 810, 108 A.L.R. 595), and its objects and purposes are not limited to the raising of revenue. It is a remedial statute and as such must be liberally construed for the purpose of accomplishing its objects. *California Employment Comm. v. Black-Foxe Military Institute*, 43 Cal.App.2d Supp. 868, 110 P.2d 729; *Los Angeles County v. Frisbie*, 19 Cal.2d 634, 122 P.2d 526. Certainly the appellant's conclusion that the legislation was intended only to apply to persons regularly engaged in "permanent employment" in the distribution and production of "consumption goods," and was enacted to provide unemployment insurance for the benefit of persons ordinarily in "permanent employment" who, due to economic conditions, are "unemployed through no fault of their own," places a much too narrow interpretation upon the language of the act. However, it should be noted that no constitutional question has been presented in this case. On the contrary, the parties have proceeded upon the theory that the legislation, insofar as it taxes the wages of the carriers, meets all constitutional tests.

The judgment is affirmed.

GIBSON, C. J., and CARTER, TRAY-NOR, and SCHAUER, J., concurred.

CURTIS, Justice (dissenting).

I dissent. As I understand the majority opinion, it requires an employer to pay contributions and to make deductions from wages of employees in support of the un-

employment fund, although such employees' wages are less than the minimum entitling them to receive the benefits of the California Unemployment Insurance Act upon becoming unemployed. Stats.1935, chap. 352, p. 1226, as amended; *Deering's Gen. Laws*, 1935 Supp., Act 8780d, p. 2039, as amended. I do not believe that a reasonable interpretation of this legislation sustains such a conclusion.

The act is an integrated and self-contained aggregation of rules, built one upon the other, all of which rules are phrased in certain terms, which in turn are carefully and artificially defined. Each clause of the statute must be read in the light of all the rest of the statute—most particularly in the light of the definitions.

As the problem is here presented, the disputed point is the identification of the "employer" who is liable for payment of contributions to the unemployment fund. In the first place, to be subject to the tax, the employer must employ individuals in the conventional legal sense; that is, the legal relationship of employer and employee must be established. Assuming, as the majority opinion in short holds, that the facts herein do establish such legal status, there still remains the question of whether the Los Angeles Down Town Shopping News is an "employer" within the special meaning of the act. Concededly, the specifically excepted services—such as agricultural labor or domestic work in a household—do not constitute "employment" under the act, and the employer of individuals in occupations which are so expressly without the coverage of the act would not be required to make contributions based on "wages" paid for such "employment." Upon like reasoning, no more liable as a taxpayer is the employer of individuals who are just as definitely excluded from the benefits of the act not by reason of the character of their work but *by reason of their minimum earnings* according to the declared operative schedule of the applicable legislation. Thus, at the time involved herein, an employee must have earned in the preceding year not less than \$156 in order to qualify for benefits (Stats.1937, ch. 743, p. 2064, *Deering's Gen. Laws*, 1937, vol. 2, Act 8780d, § 56, p. 4136)—a sum considerably more than the yearly aggregate of newsboy carriers receiving \$2.00 to \$2.50 per week and denoting the base pay for services which would be deemed "employment" within the meaning of the act.

The legislative scheme manifestly contemplates that the taxable pay roll should relate to the "employment" of *persons entitled to the benefits of the act*, and that the respective contributions of the "employer" and "employee" must be measured accordingly. This plan has been followed and emphasized in pertinent additions to the act. In 1939 section 9.2 was adopted to provide: "An individual shall be deemed 'unemployed' in any week during which he performs no services and with respect to which no wages are payable to him, or in any week of less than full-time work if the wages payable to him with respect to such week are less than his weekly benefit amount." Stats.1939, ch. 674, § 2, p. 2146, Deering's Gen.Laws, 1939 Supp., Act 8780d, § 9.2, p. 1702. At the same time the Legislature increased the base pay to \$300, Stats.1939, ch. 674, § 13, p. 2151, Deering's Gen.Laws, 1939, Supp., Act 8780d, § 57(e), p. 1723, and provided that an "unemployed" person may earn as much as \$3.00 a week without affecting his right to benefits. Stats.1939, ch. 674, § 12, p. 2150, Deering's Gen.Laws, 1939 Supp., Act 8780d, § 55, p. 1721. Thus the base pay determinative of eligibility to the unemployment benefits is even more clearly defined as the basis for computation of the "taxable pay roll" within the operative force of the act. Accordingly, a conceded employee earning less than \$3.00 a week would be deemed "unemployed," and it necessarily follows that the respective percentage contributions from the "employer" and "employee" would not be required from such minimum compensation.

It is true, as the majority opinion notes, that the act "is a remedial statute and as such must be liberally construed for the purpose of accomplishing its objects"—the relief of unemployment—but it seems to be a clear perversion of legislative intent to assume that wages paid to persons expressly made ineligible to the protection of the act are nevertheless taxable. To so extend the operation of the statute to persons not within its letter appears to be not only improper, but likewise cause for challenge of its constitutionality. It is argued that since the contributions collected on wages go into a common fund for the purpose of paying unemployment insurance benefits, whether or not the person whose earnings are so taxed draws such benefits is of no importance. Claim of Cassaretakis, 289

N.Y. 119, 44 N.E.2d 391; Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245, 109 A.L.R. 1327; Steward Machine Co. v. Davis, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279, 109 A.L.R. 1293. In this regard it is suggested that "we all pay insurance premiums of one kind or another, but we do not all collect on our policies". That is true enough, but how long would we continue to pay premiums if we knew we, or our beneficiaries, would not be *eligible* to receive any benefits if the contingency insured against occurred? Upon like considerations it is reasonable to assume that the act contemplates as "employees" only those persons *eligible* to draw benefits if the contingency—unemployment—occurs, and only their "wages" should constitute the pay roll basis for the taxable contributions.

The above noted cases are not persuasive of any other conclusion. First, in considering the Cassaretakis decision [289 N. Y. 119, 44 N.E.2d 395], it is pertinent to note the distinguishable feature of the New York Unemployment Insurance Law which puts the *entire burden* for contributions upon the employer. The question there presented was whether the New York statute was applicable to marine employments. In holding that employees in such work were within the protection of said law and entitled "to receive benefits upon becoming unemployed," the New York Court of Appeals at page 126 of 289 N.Y., at page 394 of 44 N.E.2d, made the following observation cited by the commission herein: "This tax is an excise based upon the exercise of the privilege of employing individuals. Citing the Carmichael and Steward cases, *supra*. The obligations of the employer under this law are not to his employees but to the State. Likewise, claimants of benefits assert their rights against the State and not against the employer. The employer's duty to pay contributions and the employee's right to receive benefits are independent of each other. The employer must continue to pay the tax although none of his employees ever becomes entitled to benefits through *lack of employment*; the employee has a right to receive benefits upon becoming unemployed although his employer has failed to contribute." (Italics added.) Significant in this language is the recognition that *the employee within the scope of the act is the one entitled to its benefit features*, and that the employer's

payment of a nondiscriminatory excise tax based upon his exercise of the privilege of employing an individual to perform services for him is independent of his *employee's right* to the statutory coverage *upon becoming unemployed*. The decision thus stands for the desirability of construing a state unemployment insurance law to *protect* as many employments as are fairly within its scope and increase the number of potentially eligible recipients of benefits, but it does not touch upon the problem here presented where the legislative plan provides for contributions to be exacted from *both* the employer and employee upon the basis of a pay roll for services not excepted from the terms of the California act.

The Carmichael case, *supra*, sustained the constitutionality of the Alabama Unemployment Compensation Act, which was attacked on the following grounds: (1) That it infringed the due process and equal protection clauses of the Fourteenth Amendment; (2) that the state was coerced by the federal government in adopting the Social Security Act 42 U.S.C.A. § 301 et seq.; and (3) that it involved an unconstitutional surrender of power by the state to the federal government. Like the California statute, the Alabama act provides for contributions by employers and employees, and the pay-roll levy creating a fund for use for relief of unemployment was designated an "excise tax"—an exaction on the right, on the one hand, to employ, and, on the other hand, to be employed. Carmichael v. Southern Coal & Coke Co., *supra*, 301 U. S. 508, 57 S.Ct. 871, 81 L.Ed. 1245, 109 A.L.R. 1327; see, also, Gillum v. Johnson, 7 Cal. 2d 744, 763, 62 P.2d 1037, 63 P.2d 810, 108 A.L.R. 595. But in so upholding the Alabama Act insofar as the questions raised under the federal Constitution were concerned, the Carmichael case did not consider the propriety of including in the taxable pay roll wages of persons *excluded* from the benefits of the state unemployment insurance law. Rather that case assumes throughout that the base pay refers to "employment" within the coverage of the state law and that the burden on the employee is offset by his *eligibility* to the statutory benefits *on becoming unemployed*.

The Steward case, *supra*, upheld the validity of the tax imposed by the Social Security Act upon *employers* as within the power conferred upon Congress to levy an "excise" on the right to have individuals in employment, but necessarily under the scheme of the federal legislation involved the *employee's relation to the taxable pay roll* insofar as coverage was concerned was not considered. The distinguishable element of the California act is its manifest contemplation that only the wages of persons "in employment" as therein prescribed should be included in the taxable pay roll determinative of the contributions of *both* the employer and the employee.

As a further point to be noted here, the majority opinion states: "The record shows that a few of the boys working for Shopping News had employment other than that as a carrier and earned total wages exceeding the minimum amount which determines eligibility." Such observation as to the total earnings of a *few* of the newsboy carriers does not fortify the propriety of the judgment herein holding that the wages of *all* the newsboy carriers, the great majority of whom were receiving total wages *less than* "the minimum amount which determines eligibility" are to be included in the taxable pay roll. In my opinion, the *ineligibility* of a conceded employee to enjoy the protection of the act because not "in employment" within its meaning—whether by reason of the *character* of his work or the *below minimum earnings*—is a controlling factor in establishing the exclusion of his wages from the base pay roll determinative of the respective and related contributions of the employer and the employee.

Upon the premise of this interpretation of the Legislature's plan of unemployment relief as embodied in the act—that it does not apply where the employee upon becoming unemployed is *without its benefit coverage*—the judgment herein should be reversed.

SHENK, J., concurred.

Rehearing denied; SHENK and CURTIS, JJ., dissenting.

**CALIFORNIA EMPLOYMENT COM-
MISSION v. BATES et al.
L. A. 18916.**

Supreme Court of California.

July 5, 1944.

Rehearing Denied Aug. 4, 1944.

Taxation Ⓒ59

Where newspaper publisher had the right to and did exercise control of the manner and time of distribution of newspapers by minor carriers, and had the right to discharge at will, the carriers were not "independent contractors" but were "employees" within meaning of Unemployment Insurance Act, notwithstanding carriers purchased the papers and received half of subscriptions collected as compensation. St.1935, p. 1226, as amended.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

CURTIS and SHENK, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by California Employment Commission against E. D. Bates and others to collect unemployment insurance taxes. From a judgment for defendants, plaintiff appeals.

Reversed.

Prior opinion 142 P.2d 751.

Robert W. Kenny, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., and Forrest M. Hill and Doris H. Maier, both of Sacramento, for appellant.

William M. Crandall, E. M. Wachner, and John C. Campbell, all of Los Angeles, for respondents.

EDMONDS, Justice.

California Employment Commission, formerly Unemployment Reserves Commission, which administers the Unemployment Insurance Acts (Stats.1935, Chap. 352, p. 1226, as amended; Deering's Gen.Laws, 1935 Supp., Act 8780d, as amended), sued for contributions assertedly payable upon the amounts earned by the carriers of the Pasadena Independent from 1936 to 1940. The trial court found that E. D. Bates and F. F. Runyon, the owners and publishers of

the newspaper, were not employers within the meaning of the statute and that the carriers were independent contractors. The commission has appealed from the judgment rendered against it on these findings and the question presented for decision is substantially the same as that determined in California Employment Comm. v. Los Angeles Down Town Shopping News Corp., Cal.Sup., 150 P.2d 186.

The facts are undisputed. During the years for which contributions are claimed, respondents as copartners were engaged in the publication and distribution of the Pasadena Independent. In 1936 the Independent was judicially determined to be a newspaper of general circulation under section 4460 of the Political Code; it has not been admitted by the United States Post Office as second class mail matter. The publication was delivered on Mondays, Wednesdays and Fridays of each week throughout the city of Pasadena and vicinity by carrier boys, practically all of whom were under the age of 18 years. The city or general distribution area was divided into approximately 200 routes. Although the price of the paper was 15 cents per month, in the absence of a stop order or notice to the contrary, the carrier left a paper at each residence on his route regardless of whether or not a subscription had been obtained.

Some of the boys were assigned to routes upon an application to carry the paper. Often an applicant had to wait until a route was open. Carriers were also secured through advertisements, and very often a boy was referred to the paper by one who was then working for it. When a boy was selected, the terms of a standard contract were explained to him. This contract, with a letter of transmittal, was mailed to the boy's parents for their signatures. Under the contract the carrier acquired no right or ownership in his route or subscription list and he could be discharged at any time the respondents desired to do so.

The letter stated that the paper would require the boy to make delivery to every family on the route which might be assigned to him and to call on each one of them at the end of the month. He was expected to get as many new customers as possible, and in connection with that purpose, to attend monthly meetings for sales training. The letter also stated that a

work permit issued by the school authorities would have to be obtained. No contract was made without the signatures of the boy's parents, although, in some cases, work was commenced before the contract was signed.

At the time the boy was engaged he was given a map of the route assigned to him, instructed generally as to his compensation, expected earnings, manner and method of delivery, the importance of attending sales meetings, and the method to follow in securing subscriptions. Boys without experience in the delivery of papers were told how the papers should be folded, carried on their bicycles and delivered. At an early hour of the morning of delivery days, the boys picked up the papers at street corners where they had been left by trucks. The carriers were not required to get the papers or to complete their delivery at any particular time but, of necessity, the routes had to be covered before school commenced. If a boy did not pick up his papers by 6 a. m., the district supervisors or inspector of the paper would call at the boy's home to ascertain the reason for his tardiness.

Practically all of the boys used bicycles, and although they were permitted to cover the route in any way they chose, the paper periodically issued bulletins or notices containing suggestions as to how a carrier might increase his efficiency and earning capacity. Six district supervisors or inspectors employed by the paper, each in charge of a particular number of routes, had charge of distribution. These men checked the boys' work, riding over each route. The paper required a report from the carrier upon each complaint concerning irregular delivery or improper conduct. If the publishers deemed the complaint was justified, a small fine was sometimes imposed upon the boy, but it was often remitted after explanation to the customer.

As compensation for his work, the carrier received one-half of his subscription collections with a guarantee of \$5.00 per month. The collections were made in the last week of each month and the first week of the following month. Prior to each collection period, a meeting to which the respondents arranged transportation, was held at its offices. The carrier was then given the collection book for his route, and the circulation manager led a discussion concerning ways and means of im-

proving delivery of the paper, increasing subscriptions and similar topics. The collection book consisted of a card for each resident on the route. The carrier was told to enter on the cards appropriate notations concerning the date of each call and whether a subscription was secured. As soon as a carrier had canvassed his route for subscriptions he prepared a collection summary sheet which, together with the collection book, was returned to the respondents' office for verification. If a carrier's book showed many calls and but few collections, another boy was sent to canvass the route. If a boy's collections were below average, the circulation manager discussed the situation with him. Occasionally such a boy was asked to take a short vacation; sometimes he was discharged. The books of respondents reflected separate accounts for each carrier, showing his earnings and collections, and an honor chart was maintained upon which the boys were rated for collections, complaints, and general efficiency. Boys with superior ratings received passes to theatres, free trips, merchandise, and bicycle tires.

The appellant commission contends the evidence is insufficient to support the trial court's finding that the carriers were independent contractors and not employees within the meaning of the Unemployment Insurance Act. Arguing that the Legislature intended its definition of "employment" to be more inclusive than the scope of the employment relation as defined generally by the law of this state at the time the act was adopted, nevertheless, the commission maintains, according to settled principles which govern a determination as to when there is the relation of master and servant, the carriers were employees. The publishers deny that the Legislature by its definition of "employment," intended to broaden the scope of the employment relation and in support of the judgment maintain that, according to the law in effect at the time the legislation was adopted, the boys were independent contractors.

The facts relating to the conditions under which the carriers distributed the paper not only show that the publisher had the right to control the delivery methods of the boys, but an exercise of that control in detail. The carriers had no property right in their routes and they were subject to discharge for any violation of rules. In all essential respects their relationship with the publisher was the same as the carriers

who were held to be employees in the Shopping News case, and the principles which were stated and applied as the grounds of that decision are determinative of the present controversy.

The judgment is reversed; the purported appeal from the order denying the motion for a new trial is dismissed.

GIBSON, C. J., and CARTER, TRAY-NOR, and SCHAUER, JJ., concurred.

CURTIS, Justice (dissenting). I dissent for the reasons set forth in my dissenting opinion in California Employment Commission v. Los Angeles Down Town Shopping News, Cal.Sup., 150 P.2d 186.

SHENK, J., concurred.

Rehearing denied; SHENK, CURTIS, and SCHAUER, JJ., dissenting.



24 Cal.2d 517

In re CORCOFINGAS' ESTATE.

CROWLEY, United States Alien Property Custodian, v. KALLIMANIS.
L. A. 19006.

Supreme Court of California.

July 14, 1944.

1. Appeal and error ☞113(1)

An order denying a motion to vacate a judgment is not appealable.

2. Appeal and error ☞346(1)

The rule relating to extension of time for filing of notice of appeal, by a motion to vacate judgment, refers to any motion to vacate on any ground and covers all types of motions to vacate, statutory or otherwise. Code Civ.Proc. §§ 473, 659, 663, 663a; Rules on Appeal, rule 3(b).

3. Appeal and error ☞346(1)

A motion to vacate judgment required to be made within 60 days after entry of judgment in order to extend time for filing notice of appeal is "made" when the oral motion is presented in court and not when written notice of motion is filed, so that filing of written notice of motion within 60-day period was insufficient to extend time for taking appeal where oral motion

was made more than sixty days after entry of judgment. Rules on Appeal, rule 3(b).

See Words and Phrases, Permanent Edition, for all other definitions of "Made".

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding for the purpose of determining heirship by Constantinos G. Kallimanis, executor of the estate of Christ Corcofingas, deceased, wherein Leo T. Crowley, as United States Alien Property Custodian, entered an appearance, claiming that the estate vested in him as Alien Property Custodian. Decree finding that the executor was entitled to the property, and Leo T. Crowley, as United States Alien Property Custodian, appeals. On motion to dismiss appeal.

Appeal dismissed.

Charles H. Carr, U. S. Atty., and Clyde C. Downing, Asst. U. S. Atty., both of Los Angeles, Wallace H. Walker, of Office of Alien Property Custodian, of Washington, D. C., and J. V. McDermott, Deputy United States Alien Property Custodian, of Los Angeles, for appellant.

Himrod & Parks, of Los Angeles, for respondent.

GIBSON, Chief Justice.

This is a motion to dismiss an appeal from a decree in a proceeding to determine heirship, and from an order denying a motion to vacate.

Christ Corcofingas, the deceased, died in Los Angeles County on April 5, 1942. His will, duly admitted to probate, made a specific bequest to a local resident, and left the rest of his estate to five brothers and sisters living in Greece. Respondent Kallimanis, executor of the will and the only heir at law living outside of Greece, filed his petition to determine heirship, alleging that reciprocal rights of inheritance do not now exist between the Kingdom of Greece and the United States because of the domination of Greece by the armed forces of Germany; and that, by virtue of sections 259 and 259.1 of the Probate Code, the gifts to Greek residents lapsed and must be distributed in accordance with the laws of succession of this state.

Appellant Crowley, United States Alien Property Custodian, entered an appearance

and also filed a document entitled "Vesting Order Number 1649," stating that the entire estate, except the local bequest and the amounts necessary to pay expenses, taxes and debts, had been vested in the Alien Property Custodian, pursuant to his authority under the Trading With the Enemy Act, 50 U.S.C.A. Appendix, § 1 et seq. A hearing was had and the court found that respondent was entitled to the property and that appellant had no interest therein, and rendered its decree accordingly.

The decree was signed on July 23, 1943; it was entered on July 29, 1943, and notice of entry of judgment was served and filed July 31, 1943. Notice of appeal was filed on September 27, 1943, and on the same day appellant filed in the superior court a "notice of motion to vacate judgment and enter a different judgment," specifying October 18, 1943, as the date upon which the motion would be made in court. This notice of motion, supported by affidavits, set forth as its grounds (1) that at the hearing no evidence had been introduced on the issue whether reciprocal inheritance relations existed between the United States and Greece at the time of the testator's death; (2) that subsequently information had been received from the State Department that such relations did exist at that time; and (3) that sections 259, 259.1 and 259.2 of the Probate Code were unconstitutional. Shortly thereafter, on October 7, 1943, appellant filed in the superior court a document entitled "Dismissal of Appeal" stating that he "hereby abandons and dismisses said Appeal" taken on September 27, 1943. This abandonment was filed in the lower court in accordance with rule 19(a) of the Rules on Appeal, and appellant states that it was done in order to remove any doubt as to the jurisdiction of the superior court to consider the motion to vacate the judgment. The motion to vacate was denied on November 22, 1943.

Thereafter, on November, 24, 1943, appellant filed a new notice of appeal from the decree determining heirship, and from the order denying the motion to vacate. Clerk's and reporter's transcripts were duly filed.

[1] The present motion to dismiss is based on three grounds: (1) the decree determining heirship was final and binding because the abandonment or dismissal of the first appeal did not expressly state that it was "without prejudice" to another

appeal; (2) the order denying the motion to vacate the decree is not appealable; (3) the new notice of appeal from the decree was not filed within the time prescribed by law. The second point, that the order denying the motion to vacate is not appealable, is admittedly well taken. Estate of O'Dea, 15 Cal.2d 637, 104 P.2d 368. The last contention, if sound, is determinative of the appeal from the decree, and since we have concluded that it is correct there is no need to discuss the first point.

A notice of appeal must be filed within sixty days from the entry of the judgment (rule 2(a), Rules on Appeal) unless the time is extended by new trial proceedings (rule 3(a), or by a motion to vacate the judgment (rule 3(b)). Rule 3(b) provides in part: "When a motion to vacate a judgment or to vacate a judgment and enter another and different judgment is *made* by any party *on any ground* within 60 days *after entry of judgment*, (1) if the motion is denied or not decided by the superior court within 120 days after entry of the judgment, the time for filing the notice of appeal from the judgment is extended for all parties until 30 days after entry of the order denying the motion to vacate or 120 days after entry of the judgment, whichever shall be less * * *." (Italics added.) As pointed out above, judgment was entered on July 29, 1943, and the new notice of appeal was not filed until November 24, 1943, obviously too late unless time was extended by the provisions of rule 3(b).

[2] The first question is whether the extension provisions of rule 3(b) are rendered inapplicable by reason of the failure of appellant to serve and file the notice of intention to move to vacate the judgment within ten days after notice of entry of judgment. Stated otherwise, the question is whether the motion to vacate must be a motion in compliance with the terms of section 663a, Code Civ.Proc., in order to extend the time to appeal. Respondent has assumed, in view of the title of the document ("notice of motion to vacate judgment and enter a different judgment"), that the moving party was proceeding under sections 663 and 663a. Appellant denies this, pointing out that the motion did not assert inconsistency between the findings and conclusions or judgment, but attacked the judgment on a number of different grounds. Appellant suggests that the

motion was in some respects one under section 473 of the Code of Civil Procedure and, in any event, was not designed as a proceeding under sections 663 and 663a. The rule refers generally to any motion to vacate "on any ground," and thus covers all types of motions to vacate, statutory or otherwise.

The second question is whether the motion to vacate was "made" within 60 days after entry of judgment, as required by rule 3(b). The *written notice of motion* was filed September 27, 1943, within the period, but specified October 18, 1943, as the time when the *motion would be made in court*, and this latter date was more than 60 days after entry of the judgment. The precise question is, therefore, whether rule 3(b) refers to the written notice of motion or the oral motion itself.

[3] Appellant argues that a motion is "made" when it is "initiated" by a proper notice or application. Reference is made to rule 41(b) of the Rules on Appeal, which adopts the language of section 659 of the Code of Civil Procedure to the effect that "the notice of motion shall be deemed to be a motion on all the grounds stated in the notice." Rule 3(b), however, uses the term "made" and refers to the "motion" and not the notice of motion. It has been consistently held in California that such language refers to the oral motion made in open court. See *In re Morehouse*, 176 Cal. 634, 169 P. 365; *Thomas v. Superior Court*, 6 Cal.App. 629, 92 P. 739; see, also, *Estate of Grivel*, 208 Cal. 77, 81, 280 P. 122. Rule 41(b) is not helpful, since it deals solely with motions made in the *reviewing court*, and the provision was included because the reviewing court may, under rule 41, decide the matter on the written papers, without any calendar hearing, and hence without any oral motion. See *Witkin, New California Rules on Appeal*, 17 So. Cal. L. Rev. 232, 284. Nor can it be reasonably urged that the language of rule 3(b) is inadvertent, for rule 3(a) expressly refers to the filing of a notice of intention to move as the step which must be taken within the period. The use of such distinct terminology, in two subdivisions of the same rule, would seem to indicate that different meanings were intended.

It follows that the notice of appeal from the decree was not filed in time and, accordingly, that appeal is dismissed. The

order denying the motion to vacate being nonappealable, the purported appeal therefrom is dismissed.

SHENK, J., CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.



24 Cal.2d 378

**MARKET ST. RY. CO. v. RAILROAD
COMMISSION et al.**

S. F. 16988.

Supreme Court of California.

July 3, 1944.

Rehearing Denied July 27, 1944.

1. Constitutional law ⇨298(2)

Where street railway received copy of Railroad Commission's order instituting investigation into reasonableness of rates at hearing exhibits bearing on revenues and adequacy of service and facilities and were introduced and railway had opportunity to adduce additional evidence thereon, order reducing fares did not deny due process on theory that railway was not notified that it was charged with maintaining unreasonable rates, or that issue of unreasonableness was not framed or that railway was denied opportunity to present evidence on such issue. Gen. Laws 1937, Act 6386, § 32.

2. Constitutional law ⇨298(2)

Where Railroad Commission accorded street railway opportunity for reargument on petition for rehearing after ordering reduction in fares at which time railway failed to refer to any supplement or explanation of submitted data pertaining to rate structure, railway could not thereafter contend it was denied due process for want of opportunity to meet charge that it was maintaining an unreasonable rate. Gen. Laws 1937, Act 6386, §§ 32, 67.

3. Carriers ⇨18(2)

The unreasonableness of Railroad Commission order reducing fares of street railway must be established by showing

that order interferes with railway's successful operation, its financial integrity, its facility to maintain credit and attract capital, and to compensate investors for risks assumed rather than by method employed to formulate a rate base. Gen.Laws 1937, Act 6386, §§ 32, 67.

4. Public service commissions ⇨37

The responsibility for rate fixing is with Railroad Commission and unless its action is clearly confiscatory, courts will not interfere. Gen.Laws 1937, Act 6386, §§ 32, 67.

5. Public service commissions ⇨35

The courts in reviewing Railroad Commission rate orders, when federal constitutional questions are involved, exercise an independent judgment on law and facts but refrain from sitting as a board of revision and will not disturb findings or conclusions of commission unless invasion of constitutional rights is clearly established. Gen.Laws 1937, Act 6386, § 67.

6. Carriers ⇨18(2)

Street railway, on petition to review order of Railroad Commission reducing fares, had burden of showing that evidence did not support commission's finding of value, that reduced fare was unreasonable and would result in confiscation of its property, which showing must overcome strong presumption of correctness of findings and conclusions of commission. Gen. Laws 1937, Act 6386, §§ 32, 67.

7. Carriers ⇨12(11)

Where street railway under impact of direct competition with municipal system operated at a loss and did not devote to replacement and repair amounts charged off on its books for those purposes and amounts charged to depreciation reserve left from actual annual plant consumption, Railroad Commission in determining value of investment for rate purposes was justified in refusing to follow practice of adopting as an annual charge to plant consumption the railways book depreciation reserve or any other hypothetical sum approved by accounting practices. Gen.Laws 1937, Act 6386, § 67.

8. Carriers ⇨12(11)

Where street railway under impact of direct competition with municipal system permitted its equipment to deteriorate to such an extent that there was no procurable

evidence of fair value of property except amount contained in railway's offer to sell to municipality made in period when business was profitable, Railroad Commission was not arbitrary in rejecting for rate purposes railway's book values and capitalization and refusing to make precise estimates of actual deterioration and of growing concern or other value and accepting offer of sale as best evidence of fair value of property in its present condition. Gen.Laws 1937, Act 6386, § 67.

9. Carriers ⇨12(11)

The real value and not nominal paper valuation determines amount of investment on which public utilities including street railways are entitled to a return.

10. Constitutional law ⇨298(2)

Eminent domain ⇨2(8)

Action of Railroad Commission in evaluating for rate purposes street railway properties in accordance with actualities and rejecting conjectural and unsatisfactory estimates of value or in treating railway's estimates as without probative value was not a taking of private property for public use without compensation or denial of due process.

11. Carriers ⇨18(2)

In proceeding to review Railroad Commission order reducing fares of street railway, where railway failed to show that results of order were not in accord with realities or that return on rate base under reduced fare would prevent railway from functioning adequately from either company's or investor's standpoint, order was affirmed. Gen.Laws 1937, Act 6386, §§ 32, 67.

12. Carriers ⇨12(11)

Great deterioration in capital investment in street railway as result of direct competition with municipal system causing railway's ability to attract capital to suffer does not justify Railroad Commission in going beyond fixing of rate structure that will insure a fair return on value of capital investment when business is profitable. Gen.Laws 1937, Act 6386, § 32.

13. Carriers ⇨12(11)

Where evidence authorized finding of inadequacy in maintenance and service of street railway, Railroad Commission was not arbitrary in taking such inadequacy into consideration in reducing fares as a protection to public at a time when railway

was enjoying abnormal profits. Gen.Laws 1937, Act 6386, §§ 32, 67.

14. Constitutional law ☞298(2)

The problem of value of service rendered by street railway and correctness of Railroad Commission's decision in consumer interest do not invoke constitutional question so long as otherwise investor or railway interest has received adequate consideration by commission. Gen.Laws 1937, Act 6386, §§ 32, 67.

15. Carriers ☞18(2)

In proceedings to review order of Railroad Commission fixing rate structure of street railway, Supreme Court will not set aside commission's finding for mere errors of procedure not amounting to lack of due process and will only determine whether legislative process has resulted in confiscation. Gen.Laws 1937, Act 6386, § 67.

16. Carriers ☞18(2)

Where Railroad Commission ordered reduction of fare of street railway for an indeterminate experimental period, commission retained jurisdiction to make appropriate adjustment if anticipated increased passenger traffic failed to materialize and Supreme Court would not assume that commission would reject an application to make such changes as experience might show to be necessary. Gen.Laws 1937, Act 6386, §§ 32, 67.

In Bank.

Proceeding by the Market Street Railway Company against the Railroad Commission and others to review an order of the Commission reducing the rate of fare for transportation of passengers on petitioner's street railway line

Affirmed.

Cyril Appel and Pillsbury, Madison & Sutro, all of San Francisco, for petitioner.

Everett C. McKeage, Roderick B. Cassidy, Wyman C. Knapp, Frank B. Austin, and John M. Gregory, all of San Francisco, for respondents.

SHENK, Justice.

The Railroad Commission on its own motion ordered an investigation into the reasonableness of the rates and the sufficiency and adequacy of the service ren-

dered by Market Street Railway Company in San Francisco. After hearings the commission filed its opinion and order reducing the rate of base cash fare for transportation of passengers in the city from seven to six cents. The company petitioned for a rehearing which was denied. The matter is here on its petition for a review pursuant to section 67 of the Public Utilities Act, Stats.1915, p. 115, as amended; Deering's Gen.Laws 1937, Act 6386.

The petitioner attacks the proceedings and order as a deprivation of orderly due process, and as a confiscation of its property.

[1] I. On the first, the procedural question, the company claims that it was denied due process by a failure of notice that it was being charged with the maintenance of unreasonable rates; that the issue of unreasonableness of rates was not framed during the course of the hearing; that the commission introduced no evidence of unreasonableness of the prevailing rate, and that the company was not afforded an opportunity to present evidence on the issue.

The petitioner does not claim that it did not receive a copy of the "Order Instituting Investigation," which was mailed to it. That order notified the company that "the commission, believing that public interest demands an inquiry into the reasonableness of the rates, as well as the sufficiency and adequacy of the service rendered by the Market Street Railway Company," would institute an investigation upon its own motion "into the reasonableness of the rates, charges, classifications, rules and regulations" of the company, "and also into the reasonableness, sufficiency and adequacy of the operations, service and facilities of said company." The 10th day of May, 1943, was set as the time for the commencement of the public hearings. Notice of the time of hearing was also sent to other public utilities, and public and civic bodies and officers, including the California Street Cable Railroad Co., the Mayor and the Board of Supervisors of the City and County of San Francisco, the Department of Public Works, the Board of Public Utilities, the City Attorney, the San Francisco Chamber of Commerce, the Office of Defense Transportation, and others. Hearings were conducted on May 10, July 15, and September 15, 1943. Thirty-three exhibits were introduced, consisting of reports and documents bearing on income and revenues,

studies and reports of value, analyses of profit and loss accounts, operative expenses, statistical studies in passenger revenue and car and bus hours, as well as studies in operative equipment, traffic checks, results of operation, charges and revisions in operative practices, and comparative rate and operation analyses of Market Street Railway and the Municipal Railway of San Francisco. Certain voluminous annual and monthly reports in addition were by stipulation deemed to be before the commission. The oral evidence is contained in three volumes of transcribed testimony. Witnesses were produced by the commission, by the city and by the company. J. G. Hunter, produced by the commission, the first witness to testify, gave a résumé of the matters for investigation, which included "operating expenses, taxes, depreciation, studies on rate base figures, the estimated operating results that would obtain under different fare structures." Comparative balance sheets, charges and reports were introduced dealing with these subjects. Comparisons were made between appraisals based on book value and on historical cost. Testimony on the state of the physical properties, on employment conditions, on available manpower, on adequacy of the service and facilities, on the possibility of interchange of facilities and a universal transfer system, on the company's franchise obligations in roadbed upkeep, and on elements to be considered in evaluating service, was also received. Mr. Samuel Kahn, who is president and general manager of the company and an engineer and expert in utility management, and Mr. Leonard V. Newton, vice-president of the company and engineer in charge of operations, testified on behalf of the company. On direct and cross-examination Mr. Kahn testified and presented exhibits illustrating his opinion of the effect of various rate structures. Mr. Newton's testimony was confined mainly to operations and employment conditions.

[2] Thus, the company had the required notice of hearing on the question of reasonableness of the rates and full opportunity at the hearings to present any further evidence on the rate issue, had it chosen to do so. The notice and the course of the hearings were adequate to inform the company that the reasonableness of the present rate was under investigation. The discussion on this phase of the review may be

concluded by stating that the various studies, reports and other statistical data, including the record in prior rate proceedings, together with the exhaustive investigation into the present state of the properties and the adequacy and value of the service, must be deemed to have had a direct bearing on the rate issue. The fact that the financial and rate base studies were required to be produced by the commission as a part of the record was sufficient to give to the company ample warning that the commission was seriously proceeding into an investigation of the reasonableness of the existing rate. In fact Mr. Kahn's testimony clearly indicated that he so understood the purpose of the inquiry. The statement of counsel that the elements of fair play were so lacking in the proceedings as to call for a conclusion that orderly due process was not observed is not supported by the record. The company had the opportunity to supplement or explain the reports and data introduced in evidence. The commission also accorded the opportunity for argument on the petition for rehearing, but no supplement or explanation of the submitted data was referred to on the argument on rehearing. At that time the petitioner merely contended that a rehearing should be granted in order to conduct further studies on the estimates of future revenues, expenses and net return under various rates, as well as valuation studies to supply evidence of different rate bases, including reproduction cost, different from those on which the commission placed its estimate of a fair return from operations under the reduced rate. Under these circumstances, the comment of the court in *Railroad Com. of California v. Pacific Gas & Elec. Co.*, 302 U.S. 388, at page 393, 58 S.Ct. 334, at page 338, 82 L.Ed. 319, is appropriate here: "As we have seen, the respondent [petitioner] was heard, the Commission received the testimony of respondent's witnesses, its exhibits and arguments. There is nothing whatever to show that the hearing was not conducted fairly." The petitioner's further demands are more properly addressed to the matter of reasonableness in relation to due process when we come to consider the second phase of this review, namely, the issue of confiscation.

II. The opinion of the commission gives the essential background. The year 1852 saw the first omnibus service in San Francisco; 1860 the first street railway; and

1873 the first cable line. The cable was more suited to the hilly terrain and some of the horsecar lines were converted to the cable method of operation. In 1893 Market Street Railway Company was incorporated and took over eleven of seven-teen independent street car lines.

By city charter amendments ratified by the electors in 1902, provisions were enacted for municipal acquisition of public utilities. (Stats. 1903, pp. 586 et seq.) Privately owned street railways were permitted to hold franchises for not to exceed twenty-five years, whereupon tracks and overhead construction should revert to the city without cost.

In 1902 United Railroads of San Francisco was incorporated. It succeeded to the properties of Market Street Railway Company and five additional lines. The earthquake and fire of 1906 caused heavy losses and a large reconstruction program ensued.

In 1912 the first municipal line was placed in operation. Municipal railway expansion proceeded rapidly in order to serve the traffic during the Panama Pacific International Exposition in 1915. The city built lines of extension parallel with some of the Market Street Railway lines.

United Railroads became unable to pay the interest on its bonded indebtedness and in 1921 its properties were acquired by the bondholders under foreclosure sale and were in turn sold to Market Street Railway Company. The twenty-five year franchise limitation was not enforced. Pursuant to section 131 of the city charter (Stats. 1931, p. 3052), the company surrendered its franchises and was granted a twenty-five year permit to continue operations subject to the right of the city to acquire the properties upon paying the fair value of the operative properties exclusive of going concern value or other intangible elements. In 1925 the company began placing motor buses in operation and by December, 1942 it had 125 buses in service.

The competitive factor induced by the continuing expansion of the municipal railway system became a constantly increasing threat to the operational and financial integrity of the company. The Market Street Railway Company came under the jurisdiction of the Railroad Commission, while the municipal lines remained subject to the regulation and supervision of the city. The municipality retained a five-cent fare even though the system was operated

with a deficit. Market Street Railway's original franchises included a five-cent fare clause.

In 1937 Market Street Railway applied to the Railroad Commission for an increase of the fare to seven cents. The application was granted to the extent of permitting a two-cent transfer charge. At that time the company was admittedly not seeking the increase on the basis of a fair return on its investment, but sought merely to meet \$1,000,000 additional annual operating expense due to increased taxes and labor costs. (Dec. No. 29889, 40 C.R.C. 525.) In its opinion in that proceeding the commission said: "It is clear from this record that operation under any reasonable fare structure will not in the near future yield a revenue sufficient to provide a full return on any reasonable rate base of applicant's property, so long as the competing Municipal lines are operating on a 5-cent fare. For that reason this record does not deal with the matter of establishing a rate base for this property. In fact, the only reference to valuation in this record is that which is contained in the application to the effect that a valuation made [in a report filed with the supervisors in 1929] by the late M. M. O'Shaughnessy, former City Engineer of San Francisco, shows that the present fair value of applicants property is at least \$24,000,000." Its decision (*ibid.*, p. 532) discloses that the president of the company was of the opinion "that experience alone could tell what results would obtain if the proposed fare structures were put into effect."

In 1938 the company made a supplemental application for an increase to a seven-cent fare on a showing that revenues had declined and that further increased operating expenses were imminent due to higher labor costs. The commission granted the application to the extent of permitting a seven-cent fare, four tokens for twenty-five cents. Again the commission noted that the company was not seeking the new rate on the basis of a fair return on its investment. (Dec. No. 30849, 41 C.R.C. 349, 351.)

The city of San Francisco granted franchises to bus companies for operation on a ten-cent fare in direct competition with the company, but refrained from granting any such franchises which would compete with the municipal lines. The company attempted to effect economies by installing one-man operation in its electrically operated cars, but that practice was discontin-

ued when the federal courts upheld a San Francisco city ordinance forbidding one-man operation of street cars. City and County of San Francisco v. Market St. Ry. Co., 9 Cir., 98 F.2d 628; Market St. Ry. Co. v. City and County of San Francisco, 305 U.S. 657, 59 S.Ct. 357, 83 L.Ed. 426; Id., 306 U.S. 667, 59 S.Ct. 460, 83 L.Ed. 1062. The company had attempted to abandon unprofitable lines, but had been unable to obtain permission from the city to do so.

Consequently in the same year (1938) the company made a second supplemental application for a straight seven-cent basic fare. The showing was that as a result of the increase in fares in a twelve-month period more than 10,000,000 passengers had been diverted to the municipal lines, and the company was operating at a loss. San Francisco is a city with what is termed a "high riding habit" and a large percentage of the lost traffic consisted of short-haul riders who declined to pay the seven-cent fare. In that proceeding the commission concluded that the company was entitled to relief to prevent a collapse or partial collapse of its service, and, accepting the company's estimate that revenues could be increased only by a straight seven-cent fare, it granted the petition conditionally. It required the company forthwith to petition the board of supervisors of the city for permission to abandon operation on specified lines and for such form of relief as might be necessary to eliminate "jitney" competition. The company complied with the requirements and on December 12, 1938, the board of supervisors denied the requests. Thereupon, on December 27, 1938, the commission ordered the new schedule based on a straight seven-cent fare effective January 1, 1939.

The straight seven-cent basic fare has continued until the present time. The hoped for results, however, did not immediately materialize, even with the stimulation afforded by the holding of the Golden Gate International Exposition in 1939-1940. Compared with the year 1936, the last year under the five-cent fare, the 1941 traffic and revenue reached the lowest ebb, showing a falling off of 64,056,000, or 42 per cent, in revenue passengers, and \$1,426,282, or 19 per cent, in passenger revenue. The figures show a decline of 39 per cent in revenue as compared to the maximum revenue year of 1925. The state of the operative properties and the adequacy of the service continued to decline. The company

became unable to discharge its franchise obligations for roadbed maintenance and the city was attempting to collect \$1,691-162.76 claimed as arrears.

After the entry of this country into the present world war in 1941, and upon the stepped-up production of war materials, an abnormal increase in traffic occurred resulting in increased revenue, accompanied, however, by a further marked deterioration in the operative properties and in the service to the public.

The commission examined the condition of the properties and the adequacy of the service in relation to the prevailing rates for transportation. It found evidence of long-time neglect, deterioration, mismanagement, indifference to urgent public need, and other causes productive of poor service, not all of which were chargeable to the war. The company refused to lease idle equipment to the municipality although the latter had sought to put it into service on its own lines after the Office of Defense Transportation had denied it priority rights for new equipment because of the existing condition of idleness of rolling stock in San Francisco, none of which was attributable to the city. The company was unsuccessful in retaining or drawing its share of the available manpower, which was being diverted to the Municipal Railway. Undeniably there is evidence of "deplorable condition of track, of deferred maintenance, unfulfilled street paving obligations, obsolescence of street car equipment, and the failure of the company to replace, during pre-war years, uneconomical and outdated facilities by modern, more efficient, and more profitable means of mass transportation," conditions which had grown progressively worse over a period of years antedating the commencement of the war. Service, with the exception of that to establishments directly engaged in the war effort, such as shipyards and army and navy concentration points, steadily declined in quality and adequacy. The commission stated that an analysis of the company's finances showed that over a period of years the company had diverted to payment of indebtedness funds urgently required for proper maintenance and for the replacement of depreciated property.

The record makes it apparent, and the commission recognized, that in the past competition was the factor which prevented the company from reaping financial benefit from any rate structure; that heretofore the private automobile has given the rail-

ways competition; that that source of competition is partially eliminated during the period of rubber and gasoline shortage; that the increased traffic due to war activities will not last, and that as soon as transportation conditions return to normal the company will again be handicapped by a seven-cent fare against the competition of the Municipal Railway and the automobile; and that under any rate structure the condition of the company will grow even worse than at the former low level unless the service is greatly improved. It is also disclosed that while prior to the war the five-cent fare produced a greater gross and net annual revenue than any fare in excess of five cents, a five-cent fare structure will not realize any net return to the company under a competitive system of operation.

Compared with Market Street Railway, the Municipal Railway under a five-cent fare has gained in quality of service and equipment, and in financial returns. As with Market Street Railway, however, the Municipal Railway's increase in financial returns began with the abnormal increase in traffic.

Attempts had been made to have the city of San Francisco acquire the Market Street Railway. Transportation surveys and property appraisals had been prepared and negotiations carried on over a long period of years. At the general election of November 3, 1942, the electorate of San Francisco rejected a proposed revenue bond issue to raise \$7,950,000, the price theretofore settled upon at which the company would sell its properties to the city. A similar proposition at the same figure was again submitted and again rejected at a special election held April 20, 1943.¹

The commission rejected the company's book figures of cost and depreciation and selected the offered price, \$7,950,000, as the value of the utility and rate base for the purpose of computing the return to the company under various rate structures. It concluded that operation under a six-cent fare, after deduction from gross passenger revenue of operating expenses, depreciation and taxes, would produce a net return of slightly more than six per cent on the rate base of \$7,950,000. It computed that a seven-cent fare, allowing an increase in operating expenses to \$7,940,000, includ-

ing \$750,000 for depreciation and \$590,000 for taxes, would yield annual net operating revenues of \$760,000, a return of 9.6 per cent on the rate base. Figuring the return from a seven-cent fare on a depreciation allowance of \$500,000, which is the amount the company had been charging off annually, the percentage would be 12.7. The commission found both these rates of return excessive and unjustified by the present service. Its computation under a five-cent fare, with a depreciation allowance of \$500,000, indicated a deficit of \$1,153,000. On a six-cent basic fare it estimated annual gross revenue at \$8,500,000, operating expenses, depreciation and taxes at \$8,000,000, leaving a net operating income of \$500,000, slightly more than six per cent on the base figure of \$7,950,000, which return it found to be reasonable. It said that consideration of service alone and of the value of service to the patron would justify the fixing of a five-cent fare; but it determined that a six-cent fare was a just, fair and reasonable rate, provided every possible and reasonable effort promptly be made by the company to furnish an improved service, and that a fare in excess of six cents was unjust and unreasonable.

No contention is urged that a six per cent return on the investment is not adequate, under present conditions, to attract capital and keep a utility in a solvent condition. The question is whether the record clearly establishes that the selection of the figure of \$7,950,000 as the rate base will result in confiscation of the company's property.

The commission rejected all other figures and selected the offered price as that most truly representative of the value of the company's properties. It said that "the only available indication in this record of the present value of the company's properties used and useful in the public service is the resolution of the company's Board of Directors, passed on March 25, 1943. The resolution (Exhibit 9) reads as follows:

"Sale of the Operative Properties of the Market Street Railway Company to the City and County of San Francisco. The President advised the Board that he had agreed with the Mayor and other city officials, as well as the Board of Super-

¹ Since this review proceeding was commenced and on May 16, 1944, the electorate of the city voted favorably on a propo-

sition to acquire the operative properties of the company on a self-liquidating plan for \$7,500,000.

visors, to sell the operative properties of Market Street Railway Company to the City and County of San Francisco for the sum of \$7,950,000.00 cash, which was the same amount agreed upon for the sale of the operative properties when a charter amendment for the purpose of raising such sum by a revenue bond issue was submitted to and rejected by the qualified electors of the City and County of San Francisco at the general election on November 3rd, 1942. The President stated further that a similar charter amendment, with several changes therein, for the purpose of raising the sum agreed upon for the sale of the operative properties of the Market Street Railway Company to the City and County of San Francisco by a revenue bond issue would be submitted to the qualified electors of the City and County of San Francisco at a special election to be held on April 20, 1943. The President also stated that the price mentioned is the amount that had been agreed upon for the purchase by the City and County of San Francisco of the operative properties of the company after negotiations in respect thereto which covered a considerable period of time and, as previously mentioned, is the best price obtainable therefor.

"Whereupon, on Motion of Director Fay, duly seconded by Director Scott, the following resolution was adopted.

"Resolved, that the actions of the President in negotiating the sale of and agreeing to sell the operative properties of the Market Street Railway Company to the City and County of San Francisco for the sum of \$7,950,000.00 cash be, and the same hereby are, ratified, approved and confirmed; and it is

"Further Resolved, that the officers of the Market Street Railway Company be and they are hereby authorized and directed to perform all necessary and proper acts in order to carry out and complete the sale of the operative properties of the Market Street Railway to the City and County of San Francisco for the sum of \$7,950,000 cash."

The commission adopted the price stated in the offer as the "present fair market value," without the necessity of expressing an "opinion on the reasonableness of the figure of \$7,950,000 as an exact measure of the present fair value of the company's operative property in its present depreciated physical and service condition, with its past earning record and its prospective

future under the competitive transportation situation obtaining in San Francisco." The petitioner contends that the ultimate figure adopted by the principals for the sale of the property to the city and therefore by the commission as the present fair market value was based on a capitalization of earnings; that the commission should have proceeded on a consideration of depreciated reproduction cost and historical cost, in accord with the holding of the Supreme Court of the United States in *Smyth v. Ames*, 169 U.S. 466, 18 S.Ct. 418, 42 L.Ed. 819, and other cases.

In *Smyth v. Ames*, after stating that the basis of all calculations as to the reasonableness of rates must be the fair value of the property being used for the convenience of the public, the Supreme Court proceeded to lay down the essential matters for consideration in ascertaining that value. 169 U.S. at page 546, 18 S.Ct. at page 434, 42 L.Ed. 819. "And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

Subsequent decisions emphasized the necessity for finding fair value by weighing all the elements prescribed in *Smyth v. Ames*. Notably in *Minnesota Rate Cases*, (*Simpson v. Shepard*) 230 U.S. 352, at page 434, 33 S.Ct. 729, at page 754, 57 L.Ed. 1511, 48 L.R.A., N.S. 1151, Ann.Cas. 1916A, 18, the Supreme Court said that there must be a "reasonable judgment, having its basis in a proper consideration of all relevant facts", repeating the language quoted from *Smyth v. Ames*. The emphasis progressed to the extent that in many cases, if one factor or element, particularly that of reproduction cost new, had not re-

ceived consideration in arriving at "present fair value," it was determined that the constitutional due process requirement had been violated. *State of Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Comm.*, 262 U.S. 276, 43 S.Ct. 544, 67 L.Ed. 981, 31 A.L.R. 807; *Bluefield, etc., Co. v. Public Service Comm.*, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176; *McCardle v. Indianapolis Water Co.*, 272 U.S. 400, 47 S.Ct. 144, 71 L.Ed. 316; *United Railways & Elec. Co. v. West*, 280 U.S. 234, 50 S.Ct. 123, 74 L.Ed. 390; cf. *Pacific Gas & Elec. Co. v. City and County of San Francisco*, 265 U.S. 403, 44 S.Ct. 537, 68 L.Ed. 1075; *Los Angeles Gas & Elec. Co. v. Railroad Comm.*, 289 U.S. 287, 53 S.Ct. 637, 77 L.Ed. 1180; *Railroad Comm. of State of Cal. v. Pacific Gas & Elec. Co.*, 302 U.S. 388, 58 S.Ct. 334, 82 L.Ed. 319. Thus due process was deemed not to have been observed if it was shown that the regulatory body, in evaluating the plant or operative properties for rate purposes, had not considered depreciated reproduction cost as well as book cost, actual (sometimes called original or historical) cost, capitalization, etc. Since calculations under each formula led to widely different results it became apparent that in *Smyth v. Ames* rule had proved itself unworkable. Criticisms of it are found in the dissenting and concurring opinions in *State of Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Comm.*, 262 U.S. 276, 289, 43 S.Ct. 544, 67 L.Ed. 981, 31 A.L.R. 807; *Pacific Gas & Elec. Co. v. City and County of San Francisco*, 265 U.S. 403, 416, 44 S.Ct. 537, 68 L.Ed. 1075; *McCardle v. Indianapolis Water Co.*, 272 U.S. 400, 421, 47 S.Ct. 144, 71 L.Ed. 316; *United Railways v. West*, 280 U.S. 234, 255, 50 S.Ct. 123, 74 L.Ed. 390; and *West v. Chesapeake & Potomac Tel. Co.*, 295 U.S. 662, 680, 55 S.Ct. 894, 79 L.Ed. 1640. In the *Southwestern Bell Tel. Co.* case, Justice Brandeis (Justice Holmes concurring with him), disagreed with the majority view that the commission must consider reproduction cost new under the slogan "Estimates for to-morrow cannot ignore prices of to-day," [262 U.S. 276, 43 S.Ct. 546, 67 L.Ed. 981, 31 A.L.R. 807] and advocated the prudent investment theory.

In *Georgia Ry. & P. Co. v. Railroad Comm.*, 262 U.S. 625, 43 S.Ct. 680, 67 L.Ed. 1144, decided less than three weeks later, Justice Brandeis writing the majority opinion distinguished the *Southwestern Bell*

Tel. Co. case. The court decided that the commission was not bound to slavish adherence to reproduction cost new in a case where the evidence showed that it gave consideration to that element, the dissenters seeking to apply the *Southwestern Bell* decision. On the same day the court also decided *Bluefield, etc., Co. v. Public Service Comm.*, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176, wherein reproduction costs had not received consideration and the court reversed, following the *Southwestern Bell* case, Justice Brandeis disagreeing with the grounds of reversal.

In the case of *McCardle v. Indianapolis Water Co.*, 272 U.S. 400, 408, 47 S.Ct. 144, 71 L.Ed. 316, the court required a further step, namely, that the future as well as the present must be regarded; that present value could not be determined without an honest and intelligent forecast as to probable price and wage levels, probable yield over operating expenses, etc., during a reasonable period in the immediate future.

In 1933 the Supreme Court obviously began to anticipate a departure from adherence to *Smyth v. Ames*. In the case of *Los Angeles Gas & Elec. Corp. v. Railroad Comm.*, 289 U.S. 287, 53 S.Ct. 637, 641, 77 L.Ed. 1180, the court in effect upheld the California commission which, in making a rate reduction order, had rejected reproduction cost figures as "too uncertain and hypothetical to enter into a rate base figure." The court relied on the Minnesota Rate Cases for the theory that the cost-of-reproduction method did not justify the acceptance of results which depended upon mere conjecture. It pointed out the necessity of distinguishing between the legislative and judicial functions; that it is the appropriate task of the commission to determine the value of the property affected by the rates it fixed, and that of the court, in deciding the question of confiscation, not to lay down a formula, much less to prescribe an arbitrary allowance, but to examine the result of the legislative action in order to determine whether its total effect is to deny to the owner of the property a fair return for its use. It said (289 U.S. at page 304, 53 S.Ct. at page 643, 77 L.Ed. 1180): "We do not sit as a board of revision, but to enforce constitutional rights. *San Diego Land & Town Co. v. Jasper*, 189 U.S. 439, 446, 23 S.Ct. 571, 47 L.Ed. 892. The legislative discretion implied in the rate-making

power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself. We are not concerned with either, so long as constitutional limitations are not transgressed. When the legislative method is disclosed, it may have a definite bearing upon the validity of the result reached, but the judicial function does not go beyond the decision of the constitutional question. That question is whether the rates as fixed are confiscatory. And upon that question the complainant has the burden of proof, and the court may not interfere with the exercise of the state's authority unless confiscation is clearly established."

In April 1934, the Supreme Court upheld the commission's order prescribing rates for telephone service in the case of *Lindheimer v. Illinois Bell Tel. Co.*, 292 U.S. 151, 54 S.Ct. 658, 663, 78 L.Ed. 1182. It rejected the company's claim that the rates were grossly confiscatory because not based on estimates of original or book cost and reproduction cost new; for, to recognize the claim, it stated, would be to sanction "a large increase over the rates which have enabled it to operate with outstanding success. Elaborate calculations which are at war with realities are of no avail."

West Ohio Gas Co. v. Public Utilities Comm., January 1935, 294 U.S. 63, 55 S.Ct. 316, 79 L.Ed. 761, reiterated the restricted function of the court declared in *Los Angeles Gas & Elec. Corp. v. Railroad Comm.*, 289 U.S. 287, 53 S.Ct. 637, 77 L.Ed. 1180 saying, (294 U.S. at page 70, 55 S.Ct. at page 320, 79 L.Ed. 761.) "Our inquiry in rate cases coming here from the state courts is whether the action of the state officials in the totality of its consequences is consistent with the enjoyment by the regulated utility of a revenue something higher than the line of confiscation. If this level is attained, and attained with suitable opportunity through evidence and argument (*Southern R. Co. v. [Commonwealth of] Virginia*, 290 U.S. 190, 54 S.Ct. 148, 78 L.Ed. 260) to challenge the result, there is no denial of due process, though the proceeding is shot through with irregularity or error."

Nevertheless, less than six months later, in *West v. Chesapeake & Potomac Tel. Co.*, June 1935, 295 U.S. 662, 55 S.Ct. 894, 79 L.Ed. 1640, the court affirmed a decree enjoining the commission from enforcing

prescribed rates because of the method employed to ascertain value, namely, by the use of price trend indices, rather than on the ground that the rate was confiscatory.

In April, 1936, in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 53, 56 S.Ct. 720, 726, 80 L.Ed. 1033, the majority of the court again reviewed the distinctive functions of commission and court, saying that the "judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence. * * * Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency. * * * We have said that 'in a question of rate-making there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing.' * * * The established principle which guides the court in the exercise of its judgment on the entire case is that the complaining party carries the burden of making a convincing showing and that the court will not interfere with the exercise of the rate-making power unless confiscation is clearly established. * * *"

In *Railroad Commission of State of Cal. v. Pacific Gas & Elec. Co.*, 302 U.S. 388, 58 S.Ct. 334, 82 L.Ed. 319, the court, reemphasizing the principle from *Los Angeles Gas & Elec. Corp. v. Railroad Comm.*; *Lindheimer v. Illinois Bell Tel. Co.*; *West Ohio Gas Co. v. Public Utilities Comm.*, and other cases, refused to consider as an error amounting to a denial of due process the commission's treatment of the company's estimate of reproduction costs as without probative value. The dissenting opinion of Justice Butler, who invoked application of the *Smyth v. Ames* rule, pointed out that the California Commission consistently refused to apply the *Smyth v. Ames* criteria.

Then in *Federal Power Comm. v. Natural Gas Pipeline Co.*, March 1942, 315 U.S. 575, 62 S.Ct. 736, 86 L.Ed. 1037, the court again appeared to approve nonadherence to the rule of *Smyth v. Ames* by utility commissions. It upheld an interim order of rate reduction by the Federal Power Commission, acting under the Natural Gas Act of 1938, 52 Stat. 821, 15 U.S.C. sec. 717, 15 U.S.C.A. § 717, which required that rates and charges for transportation and sale of gas in interstate com-

merce should be "just and reasonable." The gas company sought to have \$8,500,000 claimed going concern value included in the rate base. In upholding the commission the court said: (315 U.S. at page 586, 62 S.Ct. at page 743, 86 L.Ed. 1037) "The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end."

Finally in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 64 S.Ct. 281, 287, the court freed commissions from the necessity of following *Smyth v. Ames*. There the commission reduced gas rates. In testing the value of the utility property, it had omitted an item of \$17,000,000 expended for drilling operations in an unregulated period of the utility's operations, and which in the same period had been recouped from earnings by having been charged off to operating expenses. The court rejected the contentions that the rate base should reflect the reproduction cost and trended original cost, and that the well drilling costs of \$17,000,000 should have been included in the rate base. It said:

"Rate-making is indeed but one species of price-fixing. *Munn v. [State of] Illinois*, 94 U.S. 113, 134, 24 L.Ed. 77. The fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid. * * * It does, however, indicate that 'fair value' is an end product of the process of rate-making not the starting point * * *. The heart of the matter is that rates cannot be made to depend upon 'fair value' when the value of the going enterprise depends on earnings, under whatever rates may be anticipated.

"We held in *Federal Power Commission v. Natural Gas Pipeline Co.*, *supra*, that

the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.' *Id.*, 315 U.S. at page 586, 62 S.Ct. at page 743, 86 L.Ed. 1037. And when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the Act. *Id.*, 315 U.S. at page 586, 62 S.Ct. at page 743, 86 L.Ed. 1037. Under the statutory standard of 'just and reasonable' it is the result reached and not the method employed which is controlling. Cf. *Los Angeles Gas & Electric Corp. v. Railroad Commission*, 289 U.S. 287, 304, 305, 314, 53 S.Ct. 637, 643, 644, 647, 77 L.Ed. 1180; *West Ohio Gas Co. v. Public Utilities Commission (No. 1)*, 294 U.S. 63, 70, 55 S.Ct. 316, 320, 79 L.Ed. 761; *West v. Chesapeake & Potomac Tel. Co.*, 295 U.S. 662, 692-693, 55 S.Ct. 894, 906, 907, 79 L. Ed. 1640 (dissenting opinion). It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. * * *

The conditions under which more or less might be allowed are not important here. Nor is it important to this case to determine the various permissible ways in which any rate base on which the return is computed might be arrived at. For we are of the view that the end result in this case cannot be condemned under the Act as unjust and unreasonable from the investor or company viewpoint." Answering other contentions the court said: "Congress has entrusted the administration of the Act to the Commission not to the courts. Apart from the requirements of judicial review it is not for us to advise the Commission how to discharge its functions."

[3, 4] The petitioner contends that the cases of *Federal Power Comm. v. Natural*

Gas Pipeline Co. and Federal Power Comm. v. Hope Natural Gas Co. are inapplicable because they involved the commodity gas, as distinguished from the use of common carrier property. The petitioner does not contend, however, that the rate base theory of public utility valuation is not applicable in the present case. That theory of evaluating public utility property as determinative of the question of confiscation was adopted by the commissions, and assumed by the court to be proper, in the cited cases. It follows that the holdings of the Supreme Court in those cases may be considered in a case involving common carriers. Therefore those cases, particularly the Supreme Court's decision in the Hope Natural Gas Co. case, permits unreasonableness to be shown, not by the method employed to formulate a rate base, but by the fact that the "end result" of the commission's order interferes with the company's successful operation, its financial integrity, its ability to maintain credit and attract capital, and to compensate investors for risks assumed—in short, fails to provide a return sufficient to induce the utility enterprise to "perform completely and efficiently its functions for the public." The Supreme Court refrained from endorsing a particular method of valuation to arrive at the result of reasonableness, but left commissions free to follow *Smyth v. Ames*, or to select one or more of the heretofore recognized criteria or a different method, which, even if irregular, would not invalidate an order unless unreasonableness were clearly established. Thus responsibility for rate fixing, insofar as the law permits and requires, is placed with the commission, and unless its action is clearly shown to be confiscatory the courts will not interfere.

Section 32 of the Public Utilities Act, Stats. 1915, p. 115, as amended; Deering's Gen. Laws, 1937, Act 6386, empowers the California commission, after a hearing had upon its own motion or upon complaint, to make findings on the reasonableness of the rates charged by a public utility and to lower or increase the rates accordingly. By the same section the commission also has power and it is made its duty, after a hearing had on its own motion or on complaint, to determine the facilities and operation adequate to meet the public requirements, and to fix the just, reasonable and adequate rates for such service.

Section 67 of the Public Utilities Act provides for a review by this court for the

purpose of having the lawfulness of the order and decision of the commission inquired into. That section restricts the review to a determination of whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the State of California. It further provides that the findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as hereinafter noted, and that such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination. The exception to finality is that "in any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the Commission material to the determination of said constitutional question shall not be final." That section also gives the court power to enter judgment either affirming or setting aside the order or decision of the commission.

[5] That part of section 67 which requires the independent judgment of the court on the law and the facts and withholds from the commission's findings and conclusions finality on constitutional questions, was added by amendment in 1933. This court thereafter recognized that the amendment was responsive to language in certain United States Supreme Court decisions which indicated that the Legislature must provide the means whereby the courts should exercise an independent judgment on the law and the facts when federal constitutional questions were involved. *Southern California Edison Co. v. Railroad Comm.*, 6 Cal.2d 737, 59 P.2d 808; *American Toll Bridge Co. v. Railroad Comm.*, 12 Cal.2d 184, 83 P.2d 1. The United States Supreme Court and this court assumed to exercise such judgment without statutory language, deeming it appropriate for the protection of constitutional rights; but in the exercise thereof, as variously stated in the decisions, the reviewing court refrains from sitting as a board of revision; and will not disturb the findings or conclusions of the regulatory body unless invasion of constitutional rights is clearly established. In the Edison Com-

pany case this court pointed out that the amendment added nothing which was not theretofore a part of our state law; that it did not materially affect the procedure theretofore followed in a review under the Public Utilities Act, and did not make the court a trier of disputed questions of fact already resolved by the commission. We said: 6 Cal.2d at page 748, 59 P.2d at page 813, "If the mere challenge on federal constitutional grounds was intended by the amendment of 1933 to be sufficient to take the case out of the rule that the findings and conclusions of the commission in such cases should be final and beyond review, then we would have grave doubt of the power of the Legislature thus to transfer to this court the traditional functions of the commission." In *American Toll Bridge Co. v. Railroad Comm.*, supra, it was again stated that the amendment did not change the scope of the judicial review.

[6,7] In the present proceeding, as in the recent cases of *Federal Power Comm. v. Natural Gas Pipeline Co.* and *Federal Power Comm. v. Hope Natural Gas Co.*, the standard for rate fixing is that of reasonableness. The petitioner herein must be charged with the burden of showing that the evidence does not support the commission's finding of value, and that the reduced rate is unreasonable and will result in confiscation of its property. That burden is coupled with a strong presumption of the correctness of the findings and conclusions of the commission. Ordinarily a public utility is a monopoly and is not subject to the travail of competition. Because of its monopolistic character, public interest requires that it submit to regulation for the protection of the consumer, and the utility in return is entitled to protection of its investor interest. In the case of monopolistic utilities it is possible to say that regulation to accomplish the two-fold purpose may be a relatively simple matter. But here the commission was confronted with facts which are unusual in utility rate regulation. It was faced with the problem of evaluating the property of a utility which was in direct competition with a municipal utility offering similar service in the same community, in large part serving the same territory, and over which the commission had no regulatory power. From the year 1912, when a competitive system of street car operation was established in San Francisco under municipal regulation, such obstacles to profitable op-

eration by the commission regulated utility were created that commission regulation in effect gave way to regulation by competition. The evidence is clear that during the early competitive period and until the abnormal stimulation in public use brought about by the present world war, competition necessitated operation at a loss. Since the commencement of competition the company has not devoted to replacement and repair the amounts charged off on its books for those purposes, and its charges to depreciation reserve were lower than the actual annual plant consumption. In this connection it is significant that for tax purposes the company's accrued depreciation figure was shown to be \$26,834,000, and its total depreciation reserve figure only \$9,902,000. The factors which affected the value of the investment in this case justified the commission in refusing to follow the practice of adopting as an annual charge to plant consumption the company's book depreciation reserve or any other hypothetical sum approved by accounting practices. The evidence supports the conclusion that the company permitted unusual deterioration in view of negotiations for sale to the city started many years ago. The ordinary methods or theories of depreciation accounting therefore would not reflect the true record of the past annual plant consumption and the result, were such methods adopted, would not be in conformity with the facts. On the other hand, the evidence of obsolescence, depletion, depreciation and deterioration is such as to justify the commission's observation that there was no available or procurable evidence of the fair value of the property except the amount contained in the company's offer to sell to the city, made in the period when the business was profitable. Acceptance of the company's book figures or of the amount of outstanding capitalization, in order to arrive at the present worth of the properties, would result in a figure inflated so far above fair value as to impede the commission's authorized regulatory effort to restore the company as a useful public servant performing its functions adequately. Capitalization in any event has little relation to the depreciated value of the investment. Also going concern value can have little if any place in the rate base under the facts except as the special factor of competition has so affected that value as to indicate it at nil. Separate appraisal of the going concern element is not

required. Federal Power Comm. v. Natural Gas Pipeline Co., supra.

[8] It cannot be said that under the facts of this case arbitrary action resulted merely from the commission's rejection of book values and capitalization, its refusal to make precise estimates of actual deterioration, of going concern or other values, and its acceptance of the company's offer of sale to the city made in a profitable period as the best evidence of the fair value of the utility in the present condition of its operative properties. The commission expressly refrained from considering whether the amount of the offer in relation to value under all the conditions was not too high. Furthermore, it appears that studies of valuation for sale purposes were also made by the city and by the commission, and only after such studies was a sale price selected which was deemed commensurate with the fair value of the property under existing conditions.

[9, 10] It is the real and not the nominal paper valuation that determines the amount of the investment on which the utility is entitled to a return. See Pond, Public Utilities, Fourth ed., vol. 2, pp. 1117, 1118. As said in *Lindheimer v. Illinois Bell Tel. Co.*, 292 U.S. 151, 54 S.Ct. 658, 663, 78 L.Ed. 1182, the "actual experience of the company is more convincing than tabulations of estimates. * * * Elaborate calculations which are at war with realities are of no avail." There is no fundamental or statutory law which will preclude the commission from evaluating a public utility in accordance with the actualities. So to proceed is not to take private property for public use without compensation. There is no denial of due process in rejecting conjectural and unsatisfactory estimates of value, or in treating the petitioner's estimates as without probative value. *Railroad Comm. of State of Cal. v. Pacific G. & E. Co.*, 302 U.S. 388, 397, 398, 58 S.Ct. 334, 82 L.Ed. 319. As was said in *Los Angeles Gas & Electric Corp. v. Railroad Comm.*, 289 U.S. 287, 306, 53 S.Ct. 637, 644, 77 L.Ed. 1180, "The public have not underwritten the investment. The property, on any admissible standard of present value, may be worth more or less than it actually cost. The time and circumstances of the outlay, and the effect of altered conditions, demand consideration."

[11] The petitioner has not shown that the results are not in accord with the

realities. Both before the commission and in this court it contented itself merely with urging that the commission proceeded erroneously in selecting for rate making purposes the offer price of \$7,950,000, because, so it claims, that figure was based on a capitalization of earnings. The petitioner made no offer or attempt to show that the value fixed by the commission did not represent either the true depreciated legitimate cost or the true depreciated actual cost. In *Minnesota Rate Cases (Simpson v. Shepard)*, 230 U.S. 352, 566, 33 S.Ct. 729, 767, 57 L.Ed. 1151, 48 L.R.A., N.S., 1151, Ann.Cas.1916A, 18, it was said that "the company having assailed the constitutionality of the state acts and orders, was bound to establish its case, and it was not entitled to rest on expressions of judgment when it had it in its power to present accurate data which would permit the court to draw the right conclusion." Since it is impossible to say in the light of the evidence in this proceeding that the figure selected by the commission does not bear a proper relation to the fair value of the utility under existing conditions, it must be concluded that the petitioner has not shown arbitrary action on the part of the commission in selecting the sale offer price as the rate base, or that the evidence does not support the commission's finding that the figure selected represents at least fair value, if not more than that.

The petitioner has also failed to meet the burden cast upon it to establish that the return on the rate base under the reduced fare will prevent the utility's functioning adequately from the company or investor standpoint. The commission has the experience and the data at hand from which to cull the estimates of probable increase in traffic under a reduced fare and improved service, and of the probable future operating revenues, expenses, and other costs. This court will not disturb its findings on those disputed questions of fact. The company is now and for several years has been doing an abnormally increased traffic business with returns greatly in excess of its operating costs plus increased reserves for depreciation and taxes. It does not question that under a seven-cent fare it has enjoyed a return of more than a fair percentage above the constitutional line of confiscation on the fair value as found by the commission. Nor is it questioned that a return of six per cent on the value of its capital investment is uncon-

stitutional. The petitioner claims that the commission's estimates are false, and that falsity resides in the fact that at the prevailing cost per head for passenger transportation, it will suffer a deficit on the estimated volume of increased traffic at the six-cent fare. The fallacy, however, is in the assumption that the cost ratio under the six-cent fare will be the same as under the seven-cent fare. The commission answers that the assumption is not true, inasmuch as the increase in traffic is expected, not necessarily in the peak hours, but in large part from the patronage in off hours which was diverted to Municipal Railway, or discontinued upon the inception of the higher rate, and which is expected to be regained materially upon the reduction of the fare and the improvement of the service. The petitioner also claims that the commission did not consider the evidence of a probable increase in labor costs pursuant to pending negotiations with labor unions. The commission on the other hand states that it did give consideration to that element. The commission's figures, with increased allowances for operating expenses, depreciation and taxes, must be deemed to resolve these disputed points adversely to the petitioner. "Long operation and adequate records make forecasts of net operating revenues fairly certain." *Driscoll v. Edison L. & P. Co.*, 307 U.S. 104, 120, 59 S.Ct. 715, 723, 83 L.Ed. 1134.

[12] The foregoing discussion demonstrates that the interests of the investor have received constitutional protection by the action of the commission. Under rule by competition and the consequent great deterioration in its capital investment, the utility's ability to attract capital has undoubtedly suffered. But this is not an element that can be controlled by the regulatory body beyond the possibility of insuring to the utility a fair return on the value of the capital investment when business is profitable. The fact that the utility has suffered deficits in the past does not justify excessive profits in the future. *Los Angeles Gas & Elec. Corp. v. Railroad Comm.*, 289 U.S. 287, 313, 53 S.Ct. 637, 77 L.Ed. 1180; *Federal Power Comm. v. Natural Gas Pipeline Co.*, 315 U.S. 575, 590, 62 S.Ct. 736, 86 L.Ed. 1037. "When a business disintegrates, there is damage to the stockholders, but damage also to the customers in the cost or quality of service." *West Ohio Gas Co. v. Public Utilities*

Comm. (No. 1), 294 U.S. 63, 72, 55 S.Ct. 316, 321, 79 L.Ed. 761.

[13,14] The record is also clear that the commission has not been arbitrary in acting for the protection of the public which is under compulsion to use the present depleted and inadequate service, or which may be expected to make use of an improved service. As the commission said in its opinion, "After making such allowance (for war time difficulties) the important question remains to what extent the ratepayer, under war conditions, should be compelled to pay the same or higher rates for an inadequate and inferior service while the utility enjoys abnormal profits." It is unnecessary to consider whether the seven-cent fare would still be unreasonable were the petitioner performing a fully adequate and efficient service. The findings of inadequacy in the maintenance and service are supported by the evidence. The commission is empowered under the statute in fixing the fare to take into consideration the quality of the facilities and service. The commission decided that even in war time improvement was possible, and that the value of the improved service would be no more than six cents. The problem of the value of the service, and the correctness of the commission's decision on the consumer interest, do not involve constitutional questions, so long as otherwise the investor or company interest has received adequate consideration by the commission. When the company interest has received constitutional protection, the findings of the commission on the consumer interest become final in the proceeding. The question involving that interest then has been answered by the commission correctly pursuant to the statute and the authorities to the effect that the reasonableness of rates should not be considered apart from the adequacy of the service, and that the public should not be charged more than the service is reasonably worth. The statute is a legislative recognition of the public's right to demand that consideration be given to the value of the service. *Covington & L. Turnpike R. Co. v. Sandford*, 164 U.S. 578, 596, 17 S.Ct. 198, 41 L.Ed. 560; *Spring Valley Waterworks v. City and County of San Francisco*, C.C., 192 F. 137; see *Article, Value of the Service as a Factor in Rate-Making*, 32 *Harv.L.Rev.* 516.

In the final analysis the question whether the right to just compensation for the serv-

In re LUND'S ESTATE.

LUND v. HANLON.

Civ. 12659.

District Court of Appeal, First District,
Division 2, California.

July 11, 1944.

ice rendered has been denied to the utility depends upon the special facts in the case. Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 434, 33 S.Ct. 729, 57 L. Ed. 1511, 48 L.R.A.,N.S., 1151, Ann.Cas. 1916A, 18. Each case must be controlled by its own circumstances. Los Angeles Gas & Elec. Corp. v. Railroad Comm., 289 U.S. 287, 315, 53 S.Ct. 637, 77 L.Ed. 1180. Pragmatic adjustments depend upon the particular facts. Federal Power Comm. v. Natural Gas Pipeline, supra. It does not appear from the facts in this record that the rate fixed by the commission is so unreasonably low as to call for a declaration that Market Street Railway Company has been deprived of its property without due process of law or without just compensation.

[15] The petitioner asserts some errors in the admission and consideration of statistical and other documentary evidence. It is not the function of the reviewing tribunal in these proceedings to set aside the legislative finding for mere errors of procedure not amounting to lack of due process. Its duty is to ascertain whether the legislative process has resulted in confiscation. West v. Chesapeake & Potomac Tel. Co., 295 U.S. 662, 674, 55 S.Ct. 894, 79 L.Ed. 1640.

[16] The petitioner objects to the apparent indeterminate duration of the experimental period under the six-cent fare fixed by the commission. The commission still has jurisdiction and if from the monthly reports filed by the company during a reasonable experimental period it appears that the expected increase in passenger traffic on the utility's system due to the reduction in fare and improvement in service does not materialize, the commission has the power to make appropriate adjustments. As the prescribed rate is expressly stated to be tentative, there is no ground for assuming that the commission will reject an application to make such changes as experience may show to be necessary in order to produce the stipulated revenue. Clark's Ferry B. Co. v. Public Serv. Comm., 291 U.S. 227, 241, 54 S.Ct. 427, 78 L.Ed. 767.

The order is affirmed.

GIBSON, C. J., and CURTIS, ED-
MONDS, CARTER, TRAYNOR, and
SCHAUER, JJ., concurred.

1. Descent and distribution §86

The purpose of the Code section giving probate court power to inquire into an assignment by an heir before making distribution was to give probate court some control over agreements providing compensation for services of so-called "heir-hunters." Probate Code, § 1020.1.

2. Descent and distribution §86

Where neither litigant challenged validity of Code section under which proceeding was brought, District Court of Appeal, for purpose of determining issues raised, would assume validity of section. Probate Code, § 1020.1.

3. Descent and distribution §86

Where respondent in proceeding by heir to test validity of assignment of one-third of heir's interest in estate did not appeal from decree reducing amount distributable to respondent, on heir's appeal respondent could not complain of refusal of probate court to distribute estate in strict accordance with terms of assignment. Probate Code, § 1020.1.

4. Courts §198

The probate court is a court of special and limited jurisdiction and has jurisdiction only to extent that law prescribes.

5. Descent and distribution §86

The Code section authorizing probate court to inquire into assignment by heirs does not grant such court general jurisdiction to set aside an assignment in its entirety and for all purposes, but merely purports to grant limited jurisdiction, under certain circumstances, to ignore assignment in whole or in part for purpose of distribution of estate. Probate Code, § 1020.1.

6. Descent and distribution §86

On appeal, on the judgment roll, from a decree recognizing assignment of heir's interest in estate only to the extent of \$1,000, District Court of Appeal would as-

sume that there was ample evidence to sustain finding that \$1,000 was the reasonable value of respondent's services to heir. Probate Code, § 1020.1.

7. Descent and distribution 86

Where probate court found that circumstances warranted setting aside heir's assignment of an interest in estate to respondent but decree awarded respondent a lesser amount, the words "set aside" were used in limited sense of setting aside assignment only so far as it prescribed amount of compensation to respondent for finding heir, and award of reasonable compensation was not objectionable as a recovery on quantum meruit which was not within issues of pleading. Probate Code, § 1020.1.

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Proceeding in the matter of the estate of Andrew Lund, deceased, on petition of Frank Lund, to determine the validity of an assignment by petitioner of a portion of petitioner's share of estate to M. E. Hanlon. From a decree fixing the amount distributable to M. E. Hanlon under the assignment, Frank Lund appeals.

Affirmed.

Simeon E. Sheffey, of San Francisco, for appellant.

Robert E. Hatch, of San Francisco, for respondent.

SPENCE, Justice.

Appellant Frank Lund, as an heir and a person entitled to take under the will of the deceased, filed an instrument entitled "Petition Pursuant to Section 1020.1 of the Probate Code". He alleged therein that he was entitled to one-half of the estate of the deceased; that respondent Hanlon asserted a claim to one-third of the share of appellant which claim was denied by appellant; and he prayed that the probate court inquire into the claim of respondent and adjudge that respondent had no right, title or interest in the estate or in the share of appellant. Respondent answered by alleging that appellant had executed an agreement in writing whereby appellant had assigned to respondent a one-third interest in appellant's share; and respondent prayed that said one-third interest be distributed to respondent. The probate court filed its findings of fact and conclusions of law and

decreed that respondent was entitled to have distributed to him the sum of \$1000 out of appellant's share of the estate. This amount was substantially less than one-third of appellant's share but no appeal has been taken by respondent. Appellant has taken this appeal from said decree upon the judgment roll.

Section 1020.1 of the Probate Code, enacted as a new section in 1941, reads as follows:

"The court before making distribution of any property of a decedent to any assignee or transferee of any heir, devisee or legatee or before making distribution to any person other than an heir, devisee, or legatee pursuant to any agreement, request or instructions of any heir, devisee or legatee or of any attorney-in-fact of any heir, devisee or legatee may on the motion of any person interested in the estate or on the motion of the public administrator or on its own motion inquire into the consideration for such assignment, transfer, agreement, request or instructions and into the amount of any fees, charges, or consideration paid or agreed to be paid by the heir, devisee or legatee and into the circumstances surrounding the execution of such assignment, transfer, agreement, request or instructions and if it finds that the fees, charges or consideration paid by any such heir, devisee or legatee is grossly unreasonable or that any such assignment, transfer, agreement, request or instructions was obtained by duress, fraud or undue influence it may refuse to make distribution pursuant thereto except upon such terms as it deems just and equitable. * * *

[1] At the time of the enactment of said section, sections 530, 530.1 and 1201a of the Probate Code, which had been enacted in 1939, were repealed. Stat. 1941, p. 2893, Ch. 1162. Said section 1020.1 and the former section 530.1 appear to have been enacted in an attempt by the legislature to give the probate court some control, at least for the purpose of distribution, over agreements providing compensation for services of so-called "heir-hunters". The present section purports to permit the probate court, upon motion of an interested person or upon its own motion to "inquire into the consideration" for any assignment by an heir, devisee or legatee and "into the amount of any fees, charges, or consideration paid or agreed to be paid by the heir, devisee or legatee and into the circumstances surrounding the execution of such

assignment." It then provides for certain alternative findings which may be made. The probate court may find either (1) that such assignment was obtained by "duress, fraud or undue influence" or (2) that "the fees, charges or consideration paid by any such heir, devisee or legatee is grossly unreasonable." It is then provided that upon the making of either finding the court "may refuse to make distribution pursuant thereto except upon such terms as it deems just and equitable."

[2, 3] The anomalous nature of section 1020.1 is at once apparent. Prior to the enactment of said section and its forerunner, the probate court had no jurisdiction to determine the issue of the validity of an assignment upon the distribution of an estate. *Estate of Howe*, 161 Cal. 152, 118 P. 515. This section apparently attempted to give the probate court jurisdiction to determine that issue, at least for the purpose of distribution. It further attempted to give the probate court jurisdiction, assuming the validity of the assignment, to determine the question of the reasonableness of the compensation, at least for the purpose of distribution. We are not called upon here, however, to determine the numerous questions which may arise with respect to said section. Appellant invoked its provisions and respondent is not complaining of the decision of the probate court. In other words, neither party claims that the section is invalid. Respondent did not appeal and cannot complain on this appeal of the refusal of the probate court to distribute the estate in strict accordance with the terms of the assignment. We will therefore assume solely for the purpose of this discussion that the section is valid.

If it may be said that the section is anomalous in nature, the pleadings and findings herein are equally anomalous. Appellant alleged neither that the assignment was obtained by "duress, fraud or undue influence" nor that the charges were "grossly unreasonable". Appellant's petition contained allegations more in the nature of a complaint to quiet title to his share in the estate. Similarly the findings of fact contain no findings conforming precisely to the findings contemplated by said section. The probate court made extensive findings but we need set forth only the portions thereof which are material on this discussion. Finding VI recites: "That the signature of Frank Lund to said docu-

ment was obtained under circumstances that warrants this court, in the exercise of its equity powers herein, to set aside and refuse to make distribution, pursuant to said document." Finding VIII recites: "Upon the petition and at the request of said Frank Lund, the court has invoked its powers prescribed by Section 1020.1 of the Probate Code of the State of California, and refuses to make distribution to or on behalf of M. E. Hanlon, pursuant to the terms of said document hereinabove set forth; that the court taking into consideration all the circumstances, and the fact that he was the first to inform Frank Lund, that he had some money coming from somewhere, and the probability that Frank Lund might never have found out about his father's estate, if it had not been for M. E. Hanlon, and the fact that his sister, Lillian Blanche Imel, her agents or attorneys never made any attempt to find him and it was to her advantage if he were not found, the court finds that M. E. Hanlon rendered a service to Frank Lund; the court finds that the service rendered by M. E. Hanlon is of the reasonable value of One Thousand Dollars (\$1000.00)." From these findings, the court concluded that respondent was entitled to receive said sum of \$1,000 as the reasonable value of his services and that "all decrees of distribution in the matter of this estate shall be in accordance with the foregoing conclusions of law." A "Decree under Section 1020.1 Probate Code" was entered accordingly.

Appellant argues that the probate court "was warranted in setting the document aside"; that "when the document was so set aside, respondent had no interest in the estate"; that the probate court erred in permitting a recovery upon a quantum meruit which was a recovery upon a cause "not within the issues of the pleadings"; and that in any event, respondent could not recover upon a quantum meruit as the services performed in locating appellant were not performed at appellant's request. We believe appellant's argument ignores the nature of said code section which merely permits the probate court to "refuse to make distribution pursuant thereto (the assignment) except on such terms as it deems just and equitable". We believe further that appellant's argument is based upon the false premise that the probate court "set aside" the document in its entirety and for all purposes and permitted a recovery upon a quantum meruit.

[4-7] It is elemental that the probate court is a court of special and limited jurisdiction and that it has jurisdiction only to the extent that the law prescribes. As we read section 1020.1 of the Probate Code, it does not purport to grant to the probate court general jurisdiction to "set aside" an assignment in its entirety and for all purposes. It merely purports to grant to the probate court the limited jurisdiction, under certain circumstances, to ignore the assignment in whole or in part for the purposes of the distribution of the estate. In this proceeding in which appellant invoked the provisions of said section, appellant was granted relief to the extent that the probate court ignored the assignment in part for the purpose of distribution. In other words, it recognized the assignment of appellant's interest only to the extent of \$1000. This sum was found to be the reasonable value of respondent's services and, on this appeal upon the judgment roll, we must assume that there was ample evidence to sustain that finding. Despite the informality of the pleadings and findings, we are satisfied that this finding is sufficient to support the decree against the attack made by appellant. While the probate court recited in its findings that circumstances warranted it "to set aside and refuse to make distribution pursuant to said document", it did not decree that the assignment be "set aside" and its jurisdiction extended only to the refusing, as it did, to make distribution to the extent specified in the document. We are of the opinion that the finding using the words "set aside" must be interpreted in the limited sense of setting aside or ignoring the document only insofar as it prescribed the amount of compensation and that, as so interpreted, the probate court acted in the manner contemplated by the section in that it acted upon the agreement of the parties but gave said agreement force and effect, for the purposes of distribution, not according to its precise terms but only to the extent of awarding reasonable compensation for respondent's services for which appellant had agreed to pay a larger amount. In view of these conclusions, we find no merit in appellant's argument that the probate court "set aside" the document and permitted a recovery upon a quantum meruit.

In conclusion, we desire to emphasize the fact that no question has been raised concerning the validity of the section un-

der consideration. We desire to state further that no question has been raised concerning the validity generally of agreements providing compensation, by assignment or otherwise, for the services of so-called "heir hunters". We are therefore not called upon to pass upon either of said questions.

The decree is affirmed.

NOURSE, P. J., and STURTEVANT, J., concur.



65 Cal.App.2d 222

In re COTTRILL'S ESTATE.

CAMPBELL v. MICHEL et al.

Civ. 14367.

District Court of Appeal, Second District,
Division 3, California.

July 14, 1944.

Hearing Denied Sept. 11, 1944.

1. Statutes ☞231

In interpreting the Probate Code provision relative to gifts to charity, all of the sections in article relating thereto should be considered together and as a whole. Probate Code, §§ 40-43.

2. Wills ☞15

Where will was executed more than six months before death of decedent leaving as her only heir a niece who was not one of relatives listed in statute restricting amount that may be bequeathed or devised to charitable institution, a bequest to charitable institution was not limited to one-third of estate. Probate Code, §§ 41-43.

3. Wills ☞3

Amendment of section of Probate Code making a limitation as to degree of relationship of heirs who could invalidate testamentary gifts to charity does not operate to repeal other sections in same article relating to bequests or devises by will executed at least six months prior to death of testator leaving no spouse, child, grandchild, or parent. Probate Code, §§ 41-43.

4. Statutes ☞158

Presumption is against repeal by implication.

5. Appeal and error ⇐102

An order sustaining demurrer is not an appealable order.

Appeal from Superior Court, Los Angeles County; Wm. R. McKay, Judge.

Final accounting of Anna Michel, executrix of the estate of Minnie F. Cottrill, together with a petition for final distribution wherein Edna Dorothy Campbell filed objections to which the executrix and the First Church of Christ, Scientist, in Boston, Mass., as residuary beneficiary filed a demurrer. From an order sustaining the demurrer without leave to amend and settling the final account as rendered and ordering distribution in accordance with petition, the contestant appeals.

Appeal from order sustaining demurrer dismissed and otherwise affirmed.

Ben F. Gray, of Los Angeles, for appellant.

Lindstrom & Bartlett, of Los Angeles, for respondent Anna Michel.

Robert L. Moore, of Los Angeles, for respondent First Church of Christ.

PARKER WOOD, Justice.

Minnie F. Cottrill died on August 9, 1941. She left an holographic will dated January 10, 1939, to which there were two codicils. The last codicil was dated June 20, 1940. The estate was of the approximate value of \$49,000. Her only heir was a niece, the appellant. The will and codicils were admitted to probate and provided that the estate should be distributed as follows: \$50 to the niece; \$105, in the aggregate, to other persons; and the residue to The First Church of Christ, Scientist, in Boston, Massachusetts. Said Church was a charitable institution.

On May 17, 1943, the executrix filed her second and final account, and a petition for final distribution wherein the executrix sought distribution in accordance with the provisions of the will. Appellant filed objections to the petition for final distribution, wherein she stated that she was a niece of decedent; that the will devised and bequeathed to a charitable corporation for charitable uses more than one-third of the estate; that the will was executed more than six months before decedent's death; that appellant was entitled under the law to have "distributed to her two-thirds of the estate"; and that the petition for distribu-

tion, in asking for distribution of more than one-third of the estate to the charitable corporation, was contrary to law. The executrix and the Church (residuary beneficiary) each filed a general demurrer to said objections, and specified as grounds therefor that said objections and the record show that said objector was a niece of testatrix, that the will and codicils were executed at least six months prior to the death of testatrix, and that the objector had no legal basis for objecting to the distribution in accordance with said petition. The demurrers were sustained without leave to amend. An order was made settling the second and final account as rendered, and an order was made that distribution be in accordance with said petition for final distribution. The appeal is from said orders, and from the order sustaining the demurrers without leave to amend.

Section 41 of the Probate Code, as amended in 1937, provided: "No estate * * * may be bequeathed or devised to any charitable * * * corporation * * * for charitable uses, by a testator who leaves a spouse, brother, sister, nephew, niece, descendant or ancestor surviving him, who, under the will, or the laws of succession, would otherwise have taken the property so bequeathed or devised, unless the will was duly executed at least thirty days before the death of the testator. If so executed at least thirty days before death, such devices [sic] and legacies shall be valid, but they may not collectively exceed one-third of the testator's estate as against his spouse, brother, sister, nephew, niece, descendant or ancestor, who would otherwise, as aforesaid, have taken the excess over one-third; and if they do, a * * * deduction * * * shall be made so as to reduce the aggregate thereof to one-third of the estate. All property bequeathed or devised contrary to * * * this section shall go to the * * * niece * * * to the extent that they [she] would have taken said property * * * but for such devises or legacies * * *." (Italics added.)

Section 43 of the Probate Code provides: "Nothing in this article contained shall apply to bequests or devises made by will executed at least six months prior to the death of a testator who leaves no spouse, child, grandchild or parent, or when all of such heirs, by a writing executed at least six months prior to his death, shall have waived the restriction."

It will be noted that testatrix had executed her will and both codicils more than six months prior to her death.

Appellant contends that section 41 of the Probate Code, *as amended in 1937*, supersedes section 43 of that code, and limits the aggregate of charitable devises and bequests to one-third of a testator's estate when such testator is survived by a niece—even though the will was executed more than six months before the death of the testator.

The Probate Code was adopted in 1931. Article II of Chapter I, Division I, of the Probate Code, entitled "Gifts to Charity," consists of four sections—40, 41, 42 and 43. The provisions of sections 41 and 43 have been stated above. Section 40 provides that the limitations of that article apply to both foreign and domestic wills. Section 42 provides that certain municipal and state institutions are excepted from the limitations of that article. Said sections 40 and 42, however, are not involved herein. When the Probate Code was adopted, sections 41, 42 and 43 of that code were taken practically verbatim from former section 1313 of the Civil Code. Typical instances of differences in the language used in said sections of said codes are: That the word "unless" was used in the Probate Code in lieu of the word "except," the word "death" was used therein in lieu of the word "decease," and the word "article" was used therein in lieu of the word "section." In adopting the Probate Code in 1931, former section 1313 of the Civil Code was divided into three parts; and in substance, the first part became section 41, the second part became section 42, and the third part became section 43. Section 43, above quoted, has not been amended. Section 41, at the time the Probate Code was adopted, provided: "No estate * * * may be bequeathed or devised * * * for charitable uses, *unless done by will* duly executed at least thirty days before the death of the testator. If so *made* at least thirty days before death, such devises and legacies shall be valid, but they may not collectively exceed one-third of the *estate of a testator who leaves legal heirs*, and if they do, a * * * deduction * * * shall be made so as to reduce the aggregate thereof to one-third of the estate. All *dispositions of property made contrary hereto shall be void, and go to the residuary legatees or devisees or heirs, according to law.*" (Italics added.)

[1, 2] It is to be noted that the principal difference in section 41 before and after the 1937 amendment, insofar as the issue here involved is concerned, is that before the amendment the section stated that no testamentary disposition of property to charity could exceed collectively one-third of the estate of a testator who leaves "legal heirs"; and that after the amendment the section stated that no testamentary disposition of property to charity could exceed collectively one-third of the estate of a testator "*as against his spouse, brother, sister, nephew, niece, descendant or ancestor,*" who would otherwise, under the will or the laws of succession, have taken the property so bequeathed or devised. (Italics added.) In other words, before said 1937 amendment the general expression "legal heirs" was used in section 41, and after the said amendment a specific expression designating certain heirs was used in said section. Before the amendment, a niece was included in section 41 under the general expression "legal heirs"; and after the amendment, a niece was included in that section under the specific designation of certain heirs. Under said section 41, before said amendment, there was no limitation as to how distant the degree of relationship of "legal heirs" might be. After said amendment of that section, the degree of relationship of a person who might invalidate a testamentary disposition to charity of more than one-third of an estate, within the provisions of said section 41, was limited to a certain classification of heirs. The effect of the amendment, therefore, was to make a limitation as to the degree of relationship of heirs who could invalidate such testamentary gifts to charity. Such a limitation enlarged or extended the right of a testator to make testamentary gifts to charity, by decreasing the number or classes of heirs who could object to such disposition of property. The 1937 amendment eliminated some of the collateral and more distant relatives in whose behalf the charitable gift restrictions had theretofore operated. A niece, however, was not one of the collateral relatives so eliminated by the amendment but was retained, under an express provision of the amendment, as one in whose behalf said restrictions operated. Section 41 was no more favorable to a niece after the amendment in 1937 than it was before the amendment, since a niece was included in that section before and after the amendment. With respect to charitable institutions, however, said section was more

favorable to them after the amendment than it was before, since there were fewer classes of heirs who could object to charitable bequests. As above stated, section 43 was not amended, and it expressly provided that nothing "contained" in said "article" should apply when certain conditions stated in section 43 existed. Section 41, being "contained" in said Article II, was subject to said provisions of section 43. Former section 1313 of the Civil Code, upon which said Article II was based, provided in the last portion thereof that "Nothing in this section contained shall apply" under certain conditions there stated, which conditions were the same as those stated in section 43. (*Italics added.*) Under said section 1313 of the Civil Code, when said certain conditions existed, that is, the decedent left no husband, wife, child, grandchild or parent and the will was executed more than six months prior to the death of the testator, the "legal heirs" referred to in that section could not invalidate the testamentary disposition to charity. In *Re Estate of Graham*, 1923, 63 Cal.App. 41, 218 P. 84 (which was decided when section 1313 of the Civil Code was in effect) the testatrix left no husband, parent, child or grandchild. She executed a will more than six months prior to her death, and gave more than one-third of her estate to charity. Second cousins (as shown by the transcript therein) of testatrix filed objections to a distribution under the terms of the will. The court overruled said objections and ordered that the estate be distributed in accordance with the will. The effect, therefore, of that decision was that the provisions in said section 1313 in the Civil Code, which were the same as the present provisions in section 43 of the Probate Code, rendered inapplicable the other provisions of section 1313, with respect to objections by "legal heirs," when the will had been executed more than six months before the death of a decedent, who left none of the relatives listed in section 43. In interpreting the Probate Code provisions relative to "Gifts to Charity," especially in view of the reference in section 43 to the whole of Article II, all of the code sections in said Article II should be considered together and as a whole. When so considered, the interpretation of Article II, insofar as the effect of the provisions of section 43 (relative to a will made more than six months

before death) is concerned, should be the same as the interpretation in *Re Estate of Graham*, supra, of the similar provision in former section 1313 of the Civil Code. In *Re Estate of Yule*, 1943, 57 Cal.App.2d 652, 135 P.2d 386, which arose after the 1937 amendment to section 41, it was contended by appellants that a testamentary disposition of property to charity should be limited to one-third of the estate. The appellants were half-sisters, nephews and nieces (as shown by the clerk's transcript therein). Respondents contended, and it was so held, that under section 43 the disposition was valid. The court said, 57 Cal.App.2d at page 655, 135 P.2d at page 388: "It is provided in section 43 of the Probate Code that the restriction referred to in section 41 shall not be applicable to bequests or devises made by will executed at least six months prior to the death of a testator who leaves neither spouse, child, grandchild or parent. The will now before us was executed more than six months before the death of decedent, who left none of the relatives listed in section 43 of the code. It follows that the gift in question is not limited by the restrictions of section 41." In the present case, the will was executed more than six months before the death of decedent, who left none of the relatives listed in section 43 of the Probate Code. The testamentary gift herein to a charitable institution is not limited by the restrictions of section 41 of the Probate Code.

[3, 4] The amendment of section 41 in 1937 did not operate to repeal section 43. The presumption is against repeal by implication. The subject matter of the two sections is not the same. In amending section 41 the legislature did not attempt to revise the law covered by the two sections, and as those sections now stand they are not less harmonious or less reconcilable than they were before the amendment. For these and for other reasons the two sections must be read together. See 23 Cal.Jur. 694-703.

[5] The order settling the second and final account, and the order for final distribution are affirmed. The appeal from the order sustaining the demurrers is dismissed, such order not being an appealable order.

DESMOND, P. J., and SHINN, J., concur.

HERZOG v. CAPITAL CO. et al.*

Civ. 3329.

District Court of Appeal, Fourth District,
California.

July 14, 1944.

Hearing Granted Sept. 11, 1944.

1. Fraud $\S$ 58(2)

In action for fraud in sale of dwelling house to plaintiff, evidence justified trial court's conclusions that defendant corporation's local manager should have informed himself of prior leaky condition of house before making representations to plaintiff that it was in perfect condition, and was guilty of actual fraud in making such representations after his attention was directed to repairs necessitated by former leaks, even if he believed such representations to be true. Civ.Code, $\S$ 1572, subd. 2.

2. Principal and agent $\S$ 178(1)

An agent's knowledge within scope of his employment is usually considered to be principal's knowledge.

3. Limitation of actions $\S$ 100(6)

Where fraud in corporation's local manager's representations that dwelling house sold by corporation was in perfect condition was not discovered by purchaser, because of absence of hard rains disclosing leaks due to structural defects, until less than three years before filing of purchaser's action against corporation for such fraud, action was not barred by statute of limitations.

4. Principal and agent $\S$ 171(4)

Generally, one accepting fruits of fraud, with knowledge of misrepresentations or concealments by which fraud was perpetrated, inferentially ratifies fraud and is liable therefor, apart from any considerations of agency, though he did not personally participate therein.

5. Corporations $\S$ 422(1)

Where contract for sale of dwelling house contained provision that buyer agreed to purchase house in its existing condition and that there were no promises or representations except those contained therein, buyer was not entitled to recover damages for fraud because of false representations by corporate vendor's local manager that house was in perfect condition,

though rescission of contract would not afford buyer adequate remedy.

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Action by Arthur L. Herzog against the Capital Company, a corporation, and another for fraud and deceit in the sale of a dwelling house to plaintiff. Judgment for plaintiff, and defendants appeal.

Reversed.

Louis Ferrari, of San Francisco, and Edmund Nelson and G. L. Berrey, both of Los Angeles, for appellants.

Monroe & McInnis and C. Rupert Linley, all of San Diego, for respondent.

MARKS, Justice.

This is an appeal from a judgment awarding plaintiff damages for fraud and deceit in the sale of a dwelling to him.

The residence in question is located in the city of San Diego and it is admitted that it was owned by defendants, with the record title standing in the name of the Capital Company. At the time of the sale a Mr. Yakel was local manager of the Capital Company in San Diego.

In June, 1938, plaintiff was in search of a residence in San Diego. He went to the office of Hotchkiss and Anewalt, realtors, and was shown the house in question by Mr. Yakel who took him through it. The house had been newly painted inside and out and the floors had been sanded and refinished. In the inspection plaintiff noticed that lines in the plaster in one of the upstairs bedrooms indicated that the plaster had been repaired and then painted. He called Yakel's attention to those patches and was assured that the house was in perfect condition in all respects. In the words of plaintiff, Yakel said, "there had been some leaks in the house at some time, but they had been patched and repaired, but at that time the house was perfectly intact."

Both plaintiff and Roscoe Porter testified that Yakel told plaintiff, in effect, that \$1000 had been spent on the house; that it had been completely repaired; that it was in perfect condition. Plaintiff testified that he believed those representations and relied on them; that he would not have purchased the house had he known its true condition; that he did not learn of the falsity of those representations until De-

* Subsequent opinion 164 P.2d 8.

ember, 1939, or early in January, 1940; that between the time he purchased the house in June, 1938, and December, 1939, or January, 1940, there had been no hard rains; that in December, 1939, or early in January, 1940, there were very hard rains; that the house then leaked very badly; that the water poured in through three of the walls, ran down the walls, and dropped from the ceilings; that this recurred in succeeding hard rains; that the interior plaster became loose and hung from the ceilings; that furniture had to be stacked and covered to protect it from water. The condition described in the record was very bad and shows that the house was unfit for habitation in such condition.

Plaintiff had repairs made in 1940, but the leaking was not stopped. He finally employed an architect to investigate and advise him. This architect finally removed sections of the interior plaster in order to determine the cause of the leaks. He found structural defects in the original construction of the building; that there was no cross-bracing in the walls which permitted them to sway from wind pressure or during earth tremors. This would tend to crack the exterior and interior plaster. There was no sheeting on the outside of the studding under the exterior stucco. The studding was covered with a paper that was not waterproof. A wire mesh was applied over this paper and covered with exterior stucco which was not waterproof resulting in the rotting of the paper and the rusting of the wire. Water came in around the windows and other places besides through the plaster.

The leaks were finally stopped at a cost to plaintiff of something more than \$2339.39. Two of the exterior walls and part of a third were covered with water proof paper, metal lath and water proof stucco. All of the windows were removed and others installed. The interiors of several rooms were replastered and redecorated. There were other necessary repairs which we need not specify.

From 1926 to 1937, the house had been owned and occupied by Irvin M. Schulman. It had leaked during heavy rains during the entire time of his occupancy. He had expended about \$4000 in unsuccessful attempts to stop those leaks.

In 1937 he sold the house, through Mr. Yakel, to defendants. He told Mr. Yakel about the house leaking and sold it "as is".

Thus Mr. Yakel had actual knowledge of the leaky condition of the house prior to its sale to plaintiff.

Plaintiff paid \$9500 for the house. There is evidence to the effect that its reasonable market value in the condition it was in at the time of the sale to plaintiff was not more than \$4500. The trial court gave plaintiff judgment for \$3500 damages.

Defendants argue that reasonable market value is not the equivalent of "actual value" which is now made the basis of assessing damages in fraud cases such as this. Sec. 3343, Civil Code. As the case must be retried we need not decide this question.

Defendants attack the judgment on many grounds. It is argued that the complaint fails to state a cause of action; that the action was barred by the statute of limitations; that the representations made by Yakel were puffing and sales talk and mere expressions of opinion; that there was no evidence that defendants knew the representations were false.

[1] We need devote little space to the consideration of these questions. The plaintiff did inspect the house but the structural defects were concealed and were only discovered during hard rains and after large holes were cut in the plaster. Signs of leaking had been covered by the repairs made. Yakel knew the history of the leaks in the house over a long period of time. He made positive statements to plaintiff that the house was in perfect condition even after his attention had been directed to repairs in the interior plaster undoubtedly made necessary by former leaks. The trial court was fully justified in concluding that the knowledge possessed by Yakel of the prior leaky condition of the house did not justify his positive representations to plaintiff that it was in perfect condition. While Yakel may not have actually known that the prior leaks had not been stopped, in view of his knowledge of the history of the house he should have informed himself on that subject before making the positive representations that the house was in perfect condition which carried the clear implication that it would not leak. The trial court was justified in concluding that "under the law it is a matter about which he should have informed himself before making the representations. * * * that the defendant's positive assertions in a manner not warranted by the information he pos-

sessed, of that which was not true even though he believed it to be true, constituted actual fraud within the meaning of subdivision 2 of section 1572 of the Civil Code." *Shearer v. Cooper*, 21 Cal.2d 695, 134 P.2d 764, 768; *Graham v. Los Angeles First N. T. & S. Bank*, 3 Cal.2d 37, 43 P.2d 543.

[2] The facts before us present as clear a case of actual fraud and deceit on the part of Yakel with consequent damage to plaintiff as any called to our attention in a considerable time. Yakel was a regular employee of the Capital Company and was described by its assistant secretary as "local manager" in San Diego. He had negotiated the sale of another house to plaintiff by defendants in June, 1936. He negotiated the sale of the house involved here by Schulman to defendants. He negotiated the sale of the house by defendants to plaintiff. He was their agent and the knowledge of the agent, within the scope of his employment, is usually considered to be the knowledge of the principal.

[3] Plaintiff purchased the house in June, 1938. The action was filed October 21, 1942, more than three years thereafter. It is alleged in the complaint, and plaintiff testified, that the fraud was not discovered until December, 1939, or early in January, 1940, less than three years before the action was filed. Plaintiff further testified that there were no hard rains between June, 1938, and December 1939, so there had been no leaks and the fraud had not been discovered. The trial court was justified in regarding the allegations of the complaint, as well as the proof, sufficient, and in holding that the statute of limitations had not run. *Rutherford v. Rideout Bank*, 11 Cal.2d 479, 80 P.2d 978, 117 A.L.R. 383.

The next argument of defendants is much more serious to the cause of plaintiff. The agreement to purchase signed by plaintiff contained the following:

"The undersigned has examined said property and each and every part thereof, and agrees to purchase same in its existing condition and the undersigned agrees that there are no promises, representations, verbal understandings or agreements, excepting those contained herein.

"I understand that the sale of subject property is subject to acceptance by Capital Company, San Francisco, and in the event said offer is rejected, deposit set forth shall be returned."

Commencing with *Speck v. Wylie*, 1 Cal.2d 625, 36 P.2d 618, 619, 95 A.L.R. 760, it has been consistently held in California that similar provisions would not prohibit rescission of a contract obtained by the fraud of a selling agent committed without the knowledge of the principal. The reason for the rule is thus stated in a concurring opinion by Mr. Associate Justice Shenk:

"As I understand this rule, it is that an innocent principal so contracting with another may relieve himself from liability for the fraud of his agent, but he is nevertheless subject to rescission on the part of the defrauded party. The rule proceeds upon the theory that an innocent principal so contracting may not be permitted to enrich himself by reason of his agent's fraud, and that any property received by such principal is held by him as a constructive trustee for the person defrauded." See, also, *Lozier v. Janss Inv. Co.*, 1 Cal.2d 666, 36 P.2d 620; *Greenberg v. Du Bain Realty Corp.*, 2 Cal.2d 628, 42 P.2d 628; *Graham v. Los Angeles, etc., Bank*, supra; *Weiner v. Roof*, 10 Cal.2d 450, 74 P.2d 736; *Rutherford v. Rideout Bank*, supra; *Longway v. Newberry*, 13 Cal.2d 603, 91 P.2d 110; *Curtis v. Title Guarantee, etc., Co.*, 3 Cal.App.2d 612, 40 P.2d 562, 42 P.2d 323; *Rothstein v. Janss Inv. Corp.*, 45 Cal. App.2d 64, 113 P.2d 465.

It is also stated in many of those cases that an action for damages could not be maintained by the defrauded buyer against the innocent principal under the circumstances disclosed. Each of the actions was for rescission so such statement was not necessary for the decision.

Plaintiff seeks to distinguish those cases from the instant case. In practically all of them the agent committing the fraud was a broker whose compensation depended on his success in completing the sale. Here the agent committing the fraud was a regular employee who occupied the position of local manager of the Capital Company. The authority he possessed is not made at all clear in the record.

It is argued that the knowledge of this agent should be imputed to his principal and that the principal is responsible for his fraud; that, therefore, defendants were not innocent principals and should not have the protection of the rules announced in the foregoing cases.

[4] It is recognized in California that "the rule generally is that one who accepts

the fruits of a fraud, with knowledge of the misrepresentations or concealments by which the fraud was perpetrated, thereby inferentially ratifies the fraud complained of and will be liable therefor, even though he did not personally participate in the fraud, and this is so apart from any consideration of the theory of agency." *McClung v. Watt*, 190 Cal. 155, 211 P. 17, 20.

In *Kalkruth v. Resort Properties, Ltd.*, 57 Cal.App.2d 146, 134 P.2d 513, 516, relied on by plaintiff, the sale was negotiated by an agent and the contract contained a clause somewhat similar to the one involved in the instant case. The fraudulent representations were made by a selling agent but were later repeated, ratified and affirmed by the president and general manager of the corporation selling the property. A judgment for damages was affirmed, this court saying: "If the principal participates in the fraud, then the fraud becomes its own and it cannot escape liability."

[5] It seems to us that it might be possible to draw a logical distinction between fraud committed by a broker authorized by the owner to act in a sale where compensation depends on concluding the sale, and fraud on the part of a regular employee of the owner who was its local manager. Here rescission does not afford plaintiff an adequate remedy as he had spent a little less than \$3500 in repairs and in betterments in addition to the sums paid on the purchase price. However, we have reluctantly reached the conclusion that the judgment for damages must be reversed. This is compelled by the cases of *Harnischfeger Sales Corp. v. Coats*, 4 Cal.2d 319, 48 P.2d 662, and *Schroeder v. Dickinson & Gillespie Corp.*, 6 Cal.App.2d 175, 44 P.2d 425. Any further relaxation of the rule of *Gridley v. Tilson*, 202 Cal. 748, 262 P. 322, must be made by the Supreme Court and not by us.

Harnischfeger Sales Corp. v. Coats, supra, involved a judgment for damages for fraud against the seller committed by its agent. The contract of sale contained a clause very similar to the one involved in the instant case. The judgment for damages was reversed by the Supreme Court because of that clause in the contract. The briefs, filings on the petition for hearing, and the opinion of the District Court of Appeal (40 P.2d 875) give a much more

extended statement of facts than those set forth by the Supreme Court. Those facts cannot be distinguished in principle from the facts of the instant case. The same conclusion was reached in the case of *Schroeder v. Dickinson & Gillespie Corp.*, supra, in which a hearing was denied by the Supreme Court.

We consider those cases controlling here and therefore the judgment for damages cannot be sustained.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



64 Cal.App.2d 876

HUNTON et al. v. CALIFORNIA PORTLAND CEMENT CO. et al.

Civ. 3315.

District Court of Appeal, Fourth District,
California.

June 29, 1944.

Appeal and error — 1140(1)

Where plaintiff filed his written consent to reduction of judgment of \$18,000 for death of his 17-year-old son to \$10,000 in accordance with order of District Court of Appeal, judgment was affirmed as modified.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Supplementing opinion.

Affirmed as modified.

Prior opinion 149 P.2d 471.

Gray, Cary, Ames & Driscoll and John M. Cranston, all of San Diego, for appellants.

Nottbusch & Nottbusch, of San Diego, and Head, Wellington & Jacobs, of Santa Ana, for respondents.

PER CURIAM.

The plaintiff and respondent having filed his written consent to a reduction of the

amount of the judgment awarded him on the first cause of action, from \$18,000 to \$10,000, in accordance with our order of June 14, 1944 (64 Cal.App.2d 876, 149 P.2d 471):

It is ordered that: (1) With respect to the second cause of action the judgment is affirmed. (2) The judgment for damages on the first cause of action is reduced from \$18,000 to \$10,000, and as so reduced and modified, that part of the judgment is also affirmed. Neither party will recover costs on appeal.



65 Cal.App.2d 120

In re STEPHENSON'S ESTATE.

STEPHENSON v. STEPHENSON et al.
Civ. 14510.

District Court of Appeal, Second District,
Division 2, California.
July 3, 1944.

Hearing Denied Aug. 30, 1944.

1. Husband and wife Ⓒ276(1, 8)

The probate court had jurisdiction to determine surviving wife's interest in the estate and what property was community property, and could determine such questions upon final distribution.

2. Evidence Ⓒ42

It is common knowledge that for many years petitions for partial distribution have been used by widows in California to obtain determination of their community interests. Probate Code, §§ 1000, 1001.

3. Husband and wife Ⓒ276(8)

The probate court had power to order partial distribution of estate and, in proceedings for partial distribution, to determine widow's community interest without recourse to proceedings to determine heirship. Probate Code, §§ 1000, 1001, 1080, 1081.

4. Courts Ⓒ475(2)

The filing of proceedings to determine heirship during progress of hearing on petition for partial distribution did not compel termination of such hearing and deci-

sion of issues then before court at a later hearing on heirship petition. Probate Code, §§ 1000, 1001, 1080, 1081.

5. Husband and wife Ⓒ276(8)

A widow who had notice of pendency of heir's petition for partial distribution when she filed petition to determine heirship was not prejudiced by court's action in proceeding with the proceeding for partial distribution. Probate Code, §§ 1000, 1001, 1080, 1081.

6. Husband and wife Ⓒ276(8)

A widow who did not demand jury trial in proceeding for partial distribution, but only when she filed petition to determine heirship, was not prejudiced by being deprived of jury trial in the proceeding for partial distribution. Probate Code, §§ 1000, 1001, 1080, 1081.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of Henry S. Stephenson, deceased, wherein June Rand Stephenson, as executrix, and Marshall B. Stephenson filed petitions for partial distribution, objected to by June Rand Stephenson in her individual capacity. From an adverse order, June Rand Stephenson, individually, appeals.

Affirmed.

Stephen Monteleone, of Los Angeles, for appellant.

Lawler, Felix & Hall and William T. Coffin, all of Los Angeles, for petitioner and respondent.

W. J. WOOD, Justice.

On this appeal by June Rand Stephenson in her individual capacity it is contended that the court lacked jurisdiction to grant the petition for partial distribution to Marshall B. Stephenson, whereby 11,747 shares of the capital stock of Palomas Land & Cattle Company were distributed to him without recognizing in appellant any community interest therein.

Appellant married Henry S. Stephenson on July 11, 1939, and remained his wife until his death on March 29, 1941. Appellant was named as executrix of the will and qualified as such on April 23, 1941. Respondent is the son and only child of decedent by a former marriage. By the terms of the will appellant was given certain real

property, all the cash on hand at the time of the testator's death, all of his stock in June Rand Kenilworth Company and the residence. The residue of the estate was given to respondent.

Appellant filed on April 9, 1942, her first account and report as executrix and a petition for partial distribution wherein she alleged that time for presenting claims had expired and all claims presented against the estate had been paid; and that she and respondent had entered into an agreement for the compromise and settlement of certain differences between them respecting their interests in the estate whereby she was to receive from respondent \$9,000 in cash and one-fourth of the stock of Hueco Cattle Company, a part of the residue of decedent's estate, and in consideration thereof she agreed among other things to satisfy her claim for family allowance and pay all expenses of administration and succession taxes. She prayed that her account and report be settled and the Hueco stock distributed to herself and respondent in accordance with the terms of the agreement. Respondent had theretofore paid to appellant the agreed \$9,000 and on April 24, 1942, orders were made settling the account and report and distributing the Hueco stock as prayed.

Respondent filed a petition for partial distribution on September 3, 1943, asking that the 11,747 shares of the stock of Palomas Land & Cattle Company, which constituted a part of the residue of the estate, be forthwith distributed to him and that appellant be directed to file her final account and close the estate. An order to show cause was issued and served on appellant on September 11, 1943, notifying her that the petition would be heard on September 27, 1943. No objection was filed by appellant to the petition before September 27, 1943, but on that date, after the petition had been called for hearing appellant filed an instrument in which she stated that she appeared in her capacity as widow and objected to a distribution of any of the assets of the estate until her community interest therein be first determined. Appellant's counsel stated at the inception of the hearing that appellant claimed community interest in the Palomas stock on the ground that decedent, following his marriage with appellant, had devoted much time and effort to effect the allowance of a general claim of the Palomas Company against the Mexican government. Appellant's counsel

stated that he was "planning to commence proceedings to determine her community interest in the assets of the estate". Respondent's counsel replied that the evidence would show that appellant had no community interest in the Palomas stock and that the court on the hearing could and should determine all claims to the stock by anyone whether as surviving spouse or otherwise. The court overruled appellant's objection and proceeded to hear the evidence on respondent's petition for partial distribution, much of which was directed only to matters showing the efforts and time given by decedent in the interest of the Palomas property. The court filed findings in which it was found that decedent became incapacitated by reason of a "stroke" on July 29, 1940; that during the period of his marriage with appellant decedent had received a salary from the Palomas Company for the services rendered; that respondent conducted as superintendent the operations and business of the Palomas Company; and that appellant at no time owned or acquired any interest, community or otherwise, in the shares of the Palomas Company stock.

After the commencement of the hearing on respondent's petition appellant filed a separate petition in which she asked that it be decreed that she had a community interest in the stock in the Palomas Company. With this petition she filed a demand for a jury trial.

[1] The probate court unquestionably had jurisdiction to determine what interest appellant had, as surviving wife, in the estate which was being administered and could determine what property, if any, was community property. *Colden v. Costello*, 50 Cal.App.2d 363, 122 P.2d 959. It is conceded that these questions could be determined upon final distribution. *In re Estate of Kelpsch*, 203 Cal. 613, 265 P. 214. Appellant contends, however, that prior to final distribution the only method by which the interest of a surviving wife in alleged community property can be determined is that provided by sections 1080 and 1081 of the Probate Code, commonly called proceedings to determine heirship.

[2] The proceedings for partial distribution of an estate prior to final distribution have been authorized at all times since the establishment of the probate courts in California. The provisions now in effect on the subject are sections 1000 and 1001 of

the Probate Code. It is made mandatory by section 1001 that the court make the order of distribution, for it is there provided that if it appears that the estate is but little indebted and that inheritance taxes have been paid and that the distribution of the portion of the estate may be made without loss to creditors or injury to others "the court shall make an order" for the delivery of the share of the estate or such portion thereof as the court may designate to the person entitled thereto. It is common knowledge that for many years petitions for partial distribution have been used by widows in California as a means for having their community interests determined. 11B Cal.Jur. 688. And in response to petitions for partial distribution filed by others widows have brought and obtained their community property interests. In *Re Estate of McCarthy*, 127 Cal. App. 80, 15 P.2d 223, a petition for partial distribution was filed by a nephew of the decedent. The widow, Gertrude McCarthy, claimed a community interest in the property but the court found that she had no community interest therein. The reviewing court reversed the decree, holding that the evidence was insufficient to support the finding that the appellant had no community interest in the property sought to be distributed, and remanded the cause for a determination of the question as to what portion of the property of the estate, if any, was community property.

[3] The Probate Code clearly gives power to the court to order a partial distribution of an estate and, given the prescribed conditions, it is made mandatory upon the court to make the order. But to exercise that power accurately it is necessary that it first be determined what persons are entitled to the order and what portion or portions of the estate should be distributed to them. The same reasons which make it proper for the court to exercise jurisdiction to determine the interest of the widow upon final distribution are applicable when the court is called upon to order a partial distribution. In *Re Estate of Ross*, 187 Cal. 454, 202 P. 641, the appeal was by

a relative of the decedent from an order granting a petition by the administrator for a ratable distribution. The court, in referring to *William Hill Co. v. Lawler*, 116 Cal. 359, 48 P. 323, said that the term distribution includes not only the determination of the persons entitled thereto but also the "proportion or parts" to which each is entitled, and stated [187 Cal. 454, 202 P. 646]: "Although that case involved a final distribution, the same considerations apply to a distribution under section 1663, for, before the court can make an order for ratable distribution, it is necessary to know who the parties entitled to the estate are. Therefore in such a proceeding the court may determine who the heirs are and to what proportion of the estate each is entitled."

[4,5] As above noted, at the commencement of the hearing on respondent's petition no proceedings to determine heirship were pending. The filing of the heirship proceedings during the progress of the hearing did not compel the court to terminate the hearing and decide the issues then before the court at a later hearing on appellant's heirship petition. All of the interested parties were then before the court and the issues were clearly set forth. Appellant had had notice of the pendency of respondent's petition and was not prejudiced by the action of the court in proceeding therewith.

[6] Appellant's claim that she was prejudiced by being deprived of a jury trial is without merit. She made no demand for a jury trial in the matter heard by the court. Her only demand for a jury trial was made at the time she filed her own petition to determine heirship and, as we have seen, the court was justified in proceeding with the hearing of the issues on respondent's petition for partial distribution.

The order is affirmed. Respondent to recover costs on appeal from appellant in her individual capacity.

MOORE, P. J., and McCOMB, J., concur.

PEOPLE v. WILSON.*

Cr. 3789.

District Court of Appeal, Second District,
Division 2, California.

July 3, 1944.

Rehearing Denied July 17, 1944.

Hearing Granted, July 31, 1944.

1. Abortion ☞11

Criminal law ☞510

Conviction of physician of abortion upon uncorroborated testimony of woman upon whom abortion was allegedly committed, and uncorroborated testimony of woman's husband, who was an accomplice, could not be sustained. Pen.Code, §§ 274, 1108, 1111.

2. Abortion ☞11

In prosecution for abortion, any testimony in addition to that of woman upon whom abortion was allegedly committed tending to show defendant's criminal intent is sufficient corroboration, Pen.Code, § 1108.

3. Criminal law ☞387

In prosecution for feloniously employing an instrument upon another with intent to procure a miscarriage, evidence that arresting officers found no instruments in defendant's office was inadmissible as immaterial. Pen.Code, § 274.

4. Criminal law ☞369(1)

In prosecution for abortion, testimony concerning defendant's previous arrest, inadmissible of itself, adduced in attempt by prosecution to prove immaterial fact that defendant did not have certain surgical instruments in her office at time of arrest, was error. Pen.Code, § 274.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Mae A. Wilson was convicted of feloniously employing an instrument upon the person of another with intent to procure a miscarriage, and she appeals.

Reversed and remanded for a new trial.

Morris Lavine, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

W. J. WOOD, Justice.

Defendant was accused by information of the violation of section 274 of the Penal Code in that on August 2, 1943, she feloniously employed an instrument upon the person of Marcella Anderson with the intent to procure a miscarriage. Having been found guilty by a jury, she has appealed from the judgment of conviction and from the order denying her motion for a new trial.

Mrs. Anderson testified that on July 31, 1943, she had talked to defendant, a physician, on the telephone, stating that she had missed one period; that defendant told her that the fee would be \$100 and to come to her office on August 2. The witness went to defendant's office on August 2 with her husband. Defendant told her husband that since the patients were women he could not remain. The witness gave \$100 to defendant and asked her what method she used and was told that it was a curettement. Defendant then placed the witness upon an operating table. Mrs. Anderson did not see any instrument but she felt something inserted into her vagina. She stated that defendant was in front of her, working between her legs. She felt a "motion of cleaning inside of her" and suffered pain. She was on the table about thirty-five minutes and during this time she heard a noise, "the sound the different things made, she laid down different things that she used that I felt inside of me". After she left the operating table she felt weak. Defendant told her to take a dose of castor oil when she reached home. The witness then went downstairs where her husband met her and they went home. When she arrived home she continued to bleed and the next day she was taken to the hospital.

Harold Anderson testified that he was the husband of Marcella Anderson; that he went to the office of defendant with his wife on August 2 but that he was told to remain outside of the office because of the presence of women patients. He stated that he gave \$100 to his wife and then went downstairs. He stated that he knew what his wife went to defendant's office for and when asked if he took her there for the purpose of having an abortion performed he stated, "well that was more or less up to her".

Maynard Young, a special agent for the Board of Medical Examiners, testified that he was one of the arresting officers; that he found no instruments in defendant's office nor any records of her business for the past year.

Dr. Charles Malone testified that he is a physician and that he attended Mrs. Anderson at the General Hospital beginning August 4, 1943. He stated that he found a body in the uterus, that the patient "was about to lose the pregnancy conception which was in the uterus". When asked concerning her condition he answered, "inevitable abortion". He stated that it was his "opinion that the abortion was induced". The witness further stated: "We cannot specify what has been used. The means of inducing an abortion are many and various. We can only say that there was some interference. I couldn't say whether it was an instrument or something else."

Defendant denied that she had performed an abortion or curettement on Mrs. Anderson or that she had in any manner interfered with the pregnancy of Mrs. Anderson. She stated that she did not know that Mrs. Anderson was pregnant and that she had received only the sum of \$10. She further stated that she attempted to make a bimanual examination of the vagina but was unable to complete the examination because "she was too sore and tender".

[1] The testimony of Marcella Anderson was not corroborated as required by law. A defendant cannot be convicted of the crime commonly called abortion upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence. Penal Code, § 1108. Nor can a conviction be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense and the corroboration is not sufficient if it merely shows the commission of the offense. Penal Code, § 1111. We need not consider whether the testimony of Harold Anderson would supply corroboration of the testimony of his wife, for he aided and abetted in the transaction and was an accomplice therein. There is nothing whatever in the testimony of Dr. Malone which connects defendant with Mrs. Anderson's condition. It might be inferred from his testimony that steps had been taken to bring about a miscarriage but in no way was defendant con-

nected with the transaction by Dr. Malone's testimony.

[2] It was ruled in the supplemental opinion in *People v. Josselyn*, 39 Cal. 393, 400: "An essential element in the crime is a criminal intent on the part of the defendant; and any testimony, in addition to that of the witness, Locke, tending to show such intent, would be a sufficient corroboration of her testimony to bring the case within the statute, even though she might not be corroborated in respect to the particular method employed to produce the abortion." In *People v. Wah Hing*, 15 Cal. App. 195, 209, 114 P. 416, it was held that the "modified view" in the *Josselyn* case was the "correct view". This rule is approved in *People v. Lee*, 81 Cal.App. 49, 53, 252 P. 763, and in *People v. Gilman*, 43 Cal.App. 451, 455, 185 P. 310. An application of the rule of the *Josselyn* case compels the conclusion that the record fails to disclose the requisite corroboration of the testimony of Mrs. Anderson. No inference can be drawn from the testimony of any witness except that of Mrs. Anderson, or possibly that of her husband-accomplice, that defendant was guilty of any criminal intent.

[3,4] The trial court erred to the prejudice of defendant in admitting the testimony of the witness Maynard Young concerning a conversation which he had with defendant. It appears that the prosecution considered that it would assist in establishing the guilt of defendant by proof that the officers found no instruments in her office. In *People v. Lee*, supra, it was held that surgical instruments which had been found in the defendant's possession were admissible in evidence to show guilt notwithstanding it was admitted that the miscarriage of the prosecutrix was sought to be accomplished by administering medicine. It was held that it could be fairly inferred that the instruments would have been used in the subsequent treatment of the prosecutrix if she had continued to remain under the care of the defendant. In the present case we have the opposite situation, for the prosecution attempted to show the guilt of defendant by the fact that she had no instruments in her office. If the reasoning in the *Lee* case is correct, it would appear that the absence of the instruments in the present case is an immaterial feature. But the prosecution not only introduced evidence to show the absence of surgical instruments in defend-

ant's office but in doing so it improperly brought before the jury a conversation which the officer had had with defendant in which the officer asked defendant the whereabouts of her instruments and she replied, "that those instruments had never been returned, we had taken them at the time of the previous arrest". A motion was made to strike this testimony but the motion was denied by the trial court. Testimony concerning a previous arrest of defendant was clearly inadmissible. The testimony was improperly interjected into the case in an improper attempt to prove an immaterial fact.

The judgment and the order denying the motion for a new trial are reversed and the cause is remanded for a new trial.

MOORE, P. J., and McCOMB, J., concur.



**LANE et al. v. PACIFIC GREYHOUND
LINES et al.***
No. 12487.

District Court of Appeal, First District,
Division 1, California.
July 7, 1944.

Hearing Granted Aug. 30, 1944.

1. Evidence ⇨118

Whether declarations constitute a part of the res gestae does not depend on what is said, but on the circumstances under which and when and where the declarations are made.

2. Evidence ⇨118

Some discretion must be allowed the trial court in determining whether declarations are admissible as a part of the res gestae.

3. Evidence ⇨118

Where, following collision, bus driver gave aid to two passengers who had fallen from their seats, then ascertained whether any passengers had been injured, and requested passengers to remain in the bus, left bus and inspected crushed car, then went out on highway and flagged a passing

motorist and sent him for police aid, following which bus driver secured and lighted flares and placed them on highway, exclusion of subsequent declarations by bus driver that he had not seen approaching automobile before collision, as not a part of the res gestae, was not an abuse of discretion.

4. Appeal and error ⇨970(2)

Ruling of trial court on declarations offered as a part of the res gestae should not be disturbed in absence of abuse of discretion.

5. Appeal and error ⇨1056(4)

Any error in holding that defendant bus driver's statements after collision were binding on him alone, and not on defendant bus company, was harmless in view of jury's verdict for both defendants.

6. Trial ⇨234(1)

Where jury was permitted to consider the effect of bus driver's declarations in determining driver's negligence and was required to find for or against driver and bus company, an instruction that bus driver's declarations were not binding on bus company was proper.

7. Appeal and error ⇨1064(4)

Where it was doubtful whether language used in instruction was understood by jury to mean anything more than that negligence was not presumed and that the party alleging negligence had the burden of establishing it, the instruction was not prejudicial although there was language used which implied that defendants as well as deceased were entitled to benefit of rebuttable presumption of due care. Code Civ.Proc. § 1963, subd. 4.

8. Automobiles ⇨246(43)

Where bus company and driver pleaded contributory negligence and also that at time of accident motorist was making an illegal left turn and there was evidence to support such defenses, court properly charged on appropriate signal for a left turn as defined by the Vehicle Code. Vehicle Code, §§ 544, 546, 604, St.1935, pp. 185, 186, St.1939, p. 2199.

9. Trial ⇨234(4), 240

In action for motorist's death resulting from collision with bus, court properly refused to charge that though driver was not exceeding speed limit, if he was going too fast in the 25 mile an hour zone north of intersection, such negligence would render

* Subsequent opinion 160 P.2d 21.

him liable, since if he had been going at a slower rate the decedent would have cleared the intersection before the bus struck his automobile.

PETERS, P. J., dissenting.

Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Action by Naomi Gae Lane, Harold Lane, and Marjorie Dam against the Pacific Greyhound Lines and James C. Perkins for death of John Harold Lane resulting from collision with bus owned by corporate defendant and driven by individual defendant. From a judgment for defendants, the plaintiffs appeal.

Judgment affirmed.

F. H. Dam, of Berkeley, for appellants.

Cooley, Crowley & Supple, of San Francisco, and T. H. DeLap, of Richmond, for respondents.

KNIGHT, Justice.

This is an action for damages brought by the adult heirs of John Harold Lane who met his death in a collision between an automobile he was driving and a Greyhound bus. The collision occurred about 7:30 o'clock on the night of December 22, 1940, on San Pablo Avenue at the Tehama Street intersection, in El Cerrito, Contra Costa County. The deceased was travelling in a northerly direction; the bus was southbound, and the collision occurred as the deceased was making a left turn off San Pablo Avenue into Tehama Street. Plaintiffs alleged that the collision was caused by the negligent operation of the bus by the driver, James C. Perkins, while driving the bus within the scope of his employment; therefore under the doctrine of respondeat superior Pacific Greyhound Lines, a corporation, was joined with Perkins as party defendant to the action. The joint answer filed by the defendants admitted that Perkins was driving the bus in the course of his employment; but they denied the allegations of negligence on his part, and set up two special defenses. In the first it was charged generally that at the time of the accident the deceased was operating his car in a careless and negligent manner, and that such negligence was a proximate cause of the accident and proximately contributed thereto. In the second special defense it was alleged that at the time of the accident

the deceased was making an unlawful left turn across the central dividing line of San Pablo Avenue and that such unlawful act was a proximate cause of the collision and contributed proximately thereto. This defense was based on the provisions of section 604 of the Vehicle Code of 1939, St. 1939, p. 2199, in effect at the time of the accident, which declared: "It is unlawful for any person to drive any vehicle on any State highway which has been divided except to the right of the central dividing section, curb, separation or line or to drive any vehicle over, upon or across any such dividing section, curb, separation or line, or to make any left turn or semicircular or U turn on any such divided highway except through an opening in the dividing curb, section, separation or line." A jury returned a unanimous verdict in favor of defendants; a motion for new trial was made and denied, and from the judgment entered on the verdict plaintiffs appeal.

Two main points are urged in support of the appeal. The first involves rulings and an instruction limiting the effect of certain testimony introduced by plaintiffs; and the second concerns the giving and refusing to give other instructions. No contention is made that the verdict is not supported by the evidence. However, a disposal of plaintiffs' first point requires a statement of facts.

Construing the evidence most strongly in favor of the defendants, and resolving all conflicts therein in support of the implied findings of the jury, the essential facts established thereby are as follows: San Pablo Avenue at the time and place of the accident ran in a northerly and southerly direction. It was a four lane state highway, approximately 81 feet wide between curbs, and was divided along the center by a painted double line. The north and south bound traffic lanes on each side of the double line were divided by a painted single line, those immediately east and west of the center double line being 10 feet 10 inches wide, the extreme westerly lane being 31½ feet wide, and the extreme easterly lane being 26 feet 2 inches wide. Tehama Street was a short street, which entered and ended on the west side of San Pablo Avenue. It was 25.80 feet wide between curbs, without any sidewalks. The jury was instructed in accordance with the provisions of section 604 of the Vehicle Code, that if at the time of the accident "there was a central dividing line on San Pablo Avenue without any

opening in said central dividing line or turning marker or markers at the intersection of Tehama, then under the law John Lane had no right to make or attempt to make a left hand turn into Tehama at said intersection"; and there is an abundance of evidence showing that there was a painted double central dividing line across the Tehama Street intersection, without any opening or any turning marker or markers at the intersection. The accident occurred on a Sunday night during a heavy rain storm. The vicinity of the intersection was extremely dark, the closest street light being on the northerly side of San Pablo Avenue approximately 250 feet from the Tehama Street intersection. A street traffic sign located 62 feet north of the line of Tehama Street on the west side of San Pablo Avenue marked the end of the 25 mile an hour zone, south of which it was lawful to drive up to 45 miles an hour. The El Cerrito police station was located on the east side of San Pablo Avenue about 500 feet north of Tehama Street.

The deceased lived on Tehama Street, about 116 feet from San Pablo Avenue. He was 66 years old, his eyesight was impaired, and his operator's license required him, while driving a car, to "wear adequate glasses." On the night of the accident he was driving home alone from San Francisco in an Essex sedan. The bus was travelling at a speed of 23 miles an hour in the most westerly southbound lane. The headlights were burning, and there was a large illuminated sign across the top of the front of the bus displaying the name "Oakland." When the deceased reached a point about 50 feet south of the southerly curb line of Tehama Street he turned suddenly to the left across the double dividing line in front of the oncoming bus to enter Tehama Street, and the impact occurred in the extreme west lane of San Pablo Avenue about 42 feet south of Tehama Street. The front end of the Essex was crushed and the deceased received injuries causing instant death.

Perkins had been a driver for Greyhound for two years, and had been on this particular run for six months immediately preceding the accident. On the night in question, on account of the heavy rains and the extremely wet pavement, he was travelling through the 25 mile an hour zone at 23 miles an hour and after passing into the 45 mile an hour zone he continued to travel at only 23 miles an hour. Approaching the

Tehama Street intersection he saw at a distance of about a thousand feet the lights of a car approaching in the opposite direction on the east side of the highway, and as its lights came closer he saw that it was pursuing a course next to the double dividing line. Just about as the bus was crossing the Tehama Street intersection Perkins again saw the approaching car; it was about 50 feet away, and without slackening its speed it suddenly made a left turn across the double line into the pathway of the bus. Perkins instantly applied his brakes with full force, sounded his horn, and swerved sharply to the right toward the westerly curb of San Pablo Avenue, but was unable to avoid the collision.

The sudden swerving and stopping of the bus caused two girls to be thrown from the front right seat. Perkins helped them up and after learning that none of the passengers had been hurt, he requested all of them to remain seated in the bus. He then got out of the bus and went forward to see what had happened to the occupant of the other car; and upon reaching the window he saw the deceased slumped over the broken steering wheel. Perkins then stepped out on the highway, signalled a passing automobile and asked the occupant to drive to the police station and notify the police of the accident. He then took some flares from the rear of the bus to light and place in the highway to warn approaching automobiles. On account of the heavy rain he was unable to light the first two, but succeeded in lighting the third one. Several police officers, including the chief and a lieutenant, arrived within a few minutes after the accident, and placed more warning flares on the highway. Perkins then went to a nearby house to phone to his employer of the happening of the accident, after which he returned to the scene of the accident and assisted the police in making their investigation of the accident, and in taking photographs and measurements.

There was some testimony given by the two girls who were riding on the right front seat, aged 15 and 12 years, respectively, and by the brother of the younger girl, aged 15, who was riding immediately behind the girls, to the effect that the windshield wiper on the right hand side of the bus was not operating, and that at some time prior to the collision the driver had wiped the windshield on that side with a cloth; and the older girl and the boy testified that by looking through the window at

objects they passed they estimated that the bus was travelling between 35 and 45 miles an hour immediately before the collision. In contradiction thereof, however, the driver testified that on account of the heavy rain storm he was watching the speedometer and driving "very cautiously" and kept the speed down to 23 miles an hour, even after passing the sign post into the 45 mile an hour zone. He also testified that the windshield wipers were working; and the record shows that when the police arrived they tested both windshield wipers and found that they were in good working order. Furthermore, the driver testified that he had no recollection of having wiped the windshield with a cloth; that the bus was provided with a windshield fan to prevent the windshield from "fogging."

Some of plaintiffs' witnesses testified that pieces of broken glass were seen and found within the intersection, upon which testimony plaintiffs seem to base the theory that the collision occurred within the intersection. But such theory was clearly negated, not only by the testimony of the driver, but by the testimony given by three police officers as to the physical conditions found to exist immediately after the accident and the next morning when they made further investigation. In this respect the record shows that the investigation conducted by them immediately following the accident extended over a period of an hour and a half; they took pictures with the aid of a synchronizer and flash lights, and also took various precise measurements with a steel tape; and with the aid of lighted flares and flash lights they carefully examined the surface of the highway. The police officers testified that the point of impact was 40 feet south of the south curb line of Tehama Street, in the extreme west southbound lane of San Pablo Avenue, and that no glass or debris of any kind was seen or found north of that point. The bus was about 35 feet long, and the police testified that the front end of the bus stopped 82 feet south of the south curb line of Tehama Street, the front right corner of the bus being $13\frac{1}{2}$ feet from the west curb line of San Pablo Avenue, and the left rear corner 4 feet west of the painted single line dividing the two southbound lanes. The bus was thus facing diagonally to the right or west, the direction in which it was turned by the driver when he saw the car of the deceased start to make the left turn.

On the morning following the accident, Cyrus K. Dam, son of plaintiffs' counsel and son-in-law of the deceased, visited the scene of the accident and took some pictures and measurements of the highway; and as a witness for plaintiffs he produced a map he had prepared from notes and measurements made by him that morning and during the several weeks following the accident. The map was not introduced in evidence, but it appears from the testimony given by the witness in connection therewith that it showed a painted single line across the Tehama Street intersection with small buttons thereon north and south of the intersection, which the witness claimed represented small painted circles indicating turning points between the circles. But he took no photographs showing any of the painted lines on San Pablo Avenue, nor any circles or buttons or markers of any kind at or near the Tehama Street intersection; and in contradiction of his testimony there is the testimony of three police officers, the driver, and other witnesses who testified positively that there was a double central dividing line running through the Tehama Street intersection and that there were no turning markers or circles or buttons of any kind therein at that intersection. Moreover, the photographs taken by the police on the day after the accident and those taken ten days later plainly show that there was a continuous double central dividing line running through the Tehama Street intersection with no markers or circles therein at that point.

Plaintiffs also introduced testimony to the effect that shortly after the accident the driver had stated that he did not see the other car until he struck it; but the driver positively denied ever having made any such statement, and his testimony that he did see the approaching car before the collision is strongly corroborated not only by the physical conditions found to exist immediately following the accident, but by the testimony of bus passengers to the effect that just before the impact occurred they realized something unusual was about to happen because the driver diverted the course of the bus suddenly to the right and applied the brakes with such force as to throw some of them forward in their seats.

From the foregoing narration it will be seen that the evidence, although conflicting on some points, is amply sufficient to support the verdict in favor of the defendants

on any one or all of three grounds: First, that Perkins was not negligent in the operation of the bus; secondly, that the deceased was negligent in making a left turn over the central dividing line on San Pablo Avenue in violation of a state traffic law; and third, that aside from the question of the violation of the state traffic law he was negligent in attempting, under all the existing conditions and circumstances shown by the evidence, to make a left turn across San Pablo Avenue into Tehama Street.

At the time the testimony relating to Perkins' post-accident declarations was received the trial court ruled that they were binding on Perkins for all purposes but were not binding on the Greyhound; and Attorney Hoey, who conducted the trial on behalf of plaintiff (Attorney Dam being associated with him), signified his concurrence in the trial court's ruling and the jury was admonished and afterwards instructed in accordance with such ruling. On motion for new trial, however (Attorney Hoey having soon thereafter withdrawn as plaintiffs' attorney, *Lane v. Pacific Greyhound Lines*, 51 Cal.App.2d 705, 125 P.2d 510), Attorney Dam contended that Perkins' post-accident declarations were admissible as part of the *res gestae* and therefore binding also on the Greyhound; and on this appeal the same contention is urged as ground for reversal. There is no merit in the contention.

The particular facts relating thereto are as follows: As their first witness plaintiffs called the driver under the provisions of section 2055 of the Code of Civil Procedure, and he was interrogated by both sides as to the circumstances of the accident. In describing it he testified, as above stated, that prior to the collision he had seen the approach of the other car, first at a distance of about a thousand feet, and again when it was only 50 feet away from him. Thereafter plaintiffs called four witnesses, none of whom were bus passengers, and one being a child ten years old, who testified in substance that shortly after the accident Perkins had said that he did not see the other car until he struck it. The first of these witnesses, Floyd Olsen, lived with his wife and ten year old daughter on Tehama Street a short distance from San Pablo Avenue. He testified that upon hearing a crash he looked through the window and saw the light of a bus on San Pablo Avenue; that he then went outside, got in his car which was parked in front

of his house, and drove to the scene of the accident; that upon his arrival Perkins was standing on the highway at the bus doorway. The examination of the witness then continued as follows: "Q. And what else did you observe there at that time and place? What did he do, if anything? A. Well, he was standing there, possibly— he gave me the impression at least of being stunned or from shock and he was merely standing there and I looked at the other car or looked at the car ahead of the bus and then I looked at him— to the driver of the bus and said— Mr. Crowley [attorney for defendants]: (interrupting) Now just a minute. What was said there is hearsay as far as the Greyhound is concerned. Mr. Hoey: Well, as far as the defendant Perkins was concerned he was there." The court then said: "It would be binding on Mr. Perkins. It wouldn't be binding on the Greyhound." And Attorney Hoey replied "No." The witness then went on to say: "Well, I turned to the driver and said, 'Where did the other car come from,' and the driver stood there and said 'I don't know where it came from. I didn't see him at all.'" Continuing, Olsen testified that at the driver's request he went back to his home, phoned for the police ambulance, and then returned to the scene of the accident; that after the police arrived he accompanied the driver up to his (Olsen's) home, so the driver could phone to his company; that after Perkins had phoned Mrs. Olsen asked him "where the other car was and he repeated again, 'I didn't see the old man until I hit him,' and this was about, oh, fifteen or twenty minutes, I should judge, after he had made the statement to me first." Attorney Crowley objected to the question in response to which the last answer was given upon the ground that it called for "hearsay insofar as the Greyhound is concerned"; thereupon the court admonished the jury "that this conversation is not binding in any way upon the defendant Pacific Greyhound Lines and is only to be considered by you in connection with establishing any responsibility on the part of the defendant Perkins, any liability on the part of the defendant Perkins." Afterwards Olsen's wife and his ten year old daughter testified to the same statement having been made by Perkins in their home. When Mrs. Olsen was asked the question "And what did he say at that time?" the following proceedings took place: "Mr. Crowley: (interrupting) That is objected to on behalf of the de-

fendant Greyhound Lines, Your Honor, as hearsay, incompetent, irrelevant and immaterial, not binding on the defendant Greyhound. Mr. Dam: If Your Honor please, I have been thinking of that same objection over night and there are two propositions that I would like to state to Your Honor very briefly. Now whether or not a statement by the driver of the bus would be what is technically called in the law an admission against interest is one thing and whether or not any statement made by the driver of the bus would be evidence upon the question of whether or not he was guilty of negligence or as tending to show negligence on his part is another thing." Mr. Crowley thereupon stated that it would save time if Mr. Dam would submit authorities on the point, and in response the court said: "Yes. I was going to suggest if you have any authorities you want to present to me get it to me during the noon hour and the other side will do the same and in the meantime I will make the same ruling I did yesterday and instruct the jury that any admissions made, or statements made by the driver of the automobile—of the bus, to Mrs. Olsen is not binding on the Pacific Greyhound Lines but is binding upon himself. Mr. Dam: That's merely as an admission against interests. The Court: Well, it is binding on him for all purposes and it is not binding on the Pacific Greyhound Lines. Now if you can show me any authority to the contrary, then I can instruct the jury to the contrary. Proceed." Plaintiffs' fourth witness on this point, named Gilbert, heard the crash while visiting at a home on San Pablo Avenue about four blocks from the Tehama Street intersection; and he walked up to the scene of the accident. There were several people gathered around when he arrived; and he testified, subject to the same objection and ruling, that he heard the driver make a statement to the effect that he did not know where the other car came from.

At no time after the trial court invited Attorney Dam to submit authorities on the question as to whether the Perkins declarations were binding on the Greyhound, did counsel make any attempt to do so, nor did he thereafter intimate by way of any argument that the trial court's ruling was erroneous; therefore, in conformity with its ruling, and the concurrence therein by Attorney Hoey, the trial court, as part of its charge to the jury, stated: "Any evidence

here about any statements, if any, made by the driver, Mr. Perkins, to anyone after the accident, was not admitted against, and is in no way related to or binding on the Pacific Greyhound Lines."

On motion for new trial, however, Mr. Dam argued that Perkins' post-accident declarations were admissible as part of the *res gestae*, citing the case of *Showalter v. Western Pacific R. Co.*, 16 Cal.2d 460, 106 P.2d 895, 897, decided in November, 1940, about nine months prior to the trial herein; and he now relies on that case as the principal authority in support of his contention that the trial court's ruling herein and the instruction given in conformity therewith were erroneous. In that case, under the facts, it was held in accordance with the trial court's ruling that the declarations were admissible as part of the *res gestae*. There is no similarity whatever between the facts of that case and those here presented; but applying the law as laid down in that case to the factual situation here presented definitely demonstrates that the trial court's ruling herein and the instruction given in conformity therewith should be sustained.

[1] In the *Showalter* case the facts were these: About 9 o'clock at night, a railroad brakeman named Showalter was riding on top of a freight car in carrying out a switching movement, and a fellow brakeman named Parrott, who was a member of the same crew, heard Showalter "holler." Parrott ran over to ascertain the trouble, and found Showalter lying across the tracks, between the trucks of the freight car, which had run over him, cutting off his legs, and soon afterwards he died from the effects of his injuries. In the action for damages brought by his widow, Parrott was asked if he had any conversation with the deceased, and he answered, "I did—as I remember, I asked him, 'How in the world did it happen, Joe?'"—"He said, 'I got knocked off.'" Being asked if that were all the conversation, Parrott replied, "Well, he said, 'I am all done, both legs cut off.'" There was no other evidence in the case tending to show the cause of the accident, and it was held that the declarations were properly admitted by the trial court as part of the *res gestae*. In so holding the court went on to point out that there had been considerable confusion in this and other jurisdictions as to the rule of *res gestae* and that the rule which it deemed "to be cor-

rect was enunciated in the early case of *People v. Vernon*, 35 Cal. 49, 95 Am.Dec. 49—namely, that declarations which are voluntary and spontaneous and made so near the time of the principal act as to preclude the idea of deliberate design, though not precisely concurrent in point of time therewith, are regarded as contemporaneous and admissible." Later on the court said: "* * * in our opinion the rule to be followed is that where a declaration is made under the immediate influence of the occurrence to which it relates and so near the time of that occurrence as to negative any probability of fabrication, said declaration is admissible." And so in the present case, if immediately following the impact the driver had voluntarily and spontaneously made the declarations attributed to him, there would have been some legal ground upon which it could have been held that under the rule of the Showalter case the declarations were admissible as part of the *res gestae*. But those are not the facts. As already pointed out, following the impact the driver first gave aid to the two girls who had fallen from their seats; he then took the precaution to ascertain whether any of his passengers had been injured, and requested them to remain seated in the bus; thereupon he got out of the bus, went forward and inspected the crushed car, then went out on the highway and flagged a passing motorist and sent him for police aid, following which he secured and lighted the flares and placed them on the highway. It was after all these things had been done that Olsen claims to have had the conversation with the driver; and the second and third declarations which it is claimed were made to the other parties were made at least 20 minutes after the first one was made to Olsen—after the driver had walked up to Olsen's house and telephoned to his employer, and returned to the scene of the collision. Admittedly the determination of the question of whether the declarations constitute part of the *res gestae* does not depend on what was said, but on the circumstances under which and when and where the declarations are made. If admissible it makes no difference whether they are in favor of or against the party making them; and it is quite certain that if here, under identical circumstances, the driver had made declarations in his favor, and sought to prove them by the parties to whom they were made, in support of his case, they

would have been excluded as self-serving and not part of the *res gestae*.

[2-4] Furthermore, the Showalter case holds that while heretofore the practice in this state has been to deny any discretion in the trial court in determining the admissibility of alleged *res gestae* statements, some discretion must necessarily be allowed the court under the doctrine there laid down. And in the present case, on account of the many things that happened between the time of the impact and the conversation Olsen claims to have had with the driver, it clearly would be unreasonable to hold as a matter of law that the trial court's ruling limiting the effect of the declarations constituted an abuse of the exercise of its discretionary power. As said in the Showalter case, in quoting approvingly from *Lloyd v. Boulevard Express*, 79 Cal. App. 406, 249 P. 837, the trial court before whom the witness appears is better prepared to pass upon the evidence upon which the admissibility of such statements depends than is an appellate court, and its ruling should not be disturbed unless it has abused its discretion. This court adhered to the same doctrine in *Siebel v. Shapiro*, 58 Cal.App.2d 509, 137 P.2d 56.

In two of the cases cited with approval in the Showalter case it is said that questions as to the admissibility of statements as part of the *res gestae* depend upon whether such statements are the emanations of acts done, before the excitement usual to the accident has subsided, or are statements made after the excitement has subsided and the witness has time to calculate a policy to be pursued; and in an effort to bring the present case within the forepart of the above rule, plaintiffs call attention to the testimony given by Olsen to the effect that when he first saw the driver on the night of the accident he was given "the impression" that the driver was "stunned." But the trial court, in the exercise of its discretionary power, was fully justified in concluding that all of the driver's activities following the happening of the accident and before Olsen arrived upon the scene, completely refuted any "impression" Olsen may have gained from looking at the driver while he stood on the highway in the dark and in a driving rain storm. Another factual difference between the present case and the Showalter case was this: There the declarant was dead, and his declaration furnished the only

means of explaining the cause of the accident; whereas here there was ample evidence showing the circumstances of the accident, including the testimony of the declarant himself, who was fully cross-examined in behalf of the plaintiff. This factor also was one the trial court was entitled to consider in the exercise of its discretionary power in passing upon the question of whether the declarations should be admitted as part of the *res gestae*.

Two cases which are strikingly similar in their facts to the present case, and which support the trial court's ruling herein, are *Bodholdt v. Garrett*, 122 Cal.App. 566, 10 P.2d 533, and *Shaver v. United Parcel Service*, 90 Cal.App. 764, 266 P. 606. In the former case the plaintiffs were injured when struck by a truck belonging to the City of Oakland and driven by an employee named Garrett. Immediately after the accident happened one of plaintiffs' witnesses walked across the street to interview Garrett, and Garrett stated that the collision was due to a broken spring in the front portion of the truck. Plaintiffs claimed that the trial court erred in instructing the jury that this statement or admission of the driver was in no way binding on the City of Oakland. On appeal it was held otherwise, the court saying: "Statements of an employee not part of the *res gestae* and not made spontaneously or as the result of excitement of the accident are not binding upon the employer. *Shaver v. United Parcel Service*, 90 Cal.App. 764, 770, 266 P. 606. While it is true that time is not the controlling element in the matter of *res gestae*, still the statements must be, not only contemporaneous, but voluntary and the result of excitement, and made before a person has time to calculate and consider the form and substance of the explanation."

[5] In any event, plaintiffs have not shown that the trial court's ruling limiting the effect of the declarations operated to their prejudice. As above stated, liability was claimed against the Greyhound only under the doctrine of respondeat superior, and such liability depended entirely upon the issue of the negligence of the driver. Neither under the pleadings, the theory on which the case was tried, nor the evidence, could a verdict have been rendered for or against one of the defendants. If the driver was negligent and his negligence was the proximate cause of the accident, plaintiffs were entitled to a verdict against both

defendants, but if the driver was not negligent plaintiffs were not entitled to a verdict against either. The jury was fully instructed accordingly, and it rendered a verdict in favor of the defendants, which necessarily was based on the finding that the driver was not negligent. Even assuming, therefore, that the driver's declarations should have been received in evidence as against both defendants, under the theory that they were part of the *res gestae*, the only evidentiary effect thereof would have been to raise a conflict on the issue of the driver's negligence; that is, as to whether he did or did not see the approaching car before he struck it; and such a conflict was created and already existed by reason of the admission of the declarations against the driver; and such conflict was resolved by the jury in favor of the driver by the rendition of a verdict in favor of the defendants.

[6] Plaintiffs argue that because of the wording of the instructions hereinabove quoted, the jury was precluded from considering the effects of the declarations as against the Greyhound; but that is not true, because in any event the Greyhound would have been liable if its driver was found to be negligent, and the jury was afforded a full and unlimited right, under the instructions, to consider the effect of the declarations in determining the issue of the driver's negligence. The trial court therefore very properly submitted to the jury but two forms of verdict, one whereby it could find against both defendants, and the other whereby it could find in favor of both defendants.

Moreover, the questions as to the correctness of the trial court's ruling and the propriety of the instruction were restricted to the issue of the driver's negligence. They were in no way related to nor did they involve the determination of the two defenses of the contributory negligence of the deceased, which were raised by the answer and upon which, if all the essential elements thereof were established, defendants were entitled to a verdict even though the driver was found to be negligent; and as we have shown, the evidence is amply sufficient to sustain the verdict on either of these defenses.

On page 64 of appellants' opening brief is set out a quotation purporting to embody the remarks made by the trial court in ruling upon the motion for new trial. That quotation was not taken from the record

and forms no part thereof. Attorney Dam sought to have the quotation inserted in the reporter's transcript at the time it was settled, but failed to accomplish that purpose. Thereafter he petitioned Division Two of this court, wherein the appeal was then pending, for an order to compel the trial court to insert those remarks in the transcript. In answer to that petition the trial judge filed an affidavit denying having made the remarks; and the petition was denied. Later a hearing before the Supreme Court was denied. *Lane v. Pacific Greyhound Lines*, 55 Cal.App.2d 525, 131 P.2d 53.

[7] The objections made by plaintiffs to the other instructions are not sustainable. One of the objections is directed against an excerpt taken from a general instruction relating to presumptions and burden of proof. The entire instruction contains several paragraphs and covers two full pages of the reporter's transcript. The major portion of the general instruction embodies the substance of several separate instructions proposed by plaintiffs based on the rebuttable presumption declared by subdivision 4 of section 1963 of the Code of Civil Procedure "That a person takes ordinary care of his own concerns." In one paragraph of the general instruction as given, language was used implying that the defendants as well as the deceased were entitled to the benefit of that rebuttable presumption, and in the following cases it is held that where a party in whose behalf the benefit of the presumption is claimed is alive and testifies fully in the case, the question of his negligence is to be determined on the evidence without regard to the presumption, and that in such cases an instruction based on said code section should not be given. *Speck v. Sarver*, 20 Cal.2d 585, 128 P.2d 16; *Paulsen v. McDuffie*, 4 Cal.2d 111, 47 P.2d 709. Reading the general instruction here as a whole, it would seem doubtful whether the language used could have been understood by the jury to mean anything more than that negligence is not presumed and that the party alleging it has the burden of establishing it. In any event, in the cases above cited, it is held that where the party claiming the benefit of the presumption has testified fully in the case, the giving of the instruction embodying said code section is not prejudicial.

[8] Among the other instructions given embodying the law relating to the duty of a

driver in making a left turn, the court properly gave an instruction based on sections 544 and 546 of the 1939 Vehicle Code, St.1935, pp. 185, 186, which instruction reads: "The appropriate signal for a left hand turn is that the hand and arm be extended horizontally beyond the side of the automobile continuously during the last fifty feet travelled by the automobile before turning." Plaintiffs' objection thereto is that there was no evidence that the deceased did not comply with the foregoing provisions. The theory on which the defendants based their defenses of contributory negligence, and the testimony given by the driver in support of those defenses, justified the giving of the instruction.

[9] The court refused to give an instruction proposed by plaintiffs to the effect that notwithstanding the driver was not exceeding the speed limit when the collision occurred, nevertheless if he was going too fast in the 25 mile an hour zone north of the intersection, such negligence would render him liable, since if he had been going at a slower rate in the 25 mile an hour zone the decedent would have cleared San Pablo Avenue before the bus struck him. The court was justified in refusing the instruction for two reasons: First, it was a formula instruction, and entirely omitted the proposition that the deceased himself must have been free from contributory negligence; secondly, it was clearly an argumentative instruction. The two remaining instructions proposed by plaintiffs, the refusal to give which is assigned as error, were fully covered by other instructions embodied in the court's charge.

After a complete review of the entire record, we are convinced that the action was fairly and carefully tried by the trial court, that its charge to the jury was fair, full and complete, that the evidence sustains the implied findings of the jury, and that no reasons have been shown which would justify the setting aside of the verdict.

The judgment is therefore affirmed.

WARD, J., concurs.

PETERS, Presiding Justice (dissenting).
I dissent.

The majority opinion holds that the trial court correctly ruled that the admissions of Perkins were not admissible against his employer, and, further, that even if they

were admissible against the employer, the error in excluding them was not prejudicial. Both holdings, in my opinion, are clearly erroneous.

The majority opinion sets forth in detail the facts most favorable to defendants. There is no doubt that such evidence supports the verdict. The important point is that the evidence was conflicting and would support a verdict for either plaintiffs or defendants. It was plaintiffs' main theory at the trial that Perkins failed to observe decedent's car which admittedly had both headlights lit; that in the exercise of ordinary care he should have observed the oncoming car; that the driver was late on his schedule and was speeding to make up time; that the windshield wiper on the right of the windshield was not working; that just prior to the accident Perkins was engaged in wiping the windshield; that Perkins' negligence in failing to observe the Lane car was the sole proximate cause of the accident. Plaintiffs introduced ample evidence to support each step of this theory of the cause of the accident.

Much is said in the majority opinion about the exact point of impact, and about whether or not a left turn could lawfully be made into Tehama Street. Plaintiffs' witnesses definitely fixed the point of impact within the intersection. The evidence is most unsatisfactory as to whether at this intersection the highway was marked so as to permit a left turn. There is ample evidence to support an implied finding that it was so marked.

Under these circumstances it is obvious that any fair consideration of the question as to whether prejudice occurred as the result of any error must start with the admission that the evidence was of such a nature that it would support a verdict for either plaintiffs or defendants.

The main error complained of is that the trial court erroneously ruled that certain admissions of Perkins were not admissible against the Greyhound company. These admissions were vital to plaintiffs' case. They were introduced for the purpose of showing that Perkins was negligent in failing to keep a proper lookout immediately before the accident. To this end plaintiffs produced four witnesses—Richard Olsen, his wife, his ten-year-old daughter, and a high school teacher. They all testified that within a period varying from two to twenty minutes after the collision Perkins stated that he did not see the Lane car

at all prior to the accident. This evidence not only impeached Perkins but was admissible on the basic question as to whether Perkins was negligent. If believed by the jury it necessarily would prove that Perkins was negligent.

These four witnesses were all disinterested. The Olsens lived on Tehama Street, and the high school teacher was visiting near the scene of the collision on the night in question. Mr. Olsen testified that he had never met or spoken with decedent; that he heard the crash and immediately left his home and proceeded to the scene of the accident; that when he arrived Perkins was standing beside the bus and "he gave me the impression at least of being stunned or from shock and he was merely standing there." As Olsen started to testify as to what the driver then said, the following occurred:

"Mr. Crowley [counsel for defendants] (interrupting): Now just a minute. What was said there is hearsay as far as the Greyhound is concerned.

"Mr. Hoey: Well, as far as the defendant Perkins was concerned he was there.

"The Court: It would be binding on Mr. Perkins. It wouldn't be binding on the Greyhound.

"Mr. Hoey: No.

"A. [the witness]: Well, I turned to the driver and said, 'Where did the other car come from,' and the driver stood there and said, 'I don't know where it came from. I didn't see him at all.'"

Olsen then asked the driver if he should call an ambulance. The driver said to get the police ambulance. Olsen then ran home. He estimated that he had been with the driver a minute to two minutes when he started to go back to his home. He called to his wife to telephone for the ambulance, got his flashlight and returned to the scene, using the flashlight to ward off traffic until the police arrived. The police arrived two or three minutes after he returned from telling Mrs. Olsen to telephone. When he had been there "probably ten or fifteen minutes" he returned to his home a second time, taking the driver with him upon his suggestion to the driver that he might want to telephone his employer. The driver telephoned in the kitchen with the door closed. The witness was asked if he heard the driver make any statement when he came out of the kitchen. At this point counsel for defendants objected: "Now we object

to that as hearsay insofar as the Greyhound is concerned, your Honor." The court then admonished the jurors as follows: "The jurors are instructed that this conversation is not binding in any way upon the defendant Pacific Greyhound Lines and is only to be considered by you in connection with establishing any responsibility on the part of the defendant Perkins, any liability on the part of the defendant Perkins."

The testimony being thus limited, Olsen was then permitted to testify: "Mrs. Olsen asked him where the other car was and he repeated again, 'I didn't see the old man until I hit him,' and this was about, oh, fifteen or twenty minutes, I should judge, after he had made the statement to me first."

On the following day of the trial, when Mrs. Olsen was on the stand and was asked if she had any conversation with Mr. Perkins, Crowley again stated his objection that anything Perkins said would not be binding on defendant Greyhound. At this point Mr. Dam, who was co-counsel for plaintiffs with Mr. Hoey, expressed his disagreement with the court's ruling that what Perkins said would not bind his employer. Without permitting Dam to pursue his arguments the court suggested that the attorneys present any authorities they had to him during the noon hour, and that in the meantime his ruling would stand. Mrs. Olsen then testified that after using the telephone Perkins said: "I do not know where the old man came from. I didn't see him until I struck him." She estimated that his remarks were made about five or ten minutes after the accident.

Joyce Olsen went on the stand immediately after her mother, and testified that the bus driver said after telephoning, "I don't know where the old man came from."

Francis Gilbert, Richmond High School teacher, testified that he was visiting near the intersection and that he went out after hearing the crash and heard the driver say to one of the men present, in substance, "I don't know where the car came from." He estimated the time as within two or three minutes after he heard the crash. The police officers had not yet arrived. The witness was not acquainted with anyone connected with the accident. Twice during the brief examination of this witness the court reiterated the admonition that testimony as to statements of Perkins after the accident were not binding on Pacific Greyhound.

Perkins denied unequivocally that he had made statements such as those attributed to him by the Olsens and Gilbert. He testified that he stopped a southbound car and requested the driver to turn back and notify the police at the station between two and three blocks north on San Pablo. After the police arrived he asked of those then present if anyone had a telephone. Olsen offered his telephone. Perkins denied that the suggestion to use his telephone had come from Olsen. He said that he had no conversation with Mrs. Olsen but to apologize for tracking water into her house.

The defendants urge, and the majority opinion holds, that the court's rulings, excluding this testimony as against Greyhound, were correct, and that, even if erroneous, the error was not prejudicial because the jury returned a verdict in favor of Perkins against whom the evidence was admitted. This presents the two crucial points on this appeal: (1) was this evidence admissible against the Greyhound, and (2) if it was, were the rulings of the trial court to the contrary prejudicial? I am of the opinion that, under the most recent cases in this state, and according to the weight of authority elsewhere, these declarations of Perkins were clearly admissible against Greyhound, that the rulings of the trial court to the contrary were erroneous, and that such error was prejudicial to the plaintiffs.

The declarations of Perkins being in the nature of admissions were, of course, admittedly admissible as against him. Admissions of a party to an action are not within the hearsay rule and may be offered against such party. *Lampton v. Davis Standard Bread Co.*, 48 Cal.App. 116, 191 P. 710; *Shaver v. United Parcel Service*, 90 Cal.App. 764, 266 P. 606; *IV Wigmore on Evidence* (3d ed.) p. 3, § 1048; 10 Cal. Jur. § 307, p. 1057. It is also the law that the admission of an agent of a party acting within the scope of his authority is in legal effect the admission of the principal and may be introduced against such principal. *IV Wigmore*, supra, p. 119, § 1078; 10 Cal. Jur. p. 1083, § 322. But where the admission is outside the scope of the agent's authority—and admissions of an agent made after an accident are generally held to be outside the employment—evidence thereof may not be introduced against the principal. *Froeming v. Stockton Electric R. Co.*, 171 Cal. 401, 407, 153 P. 712, Ann. Cas.1918B, 408; *Willard v. Valley Gas &*

Fuel Co., 171 Cal. 9, 16, 151 P. 286; Luman v. Golden Ancient Channel M. Co., 140 Cal. 700, 709, 74 P. 307. However, there are situations where the statements of the agent, although they may not be introduced as admissions of the principal made through his agent, are nevertheless admissible on a different theory. Where the remarks of the agent constitute part of what has probably been erroneously referred to as the *res gestae*, they may be introduced either for or against the principal. The basis of admissibility is not that the statements were made by an agent. Remarks of a bystander are equally admissible under proper circumstances.

Until recently most decisions in this state, including the two relied upon so heavily in the majority opinion, adhered to a very strict rule in determining what statements constituted part of the *res gestae*. It was necessary that the remarks be "contemporaneous" with the event. If made thereafter in the form of narrative explanation they were held not to be part of the *res gestae* and not admissible. But in *Showalter v. Western Pacific R. Co.*, 16 Cal.2d 460, 106 P.2d 895, the Supreme Court brought this state into line with the great weight of American authority, and expressly overruled those cases which hold that admissibility is dependent on proximity in time of the declaration to the principal event or on continuation of the occurrence to which it relates. 16 Cal.2d at page 467, 106 P.2d at page 899. It was there held that if a statement is made under such circumstances of physical shock or nervous excitement as to preclude the likelihood of reflection and fabrication, it is admissible. The test is whether the declarant is still under the influence of the happening and his statement a spontaneous expression growing out of it and not the result of reason and reflection. 16 Cal.2d at page 470, 106 P.2d at page 901; see, also, VI Wigmore, *supra*, pp. 133-155, §§ 1746-1750; Am.Law Inst., Model Code of Evidence, Rule 512b. Wigmore finds that "there is in the judicial opinion of today something of an approach to uniformity" in the acceptance of this test. VI Wigmore, *supra*, p. 135, § 1747.

In the *Showalter* case the administratrix of a deceased brakeman brought an action for his wrongful death against his employer, Western Pacific R. R. Co., under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. The decedent's legs were

severed when a car ran over him. A fellow brakeman was permitted to testify for plaintiff that he heard decedent "holler," that he ran to him and asked, "How in the world did it happen, Joe?" [16 Cal.2d 460, 106 P.2d 897] The dying man replied, "I got knocked off. * * * I am all done, both legs cut off." The court refused to hold that there was error in admitting the declarations.

It will be noted that in the *Showalter* case the trial court admitted into evidence under the spontaneous declaration exception what otherwise would have been inadmissible as a self-serving declaration. This holding was affirmed by the Supreme Court. That court held that the trial court has some discretion in determining whether the evidence falls within or without the spontaneous declaration exception, and that such discretion had not there been abused. That some such discretion exists seems to be the general rule. See VI Wigmore, *supra*, at p. 154 in § 1750. In the instant case the trial court ruled the evidence inadmissible against the employer. The majority opinion holds that such ruling was within the discretion of the trial court, and that even if the trial court could have admitted the evidence against the employer it was not an abuse of discretion to have refused to do so.

It is obvious that such discretion exists only where reasonable minds can reasonably differ as to whether the challenged remarks were evoked by the event or were the result of premeditation. There are situations where the remarks in question are so close to the event and so patently evoked by it without premeditation that it must be said, as a matter of law, that they are admissible. On the other hand, there are situations where the remarks are so far removed from the event and so obviously the result of premeditation that, as a matter of law, the evidence is not admissible. In between these extremes is the field in which the trial court has some discretion. In determining into which class the proffered evidence falls, the nature of the event, the nature of the declaration, the time elapsing between the event and the declaration, and perhaps other factors must be considered.

In the present case it seems too clear to require extended comment that the declarations were spontaneous declarations and, as a matter of law, should have been admitted against the employer. The accident was a

severe one. After the accident Perkins appeared stunned and shocked. The time interval was from two to twenty minutes. Moreover, and of great if not of conclusive importance, the remarks to which the witnesses testified were against the interest of the declarant, rather than self-serving, as in the Showalter case. The usual controversy concerning this type of evidence involves remarks favorable to the interests of the declarant. Where a remark is offered that is obviously self-serving, a trial court must scrutinize it with care to be sure that the remark was in fact spontaneous and not the result of premeditation. But when the remark offered is against the interests of the declarant the possibility or probability of fabrication is virtually eliminated. The very fact that the remark is against the interest of the declarant demonstrates the probability that it was spontaneous. That circumstance alone gives it verity. Here the circumstances testified to by the witnesses were such as to exclude any other reasonable hypothesis than that the remarks were spontaneous and not premeditated. Premeditation would obviously have sealed the lips of Perkins.

The majority opinion suggests that the rule of the Showalter case is distinguishable in that there the testimony of the declarant was unavailable, since he was dead. Here the declarant testified at the trial. It is suggested that the exception to the hearsay rule here involved is applicable only where the witness is unavailable. It is quite clear that it is not a qualification of the spontaneous declaration exception that the death, absence or other unavailability of the witness must be shown. VI Wigmore, supra, p. 138, § 1748. The spontaneity of the utterance attaches to it a guarantee of trustworthiness. "The extrajudicial assertion being better than is likely to be obtained from the same person upon the stand, a necessity or expediency arises for resorting to it." VI Wigmore, supra, p. 138, § 1748.

Consistent with its rulings made during the trial, the court instructed the jury that: "Any evidence here about any statements, if any, made by the driver, Mr. Perkins, to anyone after the accident was not admitted against, and is in no way related to or binding on the Pacific Greyhound Lines."

Defendants vigorously urge, and the majority opinion seems to agree, that even if the trial court committed error in ruling that the declarations were admissible only

as against Perkins and were not admissible against the employer, and in so instructing the jury, such errors were not and could not be prejudicial for the reason that such declarations were admitted against Perkins and the jury found in his favor. Had the jury been properly instructed, this argument would be unanswerable. Obviously, if the jury did find that even with this evidence admitted against him Perkins was not guilty of negligence, any error in excluding such evidence against the employer would be non-prejudicial. However, after reading the instructions, there is no way of knowing whether the verdict for Perkins was based upon the theory that Perkins was free from negligence or Lane was guilty of contributory negligence, or whether such verdict was based on the theory that Perkins could only be held if the Pacific Greyhound Lines was held. This anomalous situation is caused by the fact that several of the instructions are obviously conflicting. Because of the admissions made by Greyhound in its answer, the only issue involved was the liability of Perkins. From beginning to end the case was tried on the theory that Greyhound's liability turned on the liability of Perkins—if he was liable his employer was liable; if he was not liable his employer was not liable. Pursuant to this theory, early in its charge, the court instructed the jury that "any negligence on the part of defendant, Perkins, in the operation of a Greyhound stage, or bus, belonging to said corporation, * * * is also the negligence of said corporation, Pacific Greyhound Lines." Then, just before concluding its charge, and in line with its reiterated rulings at the trial, the court gave the instruction quoted above that: "Any evidence here about any statements, if any, made by the driver, Mr. Perkins, to anyone after the accident, was not admitted against, and is in no way related to or binding on the Pacific Greyhound Lines."

There cannot be any doubt as to the meaning of this last instruction. Its plain purport was to tell the jury that they could in no way consider these statements in determining the liability of Pacific Greyhound Lines; that if they deemed such statements necessary to find the driver negligent, and but for them would not find him negligent, they must exonerate the Pacific Greyhound Lines. As already pointed out, this instruction was erroneous. Then almost immediately following this instruction the court concluded its charge as follows:

"There have been prepared for your convenience and use, two forms of verdict which under the law it is possible for you to return in the case now on trial. These forms will be handed to you by the clerk when you retire. They have no significance in and of themselves and are not to be considered by you for any purpose other than as a convenience for your use, having been prepared only for the purpose of saving you labor when you have finally reached a verdict. When you have reached your verdict, your foreman will sign the verdict that you have found and it will then be your duty to return the same to the Court.

"If under the facts of the case and the instructions given you you desire to render a verdict for the plaintiffs you will use the form of verdict the body of which reads, 'We, the jury in this case, find for the plaintiffs, and assess their damages against the defendants in the sum of blank dollars.' You will fill in that blank the amount of damages that you award, have that verdict signed by your foreman and disregard the other form of verdict.

"On the other hand if under the facts and the instructions you desire to render a verdict for the defendants you will use the form of verdict the body of which reads, 'We, the jury in this case, find for the defendants'; disregard the other form of verdict; have this form signed by your foreman and come into Court."

There is no ambiguity about this last instruction. The jury was told in plain and unmistakable language that there were but two possible forms of verdict, one, a verdict in favor of plaintiffs and against both defendants, and the second, a verdict exonerating both defendants. The jury was told that it must bring in a verdict holding both defendants or exonerating both. But it had previously been instructed, erroneously, that evidence as to any statement made by Perkins was "not admitted against and is in no way related to or binding" on the Greyhound company. Thus, under this last mentioned instruction, the jury was told that if in order to hold Perkins the statements made by him had to be considered, the employer was not liable. Then, in the next breath, the jury was told, in effect, that either both defendants were liable or neither was liable. There is no way this court can know what went on in the jury room. The jury may have believed that Perkins was not negligent or that Lane

was guilty of contributory negligence. If the jury so believed, the error in the instructions relating to the admissions was not prejudicial. But the jury may have believed that Perkins was negligent, basing this conclusion upon his admissions. Having been instructed that both defendants or neither must be held they would then have been faced with the situation where they believed Perkins was negligent, but they had been told that the evidence upon which that determination was based could not be considered and was in no way related to the liability of the Greyhound. Thus, under such a hypothesis, which is equally reasonable with the first suggested hypothesis, the jury's verdict might reasonably be based on the theory that the jury found that since, under the erroneous instruction, the employer could not be held, and since they had been told that both or neither must be held, that both must be exonerated. Thus, the jury's verdict for Perkins is not necessarily a determination that he was free from negligence or that decedent was guilty of contributory negligence. Equally reasonably it can be inferred that the verdict reflects the understanding of the jury, induced by the court's instructions, that it must hold both defendants or neither, and that although based on his admissions the jury thought Perkins was negligent, they must exonerate him because they could not hold the employer. Under such circumstances the erroneous rulings and instruction were obviously prejudicial. The legal problem presented is substantially identical to that presented in *Bradley v. Rosenthal*, 154 Cal. 420, 97 P. 875, 129 Am.St.Rep. 171, where the court, in a case where it was impossible to tell whether a verdict for the agent represented the jury's view that he was free from negligence, or that he should be exonerated by reason of an erroneous instruction, held the error prejudicial.

Defendants also urge that the error, if any, was not prejudicial by reason of the decision in *Gorzeman v. Artz*, 13 Cal.App. 2d 660, 57 P.2d 550. That case held that even where declarations are made by an agent under such circumstances that they are not admissible as to the principal, nevertheless, where both principal and agent are sued in the same action, and no issue as to scope of employment is presented, the principal is liable if the agent is held on any evidence competent as to him. Why defendants cite this case is not apparent. If it correctly states the law it

demonstrates to a certainty the error in the instruction relating to the admissions of Perkins, heretofore quoted. Moreover, the jury was told, preliminarily, that any negligence of the employee was negligence of his employer, but subsequently were told that the admission evidence was in no way related to Pacific Greyhound Lines. Thus, it was told, in effect, that if it deemed such evidence essential to establish negligence of the driver, it should not hold Greyhound Lines, and, further, that it should hold both defendants, or neither. It has already been pointed out that the statements of Perkins, if made, were admissible against his employer as spontaneous declarations, and that the court's rulings during the trial and instruction to the contrary were erroneous. Whether such rulings and instruction were prejudicial depends on whether the verdict in favor of the driver necessarily exonerates him of negligence. For reasons already stated, it is apparent that it does not, that it may represent the jury's view that it should hold both defendants, or neither, and since it could not hold the employer without resort to the admission evidence, it should hold neither defendant.

On the evidence it cannot be said, as a matter of law, that defendant driver was free from negligence, or that decedent was guilty of contributory negligence. Since the decedent was not alive to testify, the plaintiffs are aided by a presumption that he exercised due care for his safety, and this presumption is a species of evidence on which the jury may base a verdict of freedom from contributory negligence. *Westberg v. Willde*, 14 Cal.2d 360, 364, 94 P.2d 590. Under such circumstances, in my opinion, the judgment and order denying a new trial should be reversed.

It should be pointed out that plaintiffs are not precluded from urging error in the instruction that any evidence as to admissions of Perkins was in no way related to the liability of defendant Pacific Greyhound Lines because they did not submit a correct instruction. If a general instruction is given, which is correct as far as it goes, a party may not complain that a more specific or elaborate instruction was not given in the absence of a request therefor. But if an instruction is affirmatively erroneous a party is not precluded from asserting error because he did not request a proper instruction. *Colgrove v. Lompoc*, etc., Club, 51 Cal.App.2d 18, 124 P.2d 128; 24 Cal.Jur. p. 796, § 74, citing cases. Nor

should it be held that plaintiffs acquiesced in the ruling of the court. Attorney Hoey did signify his agreement with the court's position when the matter first arose, but, as the record shows, on the following morning Attorney Dam, co-counsel with Hoey, withdrew this consent by urging that the ruling be reconsidered.

It was also clearly error to instruct the jury that there was a presumption that the bus driver exercised due care. Since the driver was alive, and testified fully as to the facts of the accident, his negligence, under the decisions, must be determined on the evidence without regard to any presumption. *Speck v. Sarver*, 20 Cal.2d 585, 587, 128 P.2d 16; *Paulsen v. McDuffie*, 4 Cal.2d 111, 119, 47 P.2d 709. Whether this error alone would compel a reversal need not be determined inasmuch as the errors above mentioned, in my opinion, compel such reversal.

For the foregoing reasons it is my opinion that the judgment should be reversed.



**FARMERS & MERCHANTS NAT. BANK OF
LOS ANGELES v. SUPERIOR COURT IN
AND FOR LOS ANGELES COUNTY et al.**

Civ. 14272.

District Court of Appeal, Second District,
Division 3, California.

June 21, 1944.

Hearing Granted Aug. 17, 1944.

1. Wills ☞319

The jurisdiction of superior court to admit a will to probate is dependent upon publication or posting of notice of hearing on petition to probate will and not upon mailing of such notice to heirs and devisees. Probate Code, §§ 301, 326-328.

2. Wills ☞319

Where Los Angeles county was concededly proper county in which to administer estate, publication of notice of time and place of hearing on petition for probate of will gave court jurisdiction over parties notwithstanding that such notice was not mailed to certain legatees who resided in

enemy occupied territory. Probate Code, §§ 301, 326-328; Trading With the Enemy Act § 3, 50 U.S.C.A.Appendix, § 3.

3. Wills ⚭319

The mailing to heirs and legatees of notice of time and place of hearing on petition for probate of will as required by statute is only a matter of convenience and good administration and is not jurisdictional. Probate Code, §§ 301, 326-328.

4. Wills ⚭319

The statute providing for mailing to testator's heirs and legatees of notice of time and place of hearing on petition for probate of will, although expressed in mandatory terms is directory only. Probate Code, § 328.

5. Wills ⚭319

The failure of proponent of will to comply with Code requirements as to contents of petition for probate of will and as to mailing of notice of time and place of hearing on petition would justify refusal of court to proceed until such requirements are complied with. Probate Code, §§ 326, 328.

6. Wills ⚭319

The failure to give notice by mail to testator's heirs and legatees of time and place of hearing on petition for probate of will does not render void, and therefore subject to collateral attack, order admitting will to probate. Probate Code, § 328.

7. Wills ⚭270

The fact that communication with two Russian heirs, who were in enemy occupied territory, was prohibited under Trading With the Enemy Act, did not prevent court from obtaining jurisdiction to admit will to probate where a notice by publication was in due form. Probate Code, §§ 326-328; Trading With the Enemy Act, § 3, 50 U.S.C.A.Appendix, § 3.

8. Executors and administrators ⚭20(4)

Wills ⚭270

In the matter of the probate of a will, or initiation of other proceeding for administration upon a decedent's estate, constructive service of notice is effectual as notice to interested parties residing in the territory of a nation at war with the United States or in enemy occupied territory. Probate Code, §§ 326-328.

9. Descent and distribution ⚭68

In considering probate jurisdiction, an heir has no vested interest in the estate of his ancestor prior to the latter's death, but he takes by virtue of statute, which right is subject to such conditions as the legislature may prescribe. Probate Code, §§ 301, 326-328.

10. Descent and distribution ⚭6

The Legislature's authority to impose conditions and limitations upon the right of succession is not subject to constitutional limitations. Probate Code, §§ 301, 326-328.

11. Executors and administrators ⚭288

Wills ⚭204

The Legislature having the absolute authority to authorize disposition of estate by will has the authority to enact procedure for admitting wills to probate or giving effect to them by decrees of distribution. Probate Code, §§ 301, 326-328.

12. Wills ⚭204

Although the right of heirs under a will to an opportunity to assert their interests cannot be foreclosed by decree of court without the giving of notice, the laws which provide for some notice and opportunity to be heard could not be declared invalid unless wholly unreasonable and ineffectual. Probate Code, §§ 326-328.

13. Wills ⚭204

In proceeding for the probate of a will, the reasonableness of statutes providing for constructive notice is not to be judged from a comparison of the nature of the notice with those requirements for notice which are of the essence of due process of law where vested rights are involved. Probate Code, §§ 326-328.

14. Constitutional law ⚭309(2)

Courts ⚭199

Constructive service of notice in matters of probate meets the requirements of due process of law. Probate Code, §§ 326-328.

15. Wills ⚭270

Constructive service of notice of proceeding for admission of will to probate was not intended to be effective only where there is reasonable probability that the person sought to be notified would receive actual notice, since constructive notice is equally binding upon those who do not receive actual notice. Probate Code, §§ 326-328.

16. War ☞12
Wills ☞270

Jurisdiction to admit a will to probate, where notice by publication was duly given, did not depend upon the giving of notice to the Alien Property Custodian or his filing an appearance in the proceeding on behalf of heirs who were in enemy occupied territory, although upon appearing therein such custodian was entitled thereafter to have mailed to him all statutory notices which would otherwise go directly to such heirs. Probate Code, §§ 326-328.

17. War ☞12

Under the Trading With the Enemy Act, the Alien Property Custodian had authority to represent the interests of heirs who were in enemy occupied territory. Trading With the Enemy Act § 5, as amended by First War Powers Act of 1941, § 301, 50 U.S.C.A.Appendix, §§ 5, 616.

Proceeding in mandate by the Farmers & Merchants National Bank of Los Angeles, a national banking association, executor of the estate of Jacob Kahan, deceased, against the Superior Court of the State of California in and for the county of Los Angeles and the Honorable William R. McKay, Judge thereof.

Judgment that writ issue.

^{See} Prior opinion, 148 P.2d 445.

Bodkin, Breslin & Luddy and George M. Breslin, all of Los Angeles, for petitioner.

Charles H. Carr, U. S. Atty., of Los Angeles, A. Matt. Werner, Gen. Counsel to Alien Property Custodian, and George A. McNulty, Chief, Alien Property Unit, both of Washington, D. C., and J. A. Fridinger, Atty., Alien Property Unit, of Arlington, Va., for Leo T. Crowley, Alien Property Custodian, as amicus curiae, in support of petition.

J. H. O'Conner, Co. Counsel, and S. V. O. Prichard, Asst. Co. Counsel, both of Los Angeles, for respondents.

SHINN, Justice.

This is a proceeding in mandate brought by the executor of the estate of Jacob Kahan, deceased, against the Superior Court of Los Angeles County and a judge thereof sitting in probate, seeking a writ directing the court to proceed with the administration of said estate. The will of decedent was admitted to probate the 27th

day of November, 1942, and the usual proceedings were had thereafter until the court was asked to confirm a sale of real estate. The court refused to proceed with the hearing or to take further steps in the administration, for the reason that the judge of the probate department where the proceeding is pending was and is of the opinion that the court acted without jurisdiction of the parties in ordering the will admitted to probate, and that the order and all subsequent proceedings are void. The contention is that the proceedings are void because at the time the petition was filed two of the heirs, who are also beneficiaries under the will, resided in Ukraina, Russia, in territory then occupied by the German army; that it was unlawful under the Trading With the Enemy Act, 50 U. S.C.A.Appendix, §§ 2, 3, and also physically impossible to communicate with these heirs by wire or by mail, and that they were not notified of the proceedings as required by law. Sections 327 and 328, Probate Code, read as follows:

"§ 327. When the petition is filed, the clerk of the court shall set the same for hearing by the court upon some day not less than ten nor more than thirty days thereafter, and shall give notice of the time and place of hearing by publishing the same in a newspaper published in the county; if there is none, then by three written or printed notices, posted at three of the most public places in the county. If the notice is published in a weekly newspaper, it must appear therein on at least three different days of publication; and if in a newspaper published oftener than once a week, it shall be so published that there shall be at least ten days from the first to the last day of publication, both first and last days being included. If the notice is by posting, it must be given at least ten days before the hearing."

"§ 328. At least ten days before the hearing, copies of the notice must be personally served upon the heirs of the testator and the devisees and legatees named in the will and all persons named as executors who are not petitioning, or mailed, postage prepaid, from a postoffice within this state, addressed to them at their respective places of residence, if known to the petitioner, if not, at the county seat of the county where the proceedings are pending."

Notice of the hearing on probate of the will was duly published. On November 9, 1942, copies of the printed notices were

mailed to the heirs, devisees and legatees, at addresses stated in the petition, except that those of the Russian heirs were sent to them by registered mail in care of the Alien Property Custodian, Washington, D. C. On November 27, 1942, at the time of the hearing, proof was made by affidavit of publication and mailing, and there was filed on that day a letter from the Alien Property Custodian reading as follows: "Bodkin, Breslin & Luddy, 1225 Citizens National Bank Bldg., Los Angeles, Calif. Dear Sirs: Re: Estate of Jacob Kahan, dec'd. The Alien Property Custodian acknowledges receipt, by registered mail, of two published copies of Notice of Hearing of Petition for Probate of Will and Codicil of Jacob Kahan, deceased, the hearing being set for November 27, 1942. By General Order No. 5 the Custodian requires a report of any interest of a designated national in this estate. The report is to be made on Form APC-3, herewith enclosed, and the term 'designated national' is defined in General Order No. 5, set forth in full in the report form. As provided in General Order No. 6, the Custodian will, within sixty days, determine whether or not he will accept service of the notice. Very truly, (signed) Francis J. McNamara, Assistant to the Alien Property Custodian." By said General Order No. 5, section 503.5 (7 Fed. Reg. 6199), the term "Designated National" is defined as meaning "Any person in any place under the control of a designated enemy country or in any place with which, by reason of the existence of a state of war, the United States does not maintain postal communication" and it is made the duty of executors and certain others to report to the Alien Property Custodian the interest of such designated nationals. General Order No. 6 of the Alien Property Custodian [7 Federal Register 6199], issued under authority hereinafter referred to, reads, in part, as follows: "Sec. 503.6 * * *

(a) In any court or administrative action or proceeding within the United States in which service of process or notice is to be made upon any person in any designated enemy country or enemy-occupied territory, the receipt by the Alien Property Custodian of a copy of such process or notice sent by registered mail to the Alien Property Custodian at Washington, D. C., shall be service of such process or notice upon any such person, if, and not otherwise, the Alien Property Custodian within sixty days from the receipt thereof shall

file with the court or administrative body issuing such process or notice, a written acceptance thereof. (b) Such process or notice shall otherwise conform to the rules, orders or practice of the court or administrative body issuing such process or notice."

On the 6th day of October, 1943, the Alien Property Custodian filed his written appearance in the proceeding. It has been stipulated that this appearance may be deemed to have been filed at any date after the making and entry of the order admitting the will to probate. Under this stipulation the appearance should be considered as having been made within the time specified in the order, but it should be given no further effect since we regard the mailing of notice to the Alien Property Custodian, his acknowledgment of the receipt of the notice, and his later appearance in the action as of no moment in our decision of the question of jurisdiction to admit the will to probate.

[1] Respondent court gives as its first reason for refusing to act that the mailing of notice is a jurisdictional step in the proceeding to prove a will, and that no notice of the hearing was given to the Russian heirs by mail because the Alien Property Custodian did not, prior to the hearing, accept service of the notice which he had received by mail. And respondent goes further and says that in no event can the court acquire jurisdiction to probate a will if an heir, devisee or legatee is so situated at the time notice is published, or posted and mailed that it is impossible for him to receive actual notice or knowledge of the pendency of the proceeding. We do not agree with either of these contentions. A consideration of the nature of proceedings to administer upon the estates of decedents, the provisions of the Probate Code relating to the probate of wills, and the cases bearing upon the matter of notice has persuaded us that jurisdiction of the court to admit a will to probate does not depend upon the mailing of notice, but upon publication or posting of notice, as required by the code. We shall discuss later the nature of proceedings to administer upon the estates of decedents and, while what is to be said bears upon the present point, we shall examine first the code provisions.

Section 301 of the Probate Code specifies the county or counties in which wills must be proved and administration of estates

had, depending upon the place of residence and the leaving of estate in the county in which administration is sought.

Section 326 reads as follows: "A petition for the probate of the will must state: (1) The jurisdictional facts; (2) Whether the person named as executor consents to act or renounces his right to letters testamentary; (3) The names, ages and residences of the heirs, devisees and legatees of the decedent, so far as known to the petitioner; (4) The character and estimated value of the property of the estate; (5) The name of the person for whom letters testamentary are prayed. No defect of form or in the statement of jurisdictional facts actually existing shall make void the probate of a will."

[2] Concededly, Los Angeles County is the proper county in which to administer the instant estate. Publication of notice as required by section 327, supra, gave the court jurisdiction over the parties, to the extent necessary in a probate proceeding, unless mailing of notice, as required by section 328, was a jurisdictional step. We believe that it was not and that the decisions support our conclusion. *Nicholson v. Leatham*, 1915, 28 Cal.App. 597, 153 P. 965, 155 P. 98, was an action in equity to set aside an order admitting a will to probate upon the ground that the order was void for failure to take steps essential to the giving of notice to those entitled thereto under sections of the Code of Civil Procedure which are now found in the Probate Code. The court said (pages 600, 601 of 28 Cal.App., page 967 of 153 P.): "As to the first proposition, the contention of appellants is that the courts of this state do not acquire jurisdiction to make an order admitting a will to probate upon a petition in due form filed and hearing had thereon upon proof of publication of notice as required by section 1303, Code of Civil Procedure, from which petition is omitted the names and residences of the heirs of the testator, *if such names and residences be known to the petitioner*, and that, in the absence of a copy of the published notice being addressed to such *known resident* heirs, as provided in section 1303, supra, an order made upon such petition admitting a will to probate may be set aside and vacated in a court of equity, regardless of lapse of time. In our opinion, the provisions of section 1300, Code of Civil Procedure [now section 326, Probate Code], as to what the petition for the

probate of a will shall contain, other than subdivision 1 thereof requiring a statement of the jurisdictional facts, are, in so far as noncompliance therewith affects the jurisdiction of the court, directory." The reasons which the court gave for the quoted statement are omitted here in the interest of brevity. This holding was approved in *Murray v. Superior Court*, 1929, 207 Cal. 381, 278 P. 1033, in which it was said that the failure of the petitioner to state the names and addresses of legatees which were known to him would not deprive the court of jurisdiction to pass upon a petition for the probate of a will and objections thereto. And it was said that the power to proceed with the probate of a will attaches upon the production of the will and the filing of the petition pursuant to section 1300 of the Code of Civil Procedure and the publication of the notice provided for in section 1303 of that code. In *Stiebel v. Roberts*, 1941, 42 Cal.App. 2d 434, 109 P.2d 22, where there had been a failure to mail notice to a co-executrix of a petition for a probate homestead, as required by section 1200 of the Probate Code, it was said that the failure to give notice by mail or to personally serve the co-executrix did not affect the jurisdiction of the probate court and that jurisdiction was acquired by the filing of the petition and the posting of notice as required by law. In *Security-First Nat. Bank v. Superior Court*, 1934, 1 Cal.2d 749, 37 P.2d 69, it was held that the posting of notice of hearing of a petition to settle a trustee's account and the mailing of notice to one stated in the petition to be the beneficiary of the trust was sufficient to give the court jurisdiction to settle the account, even though the petition failed to state the true names and addresses of the beneficiaries of the trust, as required by section 1120 of the Probate Code, and this notwithstanding the requirement of said section that notice of the hearing must be mailed to all beneficiaries, for the period and in the manner directed by section 1200 of the Code, at their addresses, if known, and if not known, at the county seat of the county where the proceedings are pending, or be personally served upon such persons. It is true that the court held that the judgment roll did not disclose that there had been a failure to give notice as required by law and that the order was therefore not subject to collateral attack, but the decision was to the further effect that the failure of the beneficiary to receive no-

tice because of the trustee's failure to state his name and address in the petition, as required by section 1120, did not deprive the court of jurisdiction to settle the account.

[3-6] In view of the broad claims of respondent, to be hereinafter discussed, it seems appropriate that we state somewhat fully our reasons for holding that the applicable code sections call for the mailing of notice only as a matter of convenience and good administration, and not as a step upon which the jurisdiction of the court to initiate administration proceedings depends. In the procedure of giving notice by mail, the first step is compliance with subdivision 3 of section 326. The petition is the logical source of information to one charged with the duty of mailing notice, and to the court, as to the names and addresses of those who are entitled to notice of the proceedings. It is not required that they be stated unless they are known to the petitioner. The petition may be and often is filed by a stranger. If he does not know the names and addresses of those entitled to notice, he is not required to make any effort to ascertain them. Upon the hearing of the petition the court may rely upon the statements of the petition, giving the names and addresses of those entitled to notice, or upon petitioner's statement that they are unknown. No special duty is imposed upon the court to require proof as to such names and addresses, and it is discretionary with the court to direct such an inquiry or to proceed without it. The entire procedure for mailing may be nullified through the failure of the petitioner to ascertain the names and addresses of the interested persons or his omission to disclose those that are known to him. It is true that the requirement of section 328 for mailing of notice is expressed in mandatory terms, but so is the requirement of section 301 for the statement in the petition of the names and addresses of the interested parties, which has been held to be merely directory. It is consistent with the entire scheme of notice to regard the provisions of section 328 also as directory. The Legislature has recognized the obvious distinctions between proceedings for the administration of estates and adversary proceedings in which jurisdiction may be acquired by substituted service of summons. And it is because of that distinction, no doubt, that in probate matters there is no requirement that inquiry be made by a petitioner for the discovery of names and addresses that are unknown to him as there is where

the court is asked to authorize publication of summons. If it had been intended to limit the power of the court to proceed upon constructive service in probate matters to cases in which no more certain methods of giving notice were available, we would expect to find in the Probate Code exacting requirements for the ascertainment of the names and addresses of persons interested in the estate and for personal service of notice upon them if they were in the county or in the state. And if the intention had been to require the giving of notice by mail before the court could proceed, jurisdiction would not have been allowed to rest upon the ignorance of the petitioner, his unwillingness to inform himself, or his willful omission, and there would have been no unnecessary discrimination between those whose names and addresses were stated in the petition and those whose names or addresses, or both, were, for some reason, not stated. Since there is no requirement for inquiry to learn names and addresses which are unknown to the petitioner, and since it has been held that the omission from the petition of names and addresses that are known to the petitioner does not deprive the court of jurisdiction, it necessarily follows that the whole procedure for the mailing of notice was intended to be directory only. This holding does not imply that the failure to comply with the requirements of sections 326 and 328 would not justify the refusal of the court to proceed until the sections had been complied with, nor that such failure might not be prejudicial to the rights of those who were entitled to, but were not given, notice by mail. The failure to give notice by mail does not render void the order admitting the will to probate and therefore subject to collateral attack.

[7] In this view of the requirement for mailing, jurisdiction to admit the will to probate depended upon the sufficiency of notice by publication, which was in due form. Respondent disputes the effectiveness of this notice upon the ground that postal communication between the United States and German occupied territory in Russia was and is prohibited by the Trading with the Enemy Act, *supra*. We may assume that under the circumstances the Russian heirs would not receive actual notice of the proceedings until the conditions due to the state of war had been removed and somewhat normal living conditions had been restored. But under these assumed

facts we believe there was valid service of notice and that the court had jurisdiction in the premises.

The contention of respondent, as we view it, presents two questions. The first is whether it is within the power of the state to enact laws which permit the admission of wills to probate and administration of the estates of decedents upon constructive service of notice to the heirs, devisees and legatees under such circumstances that they cannot receive actual notice of the proceedings. If the answer to this question is in the affirmative, the second question is whether the statutory procedure for constructive service is nullified or was intended not to be applicable in such cases because it cannot result in actual notice.

[8] There is a diversity of authority as to whether the court can acquire jurisdiction by constructive service in adversary proceedings of persons residing in enemy territory. The conflicting holdings are stated in an annotation in 137 A.L.R. 1365 et seq., where the cases are collected, but we deem it unnecessary to review them or the reasoning which the several courts have employed in reaching their conclusions. We are concerned only with the jurisdiction of the court in probate matters. No case has been cited, and we have found none, holding that in the matter of the probate of a will, or initiation of other proceedings for administration upon the estate of a decedent, constructive service of notice of the proceeding is ineffectual as notice to interested parties residing in the territory of a nation at war with the United States or in territory occupied by the armed forces of such enemy. No case has come to our attention in which a claimant to an interest in an estate has been permitted to challenge, by collateral attack, an order or decree rendered after constructive service of notice of the proceeding, upon the ground that it would have been impossible for him to receive personal notice because he had been, during the effective period of the notice, in some inaccessible part of the world beyond the reach of ordinary means of communication.

[9,10] In considering the probate jurisdiction, it is important to have in mind that an heir has no vested interest in the estate of his ancestor prior to the latter's death. He takes by virtue of the statutes and not by reason of natural law. While

there is some difference of opinion on this point, there is none in this state. In California and almost all of the other states it is recognized that the right to take by succession is subject to such conditions and limitations as the legislature may see fit to prescribe. It has been held in many cases in this state, and in none which we have found has it been questioned, that the broadest burdens, limitations and conditions may be attached to the right of inheritance. Whenever the question has arisen it has been held that the authority of the legislature in such matters is not subject to constitutional limitations. In *re Wilmerding's Estate*, 1897, 117 Cal. 281, 49 P. 181; *Sharp v. Loupe*, 1898, 120 Cal. 89, 52 P. 134, 586; *Estate of Porter*, 1900, 129 Cal. 86, 61 P. 659, 79 Am.St.Rep. 78; and *Estate of Bump*, 1907, 152 Cal. 274, 92 P. 643.

[11-13] One of the limitations upon the right of succession is the right of the ancestor to make disposition of his estate by will, which he may do, except in certain instances, to the exclusion of some or all of his relatives. Other conditions relate to the matter of proof of heirship and to proceedings for the proof of wills and the trial of contests involving their validity. When it is considered that one named by the statute as heir has no interest in the estate of his living ancestor which is entitled to protection on constitutional grounds, and that in the absence of statutes of succession he would take nothing, it may be questioned whether the courts can properly place any limitation upon the authority of the legislature to impose burdens or restrictions upon the estate itself or upon the rights of those who inherit it. We are not called upon to decide that question. The only questions involved are those relating to our Probate Code procedure for the proof of a will. It would sound anomalous to say that although the legislature has the absolute authority to authorize disposition of estates by will, there is some limitation upon its authority to enact procedure for admitting wills to probate or giving effect to them by decrees of distribution. It is nevertheless true that the probate laws of the several states do recognize the right of heirs to an opportunity to assert their interests before they are foreclosed by decree of court, and we do not intimate that this long established and universal policy might not bring in question the conclusiveness of decrees establishing the validity of wills, rendered

without giving the heirs any notice of the proceedings or any opportunity to establish their relationships. If it should be conceded that arbitrary laws which allowed such ex parte procedure would for any reason be invalid, it would nevertheless be true, in view of the broad powers of the legislature, that laws which provided for some notice and opportunity to be heard could not be declared invalid unless they were wholly unreasonable and ineffectual. But if we concede for the purposes of our decision that the test of reasonableness may be applied to the actions of the Probate Code dealing with notice, which would be giving the most liberal consideration to the claims of respondent, we would be obliged to hold them valid. Their reasonableness is not to be judged from a comparison of the nature of the notice which they authorize with those requirements for notice which are of the essence of due process of law where vested rights are involved.

[14] In *Estate of Davis*, 1902, 136 Cal. 590, 69 P. 412, one who claimed to be an heir of the decedent filed a contest of a will after the expiration of the allotted period of one year (as the law then stood) following its admission to probate. She alleged that she had no notice or knowledge of the order admitting the will to probate until more than a year thereafter; that she was living in a foreign country and that the time between the first publication and mailing of notice and the time of the hearing was insufficient to give her notice, and she made the claim that the statute providing for constructive service was therefore unreasonable, that it denied her due process of law, and was void. In rejecting this contention, it was held that service of notice by publication or posting constituted due process, and the court stated (page 596 of 136 Cal., page 414 of 69 P.): "As before suggested, the proceeding as to the probate of a will is essentially one in rem, and in the very nature of things the state is allowed a wide latitude in determining the character of the constructive notice to be given to the world in a proceeding where it has absolute possession of the res. * * * Public policy demands that a will shall have a speedy probate, and the legislature, recognizing that fact, has given the heir, by express enactment, one year after that probate has been decreed, within which time he may attack the will. His rights are in no way concluded by the decree of probate. He has an entire year

thereafter in which to attack the will, and he may attack it upon the same grounds and for the same reasons that he could attack it prior to its probate. Even the measure of evidence demanded of him for a successful attack is no different in the two cases. It is thus apparent that, in such a case as the one presented here, due process of law was in no degree denied [Laura Tracy, plaintiff] upon the hearing." This holding was followed on a later appeal in the same matter. *Estate of Davis*, 1907, 151 Cal. 318, 86 P. 183, 90 P. 711, 121 Am. St.Rep. 105. Constructive service of notice in matters of probate has frequently been held to meet the requirements of due process of law (*Security-First Nat. Bank v. Superior Court*, supra, 1 Cal.2d 749, 37 P.2d 69; *Monk v. Morgan*, 1920, 49 Cal. App. 154, 192 P. 1042; *Estate of Aldrich*, 1905, 147 Cal. 343, 81 P. 1011), although the precise question we are considering has not been decided. The effect of these decisions is that probate proceedings founded upon constructive notice are in accordance with the law of the land and with natural right and justice. We think there can be no doubt as to this. The provisions for constructive service are, in our opinion, far more reasonable than would be procedure which required actual notice to all interested parties in probate matters. Proceedings in probate are for the benefit of all who take, whether as heirs, devisees, or legatees. Administration is necessary before they can come into possession of their interests and their titles are confirmed by orders or decrees of court. They have the right to have administration proceedings conducted expeditiously and the provisions for the giving of notice are designed to avoid unnecessary delay. Constructive service will not always result in actual notice but claimants to an estate have no right to actual notice except when the law expressly gives them that right. There will be occasional cases in which the right to initiate or to defend adversary proceedings will be lost through the failure to receive notice, but these will be few as compared with the vast number of probate proceedings, which, as a rule, are conducted in a routine manner and without contest. The provisions of our probate laws probably strike as fair a balance as is possible between the necessities for prompt and efficient administration, which is desirable in all cases, and the disadvantages which must occasionally be suffered by those who are sought to be reached by

constructive service but who fail to receive actual notice of the pendency of the probate administration or of the steps being taken therein. The provisions for constructive service are valid.

[15] We do not agree with respondent's further contention that the code provisions in question were intended to be effective only where there is reasonable probability that the persons sought to be notified will receive actual notice, or, in other words, that the provisions for notice were "nullified" in the instant case by the circumstance that the Russian heirs could not have received actual notice. In view of our holding that the mailing of notice was directory and not jurisdictional, respondent's argument, if valid, means that the published notice was no notice at all because the notoriety given thereby would not result in the communication of the facts to the Russian heirs in any manner. But it is clear that the legislature intended constructive service to be sufficient in any situation. There are innumerable circumstances in which constructive service of notice would not result in actual notice. The rights of minor heirs are usually involved in probate matters, and oftentimes the interests of incompetents. And no one, we think, would undertake to say how many people there are whose addresses are unknown to their relatives or who pull up stakes and leave for parts unknown. Undoubtedly it was known to those who framed the laws that wills would be probated in some or perhaps many cases without actual knowledge of the proceedings having been received by all persons legally entitled to notice, but the legislature has made no exceptions for such cases. We find nothing in the probate laws in the nature of an implied limitation upon the jurisdiction to admit wills to probate in cases where, because of unusual circumstances, published notice cannot result in actual notice to the heirs or other persons interested. No other procedure has been prescribed for cases of that sort. Constructive notice of a proceeding for the appointment of an administrator or the admission of a will to probate was intended to be and is binding upon all persons, equally upon those who do not receive actual notice as upon those who do. The facts of the present case present no exception under the code or the decisions. The Russian heirs were legally before the court when the will was admitted to probate, and the order then made was valid.

[16, 17] It will appear from what we have said that jurisdiction to admit the will to probate did not depend upon the giving of notice to the Alien Property Custodian or his filing an appearance in the proceeding. He is before the court in the pending proceeding and will be entitled hereafter to have mailed to him all statutory notices which would otherwise go directly to the Russian heirs and beneficiaries. We think there is no doubt as to his authority to represent their interests in the proceeding to sell property of the estate.

The Trading With the Enemy Act of October 6, 1917, 40 Stat. 411, as amended, was further amended by the First War Powers Act, December 18, 1941, 55 Stat. 839, § 301, 50 U.S.C.A. Appendix, §§ 5, 616, so as to give to the President during the time of war the authority, through any agency he might designate, or otherwise, and under such rules and regulations as he might prescribe, to regulate, direct, prevent or prohibit any use, transfer, dealing in or exercising any right, power, or privilege with respect to any property in which any foreign country or a national thereof has any interest or with respect to any property subject to the jurisdiction of the United States. He was given authority by the First War Powers Act, Title III, to vest any property or interest of a foreign country or a national thereof, upon terms directed by him in any agency or person he might designate, the same to be held, administered, liquidated, sold or otherwise dealt with, upon such terms and conditions as he might prescribe in the interest of, and for the benefit of, the United States. And it was further provided in the Act that "Such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes." By virtue of the authority thus vested in him, the President on March 11, 1942, issued Executive Order No. 9095, 50 U.S.C.A. Appendix, § 6 note, Fed. Reg. 1971, establishing the office of Alien Property Custodian, headed by an officer bearing the same title. By the terms of that order all power and authority conferred upon the President by the Trading with the Enemy Act and First War Powers Act, so far as material here, were delegated to, and vested in, the Alien Property Custodian. The President, on July 6, 1942, by Executive Order No. 9193, Fed. Reg. 5205, amended Executive Order No. 9095. By section 4 of the amending order, the Alien Property

Custodian was authorized and empowered to prescribe from time to time regulations, rulings, and instructions, to carry out the purposes of said executive order. The said amending order reads, in part: "5. The Alien Property Custodian is authorized to issue appropriate regulations governing the service of process or notice upon any person within any designated enemy country or any enemy-occupied territory in connection with any court or administrative action or proceeding within the United States. The Alien Property Custodian also is authorized to take such other and further measures in connection with representing any such person in any such action or proceeding as in his judgment and discretion is or may be in the interest of the United States."

We have heretofore referred to General Order No. 6 of the Alien Property Custodian with respect to his appearance after receipt of notice by registered mail. A further provision of that order reads as follows: "This order shall not be construed to limit the authority of the Alien Property Custodian to take any measures in connection with representing any such person (which, as already noted, includes persons in enemy occupied territory) in any action or proceeding as in his judgment and discretion is or may be in the interest of the United States. (d) * * * (3) 'Enemy occupied territory' shall mean any place under the control of any designated enemy country or any place with which, by reason of the existence of a state of war, the United States does not maintain postal communication." The Alien Property Custodian in the exercise of authority vested in him by said acts of Congress and said executive orders could vest in himself the interests of the Russian heirs. With these broad powers, and the discretion delegated to him to act as his judgment dictates in the national interest, the Alien Property Custodian undoubtedly has the right to represent the Russian heirs in any and all proceedings relating to or affecting their interests as heirs of Jacob Kahan, deceased, or as devisees or legatees under his will. His acceptance of service and appearance in the action are sufficient evidence that he considers it to be in the interests of the United States that he represent them. His authority to act for them and to take control of their interests was clearly intended to be ample to meet all of the exigencies affect-

ing the national interest that might result from a state of war.

By the terms of Executive Order No. 9193, the orders and regulations made and the action taken by him are made final and conclusive as to his power to exercise the power and authority conferred upon the President by the Trading With the Enemy Act, as amended. It does not rest with the courts to place restraints upon the exercise of his judgment and discretion under the broad powers which he possesses.

With respect to the pending petition for confirmation of sale of real property, it will follow, from the views hereinbefore expressed, that the court has jurisdiction to act upon the petition. The Russian heirs and beneficiaries are before the court in that proceeding by virtue of the notice of the hearing given in accordance with the provisions of section 1200 of the Probate Code. While it does not appear that notice of the hearing was mailed to the Alien Property Custodian, it does appear from the brief filed herein by his counsel, as *amicus curiae*, that he has knowledge of the pending proceeding. The proof upon the hearing will no doubt show that he has been properly notified.

Although our decision as to jurisdiction is not based at all upon the fact that the notices were mailed in care of the Alien Property Custodian, we are not intimating that the probate court should not require that notice be mailed to him or in his care in cases where there are persons interested in estate matters whom he could properly represent. Unquestionably, he should receive such notice in order that he may have an opportunity to appear in the proceedings if he so desires. This is true even though there is no law or executive order which requires the mailing of notice to him of the initiation of probate proceedings in which the interests of the United States may be affected, and although acceptance of service is optional with him. Executors are required to report the interests of "designated nationals" and we think the courts should decline to make any determination which might affect the interests of the United States until the Alien Property Custodian has been given notice by registered mail and has had an opportunity to decide in accordance with his procedural orders whether he will make an appearance in the proceedings. However, it is compliance with the Code re-

quirements as to notice, and not service upon the Alien Property Custodian, that gives the court jurisdiction to administer the estates of decedents. He is not the actual representative of persons whom he is authorized to represent, in any matters except those in which he issues written acceptance of service. He has appeared in this proceeding and, as we have already stated, is entitled to notice of all subsequent proceedings in which notice is required by the Probate Code.

The writ is granted.

DESMOND, P. J., and PARKER WOOD, J., concur.



65 Cal.App.2d 180

LANE-WELLS CO. v. SCHLUMBERGER
WELL SURVEYING CORPORATION.

Civ. 14508.

District Court of Appeal, Second District,
Division 2, California.

July 12, 1944.

As modified July 13, 1944.

Rehearing Denied July 31, 1944.

Hearing Denied Sept. 5, 1944.

1. Contracts ⇨143

The construction of an unambiguous contract must be derived solely from the language therein and effect must be given to all parts of the writing.

2. Appeal and error ⇨1008(3)

In construing an unambiguous contract, the reviewing court is not bound by the decision of the trial court made either without the aid of evidence or where there is no conflict in the evidence.

3. Patents ⇨212(1)

Where owner of patent for a system of electrical logging of oil wells, operating in several states, granted to a licensee operating in California alone the right to use patented method under a contract authorizing licensor to fix minimum net prices to be charged by licensee and providing for a volume discount, and it was apparent that purpose of contract was to

avoid placing either party at a price disadvantage in a competitive field, licensor, after fixing minimum net prices, could not grant to a customer operating in several states volume discounts based on operations in all states and thereby gain an advantage over licensee.

4. Contracts ⇨147(1), 154

Where equality of opportunity is the key word of the contract, the ascertainment of such purpose is paramount, and in achieving that end such construction of the contract is to be preferred as makes it reasonable, fair, and equitable to both parties.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Lane-Wells Company against Schlumberger Well Surveying Corporation for declaratory judgment as to the rights of the parties under a patent licensing contract. From an adverse judgment, plaintiff appeals.

Reversed.

Raphael Dechter and B. L. Hoyt, both of Los Angeles, for appellant.

Frank Karr and E. D. Yeomans, both of Los Angeles, John P. Bullington, of Houston, Tex., and Randolph Karr, of Los Angeles, for respondent.

MOORE, Presiding Justice.

We have here for decision whether the findings of the court are supported by the evidence; i. e. whether the licensor complied with its agreement whereby it might fix the minimum net prices to be charged by the licensee in using certain patented methods for logging oil wells.

Respondent, as owner of patented "systems and methods" for electrical logging of oil wells, was at all times herein mentioned, and had been, engaged in doing electrical logging by use of its patented methods some years prior to the contract with appellant. By an unambiguous writing dated April 2, 1938, it granted to plaintiff a non-exclusive, non-assignable license to use such patented method, for which license plaintiff agreed to pay the royalties hereinafter mentioned. The contract reserved to licensor the privilege of fixing the prices to be charged for the service by either party so "that neither party would have a price advantage over the others. The licensee was forbidden to make any

arrangement or rebate designed to diminish the benefits of the licensor; it was required to keep accurate and faithful records to show in detail the business done by use of the methods, the gross price charged, the rate of discount allowed and all rebates that would tend to reduce the gross price, which records would enable licensor to determine that the accountings had been accurate and complete. The fixed minimum net price was not to be more than that charged by licensor. On or before the 20th of each calendar month licensee must mail to licensor an itemized statement containing the information required to be kept in its records of the work done during the preceding calendar month. As consideration for the license, licensee agreed to pay a royalty of 15 per cent of the gross price fixed by licensor from time to time, less discounts permitted by licensor, the minimum net price, to be determined according to clause 8, as follows:

"8. The Licensor shall fix from time to time the minimum net price to be charged by the Licensee for the doing of the various classes of service, work and jobs in which any process or invention or improvement is used hereunder, in systems or methods for electrical logging, provided, however, that the minimum price so fixed shall not be more than the minimum price charged by the Licensor in the same oil field for the same type of service, work or job during the same period of time, and, after any such minimum price has been so fixed, the same shall continue in force until the Licensor shall give to the Licensee written notice of any change or changes therein, which notice must be given at least thirty days before the same is to become effective, whereafter such changed prices must be charged by the Licensee until and unless any further change is made by the Licensor. The Licensee and the Licensor agree not to reduce, directly or indirectly, by discount, rebate, gift, or concession, such minimum prices so long as the same shall remain in effect, except as shall be determined upon by the Licensor from time to time."

Shortly after the execution of the contract licensor issued and forwarded to licensee a price schedule showing the prices to be charged for electrical logging operations, and included in the same writing a graduated scale of discounts based upon the dollar value and the total volume of business performed for any one customer

in any number of fields. The discounts authorized were as follows: On an account for \$2500 or less, no discount; on the second \$2500, five per cent; on the second \$5000, ten per cent; above \$10,000, twenty per cent. Such discounts were to be applied to the gross prices named in the schedules, thereby deriving the minimum net prices to be charged. This discount is hereafter referred to as "volume discount." It is the basis of appellant's action, and concerning it a declaration of the court was sought. The second letter of July 30, 1938, contained a price list and advised appellant (1) that "we did not publish this volume discount on our price list," and (2) that, while in the April letter it had grouped companies having a common control, "each company is now considered a separate unit for computing volume discount." The full significance of the volume discount appears not to have been comprehended by appellant prior to its actual commencement of logging operations, which was about April, 1939. By its letter of that month respondent wrote appellant that "all prices are net, meaning payment therefor to be made in thirty days without discount."

In immediately subsequent correspondence appellant remonstrated that under respondent's system of granting volume discounts the contract would be violated in respect to that provision which authorizes the licensor to fix from time to time the *minimum net* price to be charged by licensee, demanded the fixing of "minimum net prices which shall apply to all fields" and urged that the volume discount when conceded to a customer operating in several states worked an insuperable hardship upon licensee, whose activities were originally confined to California, and have continued in this state but it has not operated in all of the fields in which licensor has at all times transacted business. An additional hardship was that appellant was prevented from quoting a definite price to a customer, because if licensee should operate in many states such price could not be ascertained until all of the work performed for such customer in the United States could be ascertained and the volume discount computed. Licensee contended then, as it does now, that inasmuch as licensor transacted logging business in all of the oil fields in the United States for some operators while licensee did business in only some of the oil fields in which licensor had been and

still is doing business, the practice of giving volume discounts based upon work done by a customer in several fields in the oil bearing states operated to the price advantage of licensor in that it did not actually "fix" minimum net prices for the same field and for the same type of work and during the same period of time.

The trial court found that under the contract the licensor has fixed "the minimum net prices" to be charged by licensee; that it has notified licensee of all prices to be charged in all oil fields; that licensor has not reduced prices in any way below those forwarded to licensee, and decided that licensor may properly under the contract include as a part of the minimum net prices a provision for the discounts specified in the letters of licensor to licensee, and that they may be based on "the total volume of business done in the United States." We have to determine whether such findings and decision are sustained by the contract and by the acts of the parties.

[1,2] The contract contains within its terms no ambiguity or uncertainty. Its construction therefore must be derived solely from the language within its borders and effect must be given to all parts of the writing. 6 Cal.Jur. 328, Sec. 193; Bank of America v. Schumacher, 6 Cal.App.2d 651, 653, 45 P.2d 239; Scudder v. Perce, 159 Cal. 429, 114 P. 571; Roesch v. De Mota, Cal.App., 143 P.2d 67. Under that principle the reviewing court is not bound by the decision of the trial court made either without the aid of evidence or where there is no conflict in the evidence. Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825. Guided by these principles we now proceed to explore the language of the license agreement and to weigh the acts done thereunder.

[3] A cursory glance at the writing discloses (1) that the parties purposed to avoid placing either of them at a price disadvantage in a competitive field; (2) that licensor's royalty of 15 per cent was to be based upon the gross prices less any allowed discount granted by licensee; (3) that either might grant rebates to its customers so long as they do not reduce the minimum net price; (4) that licensee's books shall truly reflect the gross prices and the discount or rebate allowed. The controversy involves only paragraph 8, supra. It provides that licensor shall wield the whip hand, in that "from time to time"

it shall fix the "*minimum net price*" to be charged by licensee, provided, however, that the "minimum price" *so fixed* shall not be more than the "minimum price" charged by the licensor in the same oil field for the same type of service; and after *such minimum price* has been *so fixed* the same shall continue in force until the licensor gives licensee written notice of change. The parties agree not to reduce by discount or rebate *such minimum prices*.

From the foregoing abridgement of paragraph 8 and the italicized phrases it appears to have been definitely intended by the parties that the licensor shall fix the *minimum net price*. It is equally clear that the phrase "minimum price *so fixed*" could mean nothing else than the "minimum net prices" *fixed* at first by the licensor. Otherwise the phrase "so fixed" would be meaningless, for there was nothing "so fixed" except the "minimum net price." From this the conclusion is irresistible that the authors of the contract had no intention other than to use the two phrases interchangeably. When they agreed therefore that the *minimum price* shall not be more than the minimum price charged by licensor in the same oil field for the same type of service, they meant *minimum net prices* and not gross prices. We find nothing in the phraseology to warrant the court's finding that "defendant has not failed to fix such minimum net price", or to justify the contention of respondent that "the *minimum prices* can be reduced by discount as determined by licensor from time to time," or that "the minimum prices are the prices before the application of the discount and minimum net prices are the prices after the application of the discount."

If the licensor might "fix the minimum net price to be charged by the licensee" as well as by itself, then no other discount or rebate could be deducted by either party from such net price without violating the contract. But this is exactly what the licensor did by granting volume discounts to patrons who engage in drilling oil wells in the several oil bearing states. Take for illustration the case of the Texas Company. Licensor's bill for logging charges for the month of March 1942 were \$13,-083.57, the aggregate of all charges against it in six different states. After subtracting \$2,500 on which no deduction is allowed there remained \$10,583.57. By making the deductions of five per cent on the second \$2,500, ten per cent on the next

\$5,000 and 20 per cent on the next \$3,083.57, that customer of licensor received a total discount on its bill for \$13,083.57 in the sum of \$1,241.70. This meant a discount on respondent's California contracts of almost 10 per cent, a far greater rate of discount than is possible for appellant to give to its California contractees. In all its operations respondent rendered the same service as that which was rendered by appellant, charged the same prices and thereafter remitted to its customers the rebate based upon the aggregate of business done for any such customer in all the fields of the customer's activities.

Such practice violates that provision of the contract which forbids either to reduce the minimum net prices fixed by licensor. Since appellant is not engaged in logging in all states where oil is developed it cannot grant a discount based upon work in eastern fields and therefore must charge its California customer a greater price than that which respondent may, under the volume discount practice, accept in final settlement of its charges. This gives respondent a distinct price advantage in the very fields in which appellant is a business rival, although it pays a royalty to respondent on all work done. If, however, the discounts provided for in the contract be applied to each field separately, no advantage over appellant would obtain. Each would be able to quote the "minimum net price" with assurance that the other would not underbid him or pay a rebate upon the charges made based on the price schedule. But even though appellant were rendering the logging service in seven states, the practice of granting volume discounts based upon the aggregate of work done for one customer in all the oil fields would make it impossible to quote definite prices to its patrons. This is so because the rebate is made up after the reports are received from all of the different states. Under the contract licensee must on the 20th day of each calendar month forward to licensor a statement of all persons served, with the names and numbers and locations of each

well, the work done and the *rate of discount* allowed which may have the effect of reducing the gross price. If the discounts be applied to the accounts for each field separately, both would then operate upon the same basis with respect to prices. Under such a license contract as that here involved it could not have been intended that a licensee of a patented process for the manufacture of rubber goods, operating only in California in competition with the licensor who sells the product in all 48 states, would be forced to base its discounts upon the sales made in this state while the licensor may grant rebates based upon the volume of sales made in all of North America.

[4] If equality of opportunity is the key word of the contract, the ascertainment of such purpose is paramount. In *re City and County of San Francisco*, 191 Cal. 172, 177, 215 P. 549; *Bradley Co. v. Mulcrevy*, 166 Cal. 325, 136 P. 60. In achieving that end such construction is to be preferred as makes a contract reasonable, fair and equitable to both parties. *Whitney v. Aronson*, 21 Cal.App. 9, 130 P. 700; 17 C.J.S., *Contracts*, p. 739, § 319; *Southern Surety v. Bank of Lassen*, 118 Cal.App. 149, 154, 4 P.2d 952. Since respondent has not fixed minimum net prices but has merely furnished appellant with a schedule of prices which must be followed by appellant but below which respondent may go by virtue of its application of the volume discount to the aggregate of the accounts of a patron in any number of fields, the findings that respondent "at all times has fixed such *minimum net prices*" and "that it is not true that defendant has failed or refused at any time to fix the minimum net prices to be charged by plaintiff and defendant * * *" are not supported by the evidence.

The judgment is reversed.

McCOMB, J., concurs.

Hearing denied; SHENK and CARTER, JJ., dissenting.

RANNARD et ux. v. LOCKHEED AIRCRAFT CORPORATION et al.*

Civ. 14227.

District Court of Appeal, Second District,
Division 3, California.

July 7, 1944.

Hearing Granted Aug. 30, 1944.

1. Physicians and surgeons ⇨18(4)

Complaint, in malpractice action, alleging surgeon's negligence in diagnosis and operation for double hernia, was insufficient as against demurrer.

2. Pleading ⇨8(1)

A complaint must state facts which constitute plaintiff's cause of action, and mere conclusions which do not give even a clue as to facts which defendant will be called upon to meet are not sufficient.

3. Physicians and surgeons ⇨18(4)

A complaint against a surgeon, alleging that he operated on plaintiff carelessly and unskillfully and that as proximate result of the negligence plaintiff has been disabled and has lost ability to work, does not state a cause of action, but there must be a factual statement as to what the defendant did or failed to do and as to connection between the alleged negligence and the alleged result thereof in the pleading as well as in the proof.

4. Pleading ⇨8(17)

Negligence may be charged in general terms in pleading, in that, what was done having been stated, it is sufficient to say that it was negligently done without stating particular omission rendering the act negligent, but it must appear from facts averred that the negligence caused or contributed to the injury.

5. Pleading ⇨8(17)

Though it is permissible to charge negligence in general terms, it is nevertheless necessary to specify the particular act alleged to have been negligently done.

6. Appeal and error ⇨916(1)

Where complaint in malpractice action against surgeon in diagnosis and performing operation for hernia was insufficient in alleging conclusions without stating particulars of alleged negligence and the particulars of the insufficiency were pointed out to plaintiff's attorney during the argument on demurrer thereto, complaint must

be deemed to have stated plaintiff's case as strongly as facts would justify in view of his election not to amend in particulars pointed out and as to which lower court stated willingness to give time for amendment.

7. Physicians and surgeons ⇨18(4)

In action for alleged malpractice of surgeon, employed by defendant airplane manufacturer for purpose of giving physical examinations to persons applying for employment and to render certain other professional services in which complaint was insufficient as against demurrer, in failing to specify matters in which surgeon was negligent in diagnosing and operating on plaintiff for hernia, amendment of complaint by adding allegations as to negligence of defendant manufacturer in employing defendant's surgeon would not cure the defect because such allegations in each cause of action would in no way tend to supply facts with reference to allegedly negligent surgery of the surgeon and its consequences.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by H. H. Rannard and wife against Lockheed Aircraft Corporation and Z. P. King for damages for alleged malpractice by defendant last named while allegedly in employ of defendant first named. From the judgment and from an order denying plaintiffs' motion for a new trial, plaintiffs appeal.

Judgment affirmed and appeal from order dismissed.

A. G. VanDeventer, of Pasadena, for appellants.

George H. Moore, Hugh B. Rotchford, and Harold C. Tallmadge, all of Los Angeles, for respondent Lockheed Aircraft Corporation.

SHINN, Justice.

Plaintiffs, husband and wife, appeal from a judgment on the pleadings in favor of Lockheed Aircraft Corporation, which was ordered at the commencement of the trial. The action is for damages for the alleged malpractice of one Z. P. King, a physician and surgeon who, it is alleged, was in the employ of defendant Lockheed for the purpose of giving physical examinations to

* Subsequent opinion 157 P.2d 1.

persons who applied to Lockheed for employment and to render certain other professional services. It appears that the services of Dr. King were rendered to the husband and not the wife, and he will be referred to as plaintiff.

The complaint contained five separate statements of fact, each designated as a cause of action, which may be summarized as follows:

The first cause of action alleged that Lockheed "retained in its employ, as its agent and employee, the defendant Z. P. King in the normal conduct of, and in the furtherance of its interests in, the business in which said defendant Corporation was at all such times engaged"; that plaintiff applied to Lockheed for employment and was found acceptable, subject to a physical examination "which was required to be, and was actually, made by said defendant Corporation and its agent, defendant Z. P. King"; that at the direction of Lockheed plaintiff was given a physical examination by defendants Lockheed and King, and that said defendants conducted said physical examination negligently, carelessly, and unskillfully; that as a direct and proximate consequence and result of said negligence plaintiffs and each of them have sustained, and will continue to sustain, "losses, damages, injuries, inconveniences, and hardships" consisting of physical pain and inconvenience, the necessity for surgical and medical treatment in the future, expenses of past medical care and treatment, loss of earnings, and loss of earning ability. The amount of the damages alleged to have been suffered by reason of said medical expense, etc., was specified.

The second cause of action incorporated the allegations of the first cause of action but elaborated upon the employee relationship of defendant King by alleging that Lockheed hired and retained King for the purpose of conducting physical examinations of applicants for employment, and in hiring and retaining him negligently failed to select "a medical and surgical attendant physician and surgeon, possessed of or capable of exercising that degree of care, skill, ability or learning possessed and exercised by medical and surgical attendants, physicians and surgeons practicing their profession in the locality of said defendant Lockheed Aircraft Corporation's said principal office, but said defendant Lockheed Aircraft Corporation nevertheless

held out said defendant Z. P. King to be so qualified and skilled."

The third cause of action incorporated the allegations of the first cause of action but elaborated upon the allegation as to the negligent physical examination and alleged that plaintiff at the direction of Lockheed submitted to such examination by the defendants and was thereupon negligently "advised by said defendants that as a condition precedent to the proposed employment of said plaintiff, H. H. Rannard, by said defendant, Lockheed Aircraft Corporation, it would be necessary for said plaintiff to undergo and submit to an operation designed to correct a purported 'double hernia' purportedly found in said plaintiff; said plaintiff did thereupon, with the full acquiescence, knowledge and consent of defendant Lockheed Aircraft Corporation consent to the operation so advised, and did, on the 2nd day of November, 1941, at the direction of defendants, submit to, and undergo the said advised operation; that said operation was performed upon said plaintiff by said defendant Z. P. King in a negligent, careless, and unskillful manner" and that in advising said operation and in performing it, "defendant Z. P. King at all times acted as the agent and employee of defendant Lockheed Aircraft Corporation and such acts of defendant Z. P. King were, and each of them was, done in the scope of, and as a routine and regular part of, the usual employment and services rendered by said defendant Z. P. King to defendant Lockheed Aircraft Corporation."

The fourth cause of action was against King only and was held to state a cause of action against him.

The fifth cause of action incorporated the substance of the first cause of action, but it alleged that the diagnosis made in the examination for employment was of a double hernia and that plaintiff was operated on for that condition by defendant King. The allegations of the third cause of action with reference to the operation and Lockheed's connection with it were incorporated by reference. It was further alleged that after the operation defendant King discontinued his employment with Lockheed but that he continued to treat and take care of plaintiff following the operation, that he did so negligently, and "that defendant Lockheed Aircraft Corporation participated in and took an active part in said negligent, careless and unskillful subsequent treatment and care, and

thereby ratified and adopted and constituted as the act of said last named defendant and of its agent, defendant Z. P. King, the said negligent, careless and unskillful subsequent treatment and care." The defendants answered separately without demurring to the complaint.

The fifth cause of action was broader than any of the others and is the only one we need to consider. If it was insufficient, no cause of action was stated against Lockheed and the judgment should be affirmed.

[1-3] A transcript of the argument upon the motion has been added to the record on appeal by stipulation. It was furnished for the purpose of resolving a disagreement between counsel as to whether plaintiff had sought leave to amend. We have read it and find that plaintiff did offer to amend in one particular but declined to amend in others in which the complaint was patently inadequate. The insufficiency which we regard as determinative is that no facts were alleged to show what Dr. King did or failed to do in the diagnosis or the operation, or to show a connection between the alleged negligence of the defendants and the injuries which plaintiff claims to have suffered.

It was not alleged that plaintiff did not have a double hernia, or that an operation was not necessary to correct it, or that a hernia condition was not corrected. The court could not assume the existence of such material facts, when no attempt was made to allege them, and the omission was evidently intentional. No facts were alleged as to plaintiff's condition following the operation nor any facts from which it would appear that his condition differed from what it would have been if the operation had been performed with care and skill. There was only the naked allegation that certain damages had been sustained by reason of the alleged negligence of the defendants. No facts were stated as to what Dr. King did or failed to do which caused the undescribed condition from which the alleged damages resulted. A complaint must state the facts which constitute the plaintiff's cause of action; more conclusions which do not give even a clue as to the facts which the defendant will be called upon to meet are not sufficient. A complaint against a surgeon which alleges that he operated upon the plaintiff carelessly and unskillfully, and

that as the proximate result of the negligence the plaintiff has been disabled and has lost the ability to work, does not state a cause of action. There must be a factual statement as to what the defendant did or failed to do and as to the connection between the alleged negligence and the alleged results of it in the pleading as well as in the proof. If a man should sue another, alleging that he had been rendered an invalid by the negligent firing of a gun, or the driving of an automobile, the defendant would be entitled to know whether he was charged with having struck the plaintiff or only frightened him.

[4, 5] In *Smith v. Buttner*, 1891, 90 Cal. 95, 27 P. 29, a complaint was held defective which alleged that the plaintiff fell when she was endeavoring to descend from a house to the ground, "by reason of the negligence and failure of defendant to provide safe, suitable, or proper means of exit from said house." The court said (90 Cal. at pages 99, 100, 27 P. at page 29): "It is well settled that negligence may be charged in general terms; that is, what was done being stated, it is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent. But it must appear from the facts averred that the negligence caused or contributed to the injury. To illustrate: Suppose a plaintiff injured by the falling of a sign negligently and insecurely fastened by defendant. It would not suffice for him to allege the negligence in hanging the sign; that plaintiff, in lawfully and without negligence passing under it, was thrown down and injured through such negligence. This would be a mere assertion of the cause. It would be necessary to show that the sign fell upon him in consequence of such negligence, thereby causing his injury." In *Cary v. Los Angeles R. Co.*, 1910, 157 Cal. 599, 602, 108 P. 682, 684, 27 L.R.A., N.S., 764, 21 Ann.Cas. 1329, this statement appears: "While it is permissible to charge negligence in general terms, it is nevertheless necessary to specify the particular act or acts alleged to have been negligently done [citing] *Stephenson v. Southern Pac. Co.* [1894], 102 Cal. 143, 34 P. 618, 36 P. 407; *Smith v. Buttner*, [supra]." See also *Crabbe v. Mammoth Channel G. Min. Co.*, 1914, 168 Cal. 500, 505, 143 P. 714. In *Rathbun v. White*, 1910, 157 Cal. 248, at page 254, 107 P. 309, at page 311, it was said: "It is sufficient, under the rule well settled in this state, to

charge negligence by the general averment that the defendant negligently did the *particular act* which resulted in damage to plaintiff." (Italics added.) See also *Grossetti v. Sweasey*, 1917, 176 Cal. 793, 795, 169 P. 687. In *Lang v. Lilley & Thurston Co.*, 1912, 20 Cal.App. 264, 265, 128 P. 1031, the complaint alleged that plaintiff was injured by the negligent operation of an elevator by defendant's employee, without the statement of any facts as to the manner in which it was operated. In affirming a judgment after demurrer sustained, the court said (20 Cal.App. at page 266, 128 P. at page 1031): "The ruling was justifiable for the reason that there was a failure to specify the particular act or acts of negligence which proximately caused the accident. It is not sufficient to allege that the elevator was negligently operated and thereby the injury was produced. Defendants should have been informed, by appropriate allegation, in what respect the contrivance was negligently operated, and it should have appeared that the recited facts had a causal connection with the death of plaintiff's intestate. We are left entirely to surmise whether the elevator was moved too suddenly or too rapidly or too far or without warning, or, in other words, what particular act was negligently performed. If the case were tried on the pleadings as it stands it is evident that additional facts to those alleged would have to be proved in order for plaintiff to recover." The insufficiency of the complaint before us is emphasized by comparing it with a good allegation of the particular act which caused injury found in *McGehee v. Schiffman*, 1906, 4 Cal.App. 50, 51, 53, 87 P. 290, where it was alleged that the defendant, in extracting several of plaintiff's teeth, negligently dropped one of them into plaintiff's lung. This fundamental rule of pleading has been repeatedly adhered to in the later cases. In *Dunn v. Dufficy*, 1924, 194 Cal. 383, 228 P. 1029, a malpractice case, the complaint contained specific allegations as to the acts and omissions in the surgery which resulted in the loss of use of one of plaintiff's fingers. The discussion in which the *Dunn* complaint was distinguished from the one in *Smith v. Buttner*, *supra*, clearly points out what the court considered to be the essentials of a cause of action for malpractice, with reference to the causes of the condition resulting from the surgery. These essentials are wholly lacking in the present

complaint and the trial court properly so ruled. Plaintiff cannot justly complain that he was not given an opportunity to supply them. The deficiencies of the complaint were specified and discussed fully and the argument of the defendants was complete enough to have supported a special demurrer for uncertainty. It was repeatedly pointed out that there were no allegations as to what plaintiff's condition was prior to the accident, or what the doctor did, or failed to do, in the operation, or what condition was produced by the operation.

[6] Plaintiff's attorney stated that he could amend by adding the allegations of the second cause of action to his third and fifth causes of action, so as to charge Lockheed with negligence in the employment of the doctor, but that he could make no further amendment. The court then said: "I have said I would tentatively deny a judgment on the pleadings if you wanted to amend. If you feel that you cannot amend, then I would give a judgment on the pleadings, if you cannot state a case." The court stated a willingness to give "10, 15 or 20 days, whatever time you want," for amendment, with the understanding that if no amendment were presented a ruling would then be made on the motion for judgment on the pleadings. Plaintiff's counsel then said: "I will state that I am not going to amend * * * and I will ask the court at this time to resolve the motion for judgment on the pleadings in favor of the defendants, both defendants." The reporter's transcript shows that the motions of both defendants for judgment on the pleadings were granted. The clerk's minutes show that Lockheed's motion was granted as to all causes of action and that defendant King's motion was granted as to the first, second and third causes of action, but it was denied as to the fourth and fifth with leave to amend these causes of action within ten days. In view of plaintiff's election not to amend in particulars we have pointed out, the complaint must be deemed to have stated plaintiff's case against Lockheed as strongly as the facts would justify.

[7] The further contention is made that plaintiff offered to amend, as we have already stated, and it is apparently claimed that his counsel understood that the complaint was considered as having been amended by adding the allegations of the

second cause of action to the third and fifth causes of action. It is difficult to determine this point from the record, but we are inclined to believe that the court considered the complaint as if this amendment had been made. That fact does not bear upon the grounds of our decision that no cause of action was stated. Negligence of Lockheed in the employment of Dr. King, if it had been alleged in each cause of action, would have tended in no way to supply facts with reference to the allegedly negligent surgery of Dr. King and its consequences.

The attempted appeal from the order denying plaintiff's motion for a new trial is dismissed. The judgment is affirmed.

DESMOND, P. J., and FOX, Justice pro tem., concur.



**BALLENTINE v. SUPERIOR COURT IN
AND FOR SAN MATEO COUNTY
et al.***

Civ. 12708.

District Court of Appeal, First District,
Division 2, California.

July 20, 1944.

Rehearing Granted Aug. 19, 1944.

1. Divorce ☞269(10)

Affidavit showing that defendant was in court when interlocutory divorce decree was entered requiring him to pay alimony, that amount was fixed at his suggestion, that copy of decree was shortly thereafter served upon his attorneys, that after specified date no payments had been made, and that according to affiant's best information and belief defendant was able to make such payments, showed that court had jurisdiction of contempt proceeding for failure to make such payments.

2. Divorce ☞269(10)

Where California interlocutory divorce decree and Nevada final divorce decree provided for same amount of alimony, on contempt proceedings in California for failure to make payments according to Cali-

fornia interlocutory decree, in which no attack was made on either decree and only questions raised before court were whether payments had been made as directed, no question of res judicata was involved.

3. Divorce ☞171, 269(2)

Where after entry of California interlocutory divorce decree providing for alimony a final divorce decree between the same parties was entered in Nevada providing for same amount of alimony, there was no merger of the California interlocutory decree as respects jurisdiction of California court of contempt proceedings against former husband for failure to make alimony payments as provided in such court's decree. Civ.Code, § 137.

4. Judgment ☞884

When a judgment is rendered upon the judgment of a court of another state, a payment of either judgment discharges the obligation of the other judgment.

5. Divorce ☞269(9)

That after defendant and cross-complainant wife procured California interlocutory divorce decree she appeared in same capacity in subsequent proceedings instituted by her husband in Nevada and procured a final divorce decree awarding her the same amount of alimony as provided in California interlocutory divorce decree did not bar former wife from enforcing by contempt proceedings the California interlocutory divorce decree for payment of alimony. Civ.Code, § 137.

6. Divorce ☞286

In contempt proceeding for failure to make alimony payments as provided in interlocutory divorce decree, any error in excluding defendant's affidavit was cured by subsequently admitting it in evidence.

Original application by Edward W. Ballentine for a writ of prohibition to restrain the Superior Court of the State of California in and for the County of San Mateo and Honorable A. R. Cotton, judge thereof, from enforcing an order of contempt against the petitioner, and for a writ of mandamus ordering the respondent court to dismiss a divorce action pending before it.

Application denied.

Max H. Margolis and Paul A. McCarthy, both of San Francisco, for petitioner.

* Subsequent opinion 152 P.2d 515.

Joseph J. Bullock, of Redwood City, and Sterling Carr, of San Francisco, for respondents.

STURTEVANT, Justice.

This is an application for a writ of prohibition to restrain the respondent court from enforcing an order of contempt against the petitioner and for a writ of mandamus ordering the respondent court to dismiss a divorce action pending before said court. Heretofore the trial court granted a decree of divorce to Mary T. Ballentine, the petitioner's wife, and entered an interlocutory decree. In that decree, among other things, it was provided that the petitioner, the plaintiff and cross-defendant in the divorce action, should pay to Mary T. Ballentine, the defendant and cross-complainant, \$150 per month. Such payments were made to and including the 1st day of November, 1943. However, on the 11th day of March, 1944, she filed an affidavit and asked for orders that the plaintiff and cross-defendant appear and show cause why he should not be punished for contempt for having failed to make any additional payments. At this time the petitioner contends said affidavit was insufficient to show that the trial court had jurisdiction to make said order. *Phillips v. Superior Court*, 22 Cal.2d 256, 137 P.2d 838. However, the affidavit recited as follows: "* * * but has not made said payments or any of them since said November 1st, 1943; although in possession of sufficient funds so to do according to the best of the information and belief of affiant; that said plaintiff and cross-defendant was in court at the time of the making of said provisions of said decree, and that the amount of said payments so as aforesaid ordered to be made was fixed at the suggestion of said plaintiff and cross-defendant; that in addition thereto, a copy of said interlocutory decree was shortly after the 10th day of September, 1943 served upon Messrs. Max H. Margolis and Paul A. McCarthy, the attorneys for plaintiff and cross-defendant;

"That to the best of the information and belief of affiant, plaintiff and cross-defendant has been able at all of said times to comply with said order; that said plaintiff and cross-defendant has been employed for the greater portion of said time from November 1, 1943 to the date hereof, and that the failure of said plaintiff and cross-defendant to comply with said decree as

hereinabove set forth has been wilful and without just cause; * * *." We think said recitals are such that the petitioner's contention may not be sustained.

[1] On the 10th day of September, 1943, the Superior Court of the State of California in and for the County of San Mateo entered an interlocutory decree of divorce in favor of Mary T. Ballentine, defendant and cross-complainant, against Edward W. Ballentine, plaintiff and cross-defendant. Thereafter Edward W. Ballentine, as plaintiff, commenced an action against Mary T. Ballentine to recover a judgment of divorce. That action was commenced in the District Court of the State of Nevada in and for Washoe County. The defendant Mary T. Ballentine appeared therein, filed an answer and cross-complaint, and pleaded in haec verba the interlocutory decree so rendered by the said Superior Court in and for San Mateo County. On the 18th day of September, 1943 the District Court of the State of Nevada in and for the County of Washoe entered a final decree in favor of Mary T. Ballentine as defendant and cross-complainant against Edward W. Ballentine as plaintiff and cross-defendant. The decrees were substantially the same on the subject of maintenance. Because the former decree was interlocutory and the latter was a final decree Edward W. Ballentine now contends the Superior Court at San Mateo lost jurisdiction. That is he contends as follows: "Where merely an interlocutory decree of divorce is rendered in California and thereafter, and before a final decree of divorce can be entered in California, the other spouse becomes a bona fide resident of the State of Nevada and there files an action for absolute divorce, in which action the defendant files an answer denying, among other things, that the plaintiff in the latter cause of action is or has been a resident of Nevada where the action is filed, and also files a cross-complaint wherein she seeks affirmative relief including a decree of divorce and alimony, and thereupon, upon a trial such defendant and cross-complainant is awarded a decree of absolute and final divorce on her cross-complaint with provisions for alimony and other relief, and such a decree is rendered, filed and entered prior to any final decree of divorce in California where the first action was commenced, the decree in the State of Nevada is *res judicata* on all issues in the original action in California, and the Cali-

fornia courts and the wife in whose favor a decree was rendered in the State of Nevada are bound by the finality of the Nevada decree. No further proceedings on the California interlocutory decree can be maintained by reason of the final determination of the marital status by the Nevada court; that decree supersedes the interlocutory decree in California and prevents any further proceedings on the interlocutory decree in California, and necessitates a dismissal of the California action because of the prior dissolution of the marriage by the Nevada court pursuant to the cross-complaint of the wife and the decree in her favor in that action in Nevada."

[2] Before we proceed to discuss authorities the exact nature of the contentions of the parties should be carefully noted. In the action commenced in San Mateo County, Mrs. Ballentine was the defendant and she filed an answer and cross-complaint. Later she was awarded a decree on her cross-complaint and was awarded maintenance in the sum of \$150 per month, the custody of two minor children and maintenance for them in the sum of \$50 per month. The uncontroverted evidence is that after November 1, 1943 no payment was made and, relying on the provisions in the interlocutory decree, Mrs. Ballentine, on the 11th day of March, 1944, filed an affidavit and took out an order to show cause why the plaintiff should not be punished for contempt. In response to that order to show cause Mr. Ballentine appeared and through his counsel moved to quash proceedings on the order to show cause and to dismiss said action. In support of said motion he filed certain affidavits. The hearing of the motion occurred on April 24, 1944. At that time Mr. Ballentine produced the decree of divorce entered in the Second Judicial District Court of the State of Nevada in and for the County of Washoe in an action entitled Edward W. Ballentine v. Mary T. Ballentine. No attack was made on either judgment and no claim was made that either court did not have jurisdiction to render the decree which it rendered. Nor was the Nevada decree pleaded by either party. *Mound Water Co. v. Southern Cal. Edison Co.*, 184 Cal. 602, 611, 194 P. 1014. As to the amount of each installment of maintenance money and the time for the payment thereof the terms of the two decrees were identical. The sole questions before the court were what payments had been made and why had others not been

made as directed by the terms of the interlocutory decree of the trial court. Neither decree contained any adjudication on either of those questions and no question of *res judicata* was involved. 34 C.J. 746.

It follows that the record presents no facts warranting the application of the doctrine of *res judicata*.

[3] Mr. Ballentine also contends that under the facts hereinabove set forth the Nevada decree superseded the California decree and that the California action should be dismissed. Although he does not use the identical word, the purport of the point is that the California decree was merged in the Nevada decree. That position is not supported by the facts. There was no merger. *Lilly-Brackett Co. v. Sonnemann*, 163 Cal. 632, 126 P. 483, 42 L.R.A.,N.S., 360, Ann.Cas.1914A, 364. *Moore v. Justices of Municipal Court of City of Boston*, 291 Mass. 504, 197 N.E. 487, was an application for a writ of prohibition. It involved the following facts. On June 20, 1932 the Merrimac Chemical Company recovered a judgment in the state of Massachusetts. It took out a writ of execution which was still outstanding. In December, 1933 it brought an action in the Superior Court of Maine upon its judgment. Moore entered a general appearance and on May 12, 1934 a personal judgment was rendered against him. On May 28, 1934 the Merrimac Chemical Company instituted supplementary process proceedings against the petitioner in the Municipal Court of the City of Boston. Such proceedings were based upon the original judgment recovered in the commonwealth of Massachusetts. On appeal the question was whether that judgment was merged in the judgment rendered by the Superior Court of Maine in 1934. The court made an exhaustive study of the subject. On page 488 of 197 N.E. the court said: "The underlying principle on which the doctrine of merger rests is that a judgment is an obligation of higher quality than the original cause of action as to defenses, permanence and remedies for collection. The public welfare and the interests of parties require that there be not a repetition of trials of the same issues. The reasoning on which the doctrine of merger rests is not applicable where an action on a judgment rendered in one state is brought in another state and a second judgment there recovered. No obligation of stronger attributes is thus created. Commonly, there is no difference in the quality at-

taching to the judgments of courts of different states. They stand on the same footing in essential particulars. One has no superiority over the other; one is of as high a nature as another. The great weight of authority supports this view. *Griswold v. Hill*, Fed.Cas.No.5,836, 2 Paine 492; *Wells v. Schuster-Hax National Bank*, 23 Colo. 534, 48 P. 809; *Lilly-Brackett Co. v. Sonnemann*, 163 Cal. 632, 126 P. 483, 42 L.R.A.,N.S., 360, Ann.Cas. 1914A, 364; *Bates v. Lyons*, 7 Paige, N.Y., 85; *In re Williams*, 208 N.Y. 32, 36, 101 N.E. 853, 46 L.R.A.,N.S., 719; *Weeks v. Pearson*, 5 N.H. 324; *Springs v. Pharr*, 131 N.C. 191, 193, 42 S.E. 590, 92 Am.St.Rep. 775; *Van Winkle v. Owen*, 54 N.J.Eq. [253], 9 Dick. 253, 258, 259, 34 A. 400. See cases collected in 44 A.L.R. 462-464. To the same effect, see Am. Law Inst. Restatement, Conflict of Laws, § 450f, Merger, note 5; Story on Conflict of Laws (8th Ed.) § 599, note (a); 2 Beale on Conflict of Laws, p. 1427. See to the contrary *Gould v. Hayden*, 63 Ind. 443." It follows that the California decree was not merged in the Nevada decree.

[4] Continuing he contends that unless the interlocutory decree in the California case becomes a nullity by the entry of a final decree in the state of Nevada, the cross-complainant in the case would, when the times arrives, seek to have a final decree in accordance with the terms of the interlocutory decree and the cross-defendant would thereupon be subject to double liability by the decree in California awarding alimony in addition to and independent of the judgment of the Nevada court for alimony in favor of the cross-complainant. Be that as it may, the cross-complainant will not be injured. It is settled law that "When judgment is rendered upon the judgment of a court of another state, a payment of either judgment discharges the obligation of the other judgment." Restatement of the Law, Conflict of Laws, sec. 442.

[5] We are therefore of the opinion that the California decree and the Nevada decree "* * * stand on the same footing in essential particulars. One has no superiority over the other. One is of as high a nature as the other." That the trial court had jurisdiction to entertain contempt proceedings is statutory. (C.C. sec. 137.) Nothing that the defendant and cross-complainant did has deprived her of the right to maintain this proceeding.

In re Williams, 208 N.Y. 32, 101 N.E. 853, 46 L.R.A.,N.S., 719; *Lindsay Great Falls Co. v. McKinney Motor Co.*, 79 Mont. 136, 255 P. 25, 28; *Bruton v. Tearle*, 7 Cal.2d 48, 59 P.2d 953, 106 A.L.R. 580.

[6] On March 11, 1944, Mary T. Ballentine served and filed her affidavit and an order to show cause. On March 23, 1944, Edward W. Ballentine executed an affidavit in reply. Thereafter in open court his attorney tendered said affidavit in defense of said order to show cause. An objection was made and the objection was sustained. However at a subsequent session of the court the objection was withdrawn and said affidavit was received and the trial court read it. This petitioner assigns the first ruling of the trial court as error. However the record as quoted shows the error, if any, was not prejudicial to the said affiant Edward W. Ballentine.

The application for a writ of prohibition is denied and the application for a writ of mandamus is denied.

NOURSE, P. J., and SPENCE, J., concur.



MILLER v. MILLER.*
Civ. No. 12628.

District Court of Appeal, First District,
Division 2, California.
July 12, 1944.

Rehearing Denied Aug. 11, 1944.

Hearing Granted Aug. 30, 1944.

1. Divorce ☞ 165(5½)

Where on his ex parte application for a final divorce decree the defendant presented a false affidavit that all requirements in interlocutory decree had been complied with, such act was a fraud on the court and was properly heard as on a motion to vacate final decree made within six months from date of its entry.

2. Army and navy ☞ 34

The trial court may refuse to grant continuances under Soldiers' Relief Act when defendant will not be injured. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A.Appendix, § 521.

* Subsequent opinion 156 P.2d 931.

3. Army and navy $\S$ 34

Where issue on wife's application to vacate final divorce decree on ground that husband's affidavit in support of his ex parte application for final decree was false was whether husband had paid for medical services rendered to minor daughter as required by interlocutory decree, and it did not appear that husband was a witness on such issue and all the witnesses who could testify thereon were present and no one except the wife was called, overruling husband's application for a continuance under Soldiers' Relief Act was not prejudicial. Soldiers' and Sailors' Civil Relief Act of 1940, $\S$ 201, 50 U.S.C.A. Appendix, $\S$ 521.

4. Divorce $\S$ 165(5)

Where wife served notice on husband that she would make a motion to set aside final divorce decree which had been granted upon husband's ex parte application, and her affidavit attached thereto set forth the acts of fraud on which she relied, trial court was warranted in hearing wife's motion, notwithstanding that the notice did not state the grounds of her motion.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Marion M. Miller against Loren F. Miller for divorce. From adverse orders, the defendant appeals.

Affirmed.

Campbell, Hayes & Custer and Robert E. Hayes, all of San Jose, for appellant.

Francis N. Foley and J. A. Branson, both of San Mateo, for respondent.

STURTEVANT, Justice.

The defendant appeals from four different orders made by the trial court in an action brought by the plaintiff to obtain a divorce. On May 1, 1941, the plaintiff commenced the action. In her complaint she alleged cruelty and asked for the custody of their minor child, a division of the community property, and an award of maintenance in favor of herself and the minor child. The defendant answered denying the allegations as to the community property, the acts of cruelty, and the allegations regarding maintenance. The action was tried before the trial court sitting without a jury. On December 8, 1941, the trial court entered an interlocutory decree in favor of the plaintiff. In that decree it was

ordered that the custody of the minor child, Janet Elizabeth Miller, be awarded to the plaintiff. It enumerated the items of community property and provided a division thereof, and it further provided:

"4.—That defendant pay to plaintiff for her support and maintenance, the sum of \$40.00 per month, and defendant pay to plaintiff for the support and maintenance of said minor Janet Elizabeth Miller, the sum of \$20.00 per month and in addition pay for all reasonable and necessary medical and dental care and treatment of said minor, said payments to continue until modified, changed or terminated by order of Court."

Said decree did not specifically provide the dates on which payments of maintenance should be made. On January 18, 1943, on motion of the defendant, the trial court entered a final judgment. Said motion was supported by an affidavit made by the defendant on the 8th day of January, 1943, which alleged among other things the making of the interlocutory decree and a recital, "All the requirements therein have been fully complied with on the part of the moving party herein and he is not in default in any thereof". Later the plaintiff served a notice that on the 21st day of June, 1943, she would move the court for an order setting aside the final decree. That notice was supported by an affidavit of the plaintiff in which she alleged that on January 18, 1943, the defendant "was in default in the sum of \$30 for maintenance and support of plaintiff as prescribed by said interlocutory decree and that at said time there was outstanding and unpaid bills for medical care and treatment of the said minor child of plaintiff and defendant in the sum of \$1,298.06. That at said time the said defendant Loren F. Miller was fully aware of the nature and amount of said outstanding bills for medical care and treatment for said minor child and was fully aware of the fact that he was at that time in arrears in the sum of \$30 as and for maintenance and support of the plaintiff in accordance with the terms of the aforementioned interlocutory decree of divorce made and entered by the above entitled court on the 8th day of December, 1941, and that said final decree was procured by and through the fraud of the defendant, Loren F. Miller."

The defendant's mother, Emma E. Miller, on the 19th day of June, 1943, filed a

verified petition in behalf of the defendant in which she alleged:

"That said defendant is now in the military service of the United States; that he was inducted into such service on or about the 2nd day of November, 1942, and reported for active duty therein on or about the 17th day of November, 1942. That he so entered such service as a private in the United States Army Engineers, that he was thereafter transferred to Officers' Candidate School and is now a 2nd Lieutenant, 295 Engr. Combat Bn., stationed at Camp Shelby, Mississippi." Continuing she inserted a prayer "that all further proceedings herein be stayed as provided in the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, 50 U.S.C.A. Appendix, § 501 et seq."

On the 21st day of June, 1943, Harvey C. Miller prepared, served, and filed an affidavit reciting the induction of the defendant into the army as above set forth and inserted a prayer that the hearing of plaintiff's said motion be continued for three weeks.

On June 21, 1943, all of said motions came on for hearing. The trial court made an order denying the petition of Emma E. Miller. It also made an order denying the motion for a continuance of three weeks. Continuing the trial court took up the hearing of the motion to set aside the final decree and made an order granting said motion.

On July 16, 1943, defendant filed his notice of appeal from each and all of said orders. On July 30, 1943, the trial court heard and granted the application of plaintiff for \$50 to pay costs and \$350 counsel fees on appeal. The defendant appealed from that order on August 13, 1943. At this time the appeal has been perfected. Stating that the matter has become moot, the plaintiff abandons all rights under the order dated July 30, 1943 and it becomes unnecessary for us to further discuss said order.

[1] In his first point the defendant contends that the trial court erred in vacating the final decree because there was no substantial evidence of fraud. We find no merit in that contention. In the interlocutory decree the trial court had made orders directing defendant to make certain payments as and for the maintenance of the plaintiff and the minor daughter of the parties and for the payment of the expenses of medical and dental bills of said minor.

The evidence showed there was a balance of \$30 remaining unpaid on the maintenance order and that although the minor had been sick a considerable portion of the time elapsing between the date of the interlocutory decree and the final decree, and many bills had been incurred for medical expenses, the same had not been paid. There was evidence that the bills came to the plaintiff and that she sent them to the defendant, but the defendant had not paid any of them. Nevertheless on January 8, 1942, the defendant made an affidavit that all the requirements in the interlocutory decree had been complied with. Under the facts that part of said affidavit was false and constituted fraud. When on his ex parte application for a final decree the defendant presented said affidavit to the court, such act was a fraud on the court (*Dunlap v. Steere*, 92 Cal. 344, 346, 28 P. 563, 16 L.R.A. 361, 27 Am.St.Rep. 143) and was properly heard as on a motion made within six months from the date of the final decree. In *re Johnson*, 7 Cal.App. 436, 94 P. 592; *Estate of Ross*, 140 Cal. 282, 286, 73 P. 976; *Melde v. Reynolds*, 129 Cal. 308, 311, 61 P. 932; *Campbell-Kawan-nakos v. Campbell*, 152 Cal. 201, 208-211, 92 P. 184.

Mrs. Miller testified that \$30 of the maintenance had not been paid January 18, 1943. The defendant asserts that by the terms of the interlocutory decree the maintenance was not payable in advance. But the defendant did not show that the \$30 had been paid June 21, 1943, the date of the order appealed from. Mrs. Miller testified bills for medical and dental service incurred between the date of the interlocutory decree and January 18, 1943, the date of the final decree, had been received and forwarded to the defendant. But he made no showing that they were paid in whole or in part.

The defendant complains there was no evidence that the charges for services and care were the necessary and reasonable value for the amounts stated in said bills. But that is to present a false issue. The action was not brought to recover on the claims of the doctors and hospitals. It was a proceeding involving the truth or falsity of the affidavit made by defendant on January 8, 1943. Manifestly it may not be asserted that all bills for all services rendered in the treatment and care of a case of pneumonia and spells of asthma were not reasonable at least in part.

[2] The notice of appeal dated July 13, 1943, as recited above included several orders. By the order dated June 1, and the order dated June 21, 1943, the trial court refused defendant's application to grant him continuances. He complains that he was deprived of rights under "Soldiers' and Sailors' Civil Relief Act", U.S.C.A. Tit. 50, Appendix, § 521. When an application is made for relief under said statute it has been ruled that considering all of the circumstances before it the trial court does not err in refusing to grant continuances when the defendant will not be injured. *Johnson v. Johnson*, 59 Cal. App.2d 375, 139 P.2d 33. That rule is specially applicable in the instant case. Mrs. Miller was present in court. Dr. Cohen, Dr. Saier, Dr. Clark, Dr. Eloesser, and also the manager of St. Luke's Hospital and the manager of Palo Alto Hospital were all available as witnesses. They were the only witnesses who presumptively had any knowledge of the bills incurred in the matter of caring for the infant daughter of the plaintiff and defendant. Excepting Mrs. Miller, no one of them was called as a witness.

[3] The issue before the trial court was whether the defendant had knowingly presented a false affidavit in applying for the final decree. As the trial court remarked, if the affidavit was false to the amount of one dollar that was a sufficient showing to set the final decree aside. We need not discuss whether the bills amounted to upwards of \$1,200. Included in that sum was the claim of Dr. Cohen for \$83, which, according to the testimony of Mrs. Miller, existed at the time the divorce action was tried, was then discussed, and the payment was imposed on the defendant. The claim of the clinic was for \$100. The child was ill during the year. Just how long she was confined in the clinic is a fact not shown in the record. However, Mrs. Miller testified that she sent all bills to the defendant. The issue before the court was whether the defendant had complied with all re-

150 P.2d—17½

quirements of the interlocutory decree. That is whether he had paid the maintenance awarded to the plaintiff and "all reasonable and necessary medical and dental care and treatment" of Janet Elizabeth Miller. That Janet was sick of asthma and pneumonia during the year preceding the entry of the final decree is not disputed. That she had the services of several doctors is also not disputed. Whether the creditors had been paid was the specific issue before the court. As witnesses on that issue the defendant was not shown to be one, but the persons above mentioned were all available and qualified. It is therefore clear that the defendant was not prejudiced by the fact that the issue was tried in his absence. No claim was made that part payments had been made. The claim at issue was solely whether obligations had been incurred which had not been met.

[4] As we understand the defendant he contends that the affidavit of Mrs. Miller was insufficient to support the order. We think not. She served a notice that on the 21st day of June, 1943, she would make a motion to set aside the final decree. True it is that she did not in that notice state the grounds of her motion. However she did state, "Said motion will be made upon this notice of motion, the affidavit of Marion M. Miller which is attached hereto, and all the records, files and pleadings in the above entitled matter." In her affidavit so attached she set forth the acts of fraud on which she relied. Those papers warranted the trial court in hearing said motion. 18 Cal.Jur. 654; *Reher v. Reed*, 166 Cal. 525, 527, 137 P. 263, Ann.Cas.1915C, 737; *Savage v. Smith*, 170 Cal. 472, 474, 150 P. 353; *Hecq v. Conner*, 203 Cal. 504, 506, 265 P. 180.

The orders dated June 1, June 21 and June 28, 1943, and appealed from on July 13, 1943, are affirmed.

NOURSE, P. J., and SPENCE, J., concur.

GASTINE et al. v. EWING et al.
Civ. 3342.

District Court of Appeal, Fourth District,
California.

July 10, 1944.

Rehearing Denied Aug. 8, 1944.

Hearing Denied Sept. 5, 1944.

1. Damages ⇨222

In personal injury action, finding that injuries would permanently disable plaintiff and permanently cause her pain and suffering and disability and that thereby plaintiff had been damaged in the additional sum of \$10,000, exclusive of pecuniary damages, was not a finding that plaintiff was permanently and physically disabled from further participating in her work, and from carrying on her work, business, and profession in any manner.

2. Appeal and error ⇨891

Where recitation in court's finding that by reason of injuries plaintiff would be depreciated in her future earning capacity, and for depreciated future earnings court allowed \$5,000, indicated that trial court realized that plaintiff might be able to pursue to limited extent her usual vocation, and fair interpretation of allegations of affidavits was not opposed to such instruction, and it could not be said that if additional evidence recited in affidavits were introduced, it would result in reversal of judgment rendered, District Court of Appeal would not take additional testimony. Code Civ. Proc. § 956a.

3. Negligence ⇨32(2)

Where defendant acting through booking agents invited plaintiff to appear and demonstrate her act, plaintiff was a business "invitee" and defendants owed her all duties attendant thereon.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee".

4. Negligence ⇨32(2)

One who enters premises of another upon the latter's invitation, express or implied, for purpose of applying for work, is an "invitee".

5. Negligence ⇨32(3)

The invitation of a proprietor extends not only to all parts of premises which patron is expressly invited to use, but also to such parts as he or she is impliedly

invited to enter, and invitation also extends to those portions of premises where invitee, under circumstances and conditions of his invitation, would naturally be likely to go.

6. Appeal and error ⇨1008(1)

Where professional dancer and entertainer had been invited to defendants' cafe and night club to demonstrate her act, question whether she was a trespasser or an invitee as to portion of premises upon which she received her injuries where she went to test floor of stage which had been lowered without her knowledge was question of fact for trial court, whose finding was conclusive.

7. Trial ⇨375

Where trial judge visited premises where injuries occurred and viewed scene of accident, and observed the method of operation of inner stage and the various lighting conditions as explained by witnesses, this in itself was evidence in the case.

8. Negligence ⇨134(3)

In action for injuries to professional dancer and entertainer who was invited to defendants' premises to demonstrate her act, and who fell when she attempted to test floor, not knowing stage had been lowered by previous performers and believing that stage was stationary, evidence supporting finding of negligence on part of defendants.

9. Negligence ⇨52

Plaintiff's booking agent's uncommunicated knowledge of nature of elevator stage could not affect right of recovery of plaintiff who fell into stage elevator shaft after stage floor had been lowered.

10. Negligence ⇨136(26)

Whether plaintiff, who went at defendants' request to defendants' premises to demonstrate dancing and entertaining act and fell when attempting to test floor of stage because stage had been lowered without her knowledge, acted as a reasonable and prudent person, or was guilty of contributory negligence, was question of fact.

11. Damages ⇨43

Injured person was entitled to recover from tortfeasor reasonable value of services rendered by physician whose certificate to practice medicine had not been reg-

istered in county where services were rendered at time of such services. St.1937, p. 1272, § 2340.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by Edith Gastine and husband against John Sidney Ewing and another for personal injuries. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Dempster McKee and Monroe & McInnis, all of San Diego, for appellants.

Edgar B. Hervey, of San Diego, and Henry F. Walker, of Los Angeles, for respondents.

GRIFFIN, Justice.

This is an appeal from a judgment against defendants for damages for personal injuries received by plaintiff wife when she fell into a stage elevator shaft upon the premises of a cafe and night club owned and operated by defendants. Her presence there resulted from an invitation to appear and demonstrate an act looking toward prospective employment by defendants. Trial was had before the court sitting without a jury.

In the center of the building here involved there was a circular elevator stage about 14 feet in diameter which was raised and lowered by electrical machinery. It had a height of 54 inches above the floor. Surrounding it and at the same height, there was a platform in which stage lights of various colors were located. Encircling this platform was a circular bar and surrounding this bar were stools. The stage was not used for public dancing but only by professional entertainers who entered through a door in the basement. When the stage was lowered into the elevator pit it was 14 feet below its extreme height. The elevator pit was circular in form and completely enclosed except for the basement door. The floor of the stage was of hard maple, unpainted, and had two narrow strips of darker wood running across it. The interior of the pit was of rose color. The stage was lowered and raised by means of three buttons on the southerly portion of its floor. By pressing one button it could be raised, and by pressing another button it could be stopped. It could also be raised, but not lowered, by an auxiliary button which was located on the back bar. The cafe was lighted by

means of a large ornate chandelier over the approximate center of the stage and by side lights in brackets on the walls surrounding the stage and on the balcony.

The plaintiff Edith Gastine, to whom we will refer as the plaintiff, at the time of the accident was, and for many years had been, a professional dancer and entertainer. For some considerable time she had employed a certain theatrical booking agency, and particularly Evelyn Lening of that agency, to book her professional engagements. Through her agent plaintiff had been notified to be at defendants' cafe on the date of the accident at three o'clock in the afternoon for a rehearsal. The arrangement was that various acts of entertainment were sent down by the agency to rehearse for the approval or disapproval of the defendants. Plaintiff had signed the usual contract in the office of her agent but it had not been signed by the defendants. She was to be engaged only if her act met with their approval.

On the afternoon in question, the cafe was not open for business. When plaintiff arrived in San Diego she entered the cafe through the service entrance on the northeast corner and came around the end of the bar which was located to the south of the hallway leading from this entrance. This was her first visit to the cafe. She was met by defendants' manager who introduced himself and inquired if she was one of the new acts. She replied that she was. He laid her costumes on a table in the hall and told her she would be given a dressing room after the rehearsal. She then went into the main cafe room to rehearse with the orchestra. She saw her booking agent and defendants sitting at the bar and she spoke to her agent. The agent did not introduce plaintiff to the defendants. At that particular time defendants and the booking agent were watching the rehearsal on the stage of another act which had been booked by this agent. The plaintiff, upon her entry, saw this act being rehearsed. Nothing was said to her about the character of the stage or its operation. She proceeded to sort her music after which she noticed that the previous act was not on the stage although the orchestra was still playing.

The only means of entrance to the stage, except for the door in the basement, consisted of four steps which went up to the height of the bar with a ramp five feet long and eighteen inches wide extending

across the edge of the platform. One end of this ramp was on the bar and the other on the platform. Plaintiff was desirous of ascertaining whether the stage floor was slippery and if her shoes were appropriate. She took a pair of shoes from the several pairs she had brought with her. She testified that she was unable to see the surface of the stage from the cafe floor; that she observed that no one was on the stage at the time; that it appeared to her that the performer had finished his act and that she took it for granted that he had come down the ramp and steps although she did not see him; that she thought the stage was stationary; that the lighting in the cafe was "dim"; that the footlights threw their lights upward to reflect upon the performer; that she walked up the steps, crossed the back bar on the ramp, to test the floor; that the floor looked like some black composition; that she walked straight forward and stepped into the elevator pit and was seriously injured. The stage had been lowered by the performer who had been rehearsing. These facts are not in dispute. The defendants and their witnesses testified that the main lights and the surrounding bracket lights were fully turned on. The trial court found that the premises were "poorly lighted". Plaintiffs' agent testified that she was aware of and had told plaintiff the nature of the stage.

It is contended by defendants that regardless of whether plaintiff did or did not have actual knowledge, the knowledge which the agent had was imputed to her as a matter of law and that the evidence is without contradiction that the agent had full knowledge of the premises, their condition, and the operation of the elevator stage. The negligence charged, and which was found by the court, was that the defendants negligently caused the stage to be lowered to the basement level; that they negligently maintained the premises in a poorly lighted condition and that they failed to warn plaintiff of the danger.

Under the facts related defendants argue, (1) that they were not guilty of any negligence; (2) that plaintiff was guilty of contributory negligence as a matter of law; and (3) that the doctor bill of one Dr. West was improperly allowed as an item of damage.

Since the briefs were filed in the present action on appeal, defendants duly moved this court for permission "to produce addi-

tional evidence" relative to the present physical condition of plaintiff, which evidence they claim relates to her ability to carry on her business as a professional dancer. We will therefore first dispose of this motion before proceeding with the merits of the appeal.

The affidavit of defendant Agnes Mae Ewing recites generally that the cause was tried in March, 1943; that at the trial opinion evidence was introduced to the effect that in all probability the plaintiff would be unable to thereafter engage in her business and profession as a professional theatrical dancer; that she later heard, since the rendition of the judgment, that plaintiff was again dancing professionally. A further supporting affidavit was filed by one Joseph Faber, reciting that he is the manager of the Biltmore Bowl in Los Angeles; that plaintiff, under her professional name, Edith Davis, was "employed and presented her dancing act at said Biltmore Bowl from July 1, 1943, until August 4, 1943"; that she presented a "finished, competent and pleasing performance"; that "she made her regular appearances daily on the program; that the act given by her was in all respects a high-class theatrical performance and that there was nothing whatever about her performance to indicate disability or any interference with her dancing performance". The affidavit, as originally prepared, contained a further clause, i. e.: "Affiant states that several years previous the said Edith Davis had performed at the Biltmore Bowl, that he was familiar with the performance that she then presented and that her performance in 1943 was fully the equal of her prior performance." This latter portion was apparently stricken by the affiant before the affidavit was verified.

In reply to defendants' affidavits plaintiff recites in her affidavit that prior to February 18, 1942, the date of her injury, she was a professional dancer and was able to and did accept engagements and give dancing performances in the better class theaters and places of entertainment; that she was able to give, and on occasion had given, as high as nine performances in one day; that she was able to and did accept and perform engagements extending over periods of a week, a month, or more, and which called for the giving of at least two or three performances per day; that among the routines performed

by her were strenuous and intricate dances involving acrobatics; that since February 18, 1942, affiant has been and still is unable to engage in professional dancing in the manner and to the extent which she theretofore had engaged; that the vast majority of places of entertainment presenting professional dancers, including the Biltmore Bowl, present two or more performances a day; that very few places of entertainment present but one performance a day; that the compensation paid to entertainers for, and in places giving, more than one performance per day is proportionately greater than the compensation paid to entertainers for, and in places giving, but one performance per day; that the demand for entertainers giving but one dancing performance per day is less than the demand for entertainers giving two or more performances per day; that since the conclusion of the trial, affiant has been and remains unable to give more than one performance in any one day; that on one occasion affiant accepted and presented a dancing act at the Biltmore Rendezvous (not the Biltmore Bowl); that she was engaged by Mr. Joseph Faber and that the engagement was for a period of four weeks; that it called for, and affiant presented, but one performance per day; that at the conclusion of said engagement and by reason of her physical condition, affiant was forced to rest and to desist from giving any dancing performances for a period thereafter; that the engagement at the Biltmore Rendezvous was the only engagement accepted by her under which she has given any performances extending over a period of time since the conclusion of the trial; that she has only accepted "casual" engagements; that she has been and remains unable to perform many of the dancing routines theretofore performed by her; that she is unable to perform acrobatics and has been forced to omit them from her routines; that she is now able to do only more simple and less strenuous types of dancing; and that the performance of these simpler and less strenuous types of dancing result in acute discomfort and pain to her back but that they are gradually decreasing in acuteness and severity; that affiant's total compensation for engagements which she is now able to accept is much less than the total compensation she could obtain were she able to present more than one performance a day, and that defendants' allegation that she "has largely, if not entirely recovered

from the effects of the injuries received by her" is untrue.

[1,2] It is upon this showing that defendants seek permission of this court to take additional testimony under section 956a of the Code of Civil Procedure.

We will first analyze the written findings of the trial court bearing upon this subject. It found special pecuniary damages by way of doctor bills, medical supplies, hospital care, etc., in the sum of \$1,453.14. In another item it found that by reason of defendants' negligence plaintiff suffered a fracture of the right wrist, severely injured and fractured the sacrum; that there was a compression fracture of the second dorsal vertebrae, and injuries to her ribs; that her injuries were of such a character as to be and remain "permanent"; and that said injuries "will permanently disable said plaintiff and permanently cause her pain, suffering and disability"; that thereby plaintiff has been damaged in the additional sum of \$10,000, exclusive of pecuniary damages, therefrom. It then found, as another item of damage, that for a long time and immediately prior to the receipt of said injuries, said plaintiff was regularly employed as a dancer and entertainer and in receipt of \$50 per week for her services as such; that by reason of said injuries suffered, plaintiff "has and will be forever unable to resume the said occupation and will by reason of said injuries be depreciated in her future earning capacity", to plaintiff's additional damage, of a pecuniary nature, in the sum of \$5,000.

In this application defendants do not question or offer evidence contesting the allowance of \$1453.14 for medical expenses, etc. Their argument is, as we construe it, that the court found plaintiff was permanently and physically disabled from further participating in such work at all and from carrying on her business and profession in any manner. We do not so construe the finding. \$10,000 was allowed for her "pain, suffering, and disability" there set forth, which the court found would permanently disable her. The damage for this pain and suffering was in addition to and exclusive of any pecuniary damage by virtue of her loss of earning power. As a part of the additional pecuniary damage suffered, the court found that she had been "regularly employed as a dancer and entertainer", making \$50 per week, but that since the receipt of her injuries she "has been and will be forever unable to resume

the said occupation and will, by reason of said injuries be depreciated in her future earning capacity". For her depreciated future earnings it allowed \$5,000.

From this recitation it seems clear that the trial court realized that plaintiff might be able to pursue, to a limited extent, her usual vocation, but made allowance for the fact that she might not thereby be able to resume regular employment in the manner she had previously enjoyed. A fair interpretation of the allegations of the several affidavits is not opposed to this construction. At least it cannot be said, under the facts related, that if the additional evidence recited in the affidavit were introduced, it would result in a reversal of the judgment rendered. Under the construction given section 956a of the Code of Civil Procedure in recent cases and the limitation of the power of appellate courts to hear and determine such issues, we do not feel justified in granting the relief sought. The motion is therefore denied. *Tupman v. Haberkern*, 208 Cal. 256, 280 P. 970; *Clough v. Allen*, 115 Cal.App. 330, 1 P.2d 545; *Monson v. Fischer*, 107 Cal.App. 55, 289 P. 899; *First National Bank v. Terry*, 103 Cal.App. 501, 285 P. 336; *Murphy v. Sheftel*, 119 Cal.App. 467, 6 P.2d 549; *Estrin v. Fromsky*, 53 Cal.App.2d 253, 127 P.2d 603; *Harbour v. Harbour*, 48 Cal. App.2d 97, 119 P.2d 394; *Replogle v. Ray*, 48 Cal.App.2d 291, 310, 119 P.2d 980; *Bertrand v. Pacific Elec. Ry. Co.*, 46 Cal. App.2d 7, 115 P.2d 228; *Isenberg v. Sherman*, 212 Cal. 454, 298 P. 1004; 299 P. 528; *Davis v. Chipman*, 210 Cal. 609, 293 P. 40; *Kleinsasser v. McNamara*, 127 Cal.App. 258, 15 P.2d 788.

[3-6] We will next consider the merits of defendants' appeal. In point one it is contended that plaintiff was never an invitee on the premises but at most a mere licensee and that she was a trespasser immediately prior to the accident when she went upon the steps and ramp without the knowledge of the defendants. The evidence conclusively shows that defendants desired to secure and employ new acts for presentation to their patrons. Defendants, acting through a booking agency, invited plaintiff to appear and demonstrate her act on the date in question. Defendants, their agents and employees, were present. Upon entering the premises plaintiff was greeted by defendants' manager who learned that she had come to demonstrate an act. Her presence was therefore known

to defendants. She was there to transact business of common interest and mutual advantage to them and to herself. She was a business invitee and defendants owed her all duties attendant thereon. *Koppelman v. Ambassador Hotel Co.*, 35 Cal.App. 2d 537, 96 P.2d 196; *Stewart v. Lido Cafe*, 13 Cal.App.2d 46, 56 P.2d 553; *Bush v. Weed Lumber Co.*, 63 Cal.App. 426, 218 P. 618. It has been held that one who enters the premises of another upon the latter's invitation, express or implied, for the purpose of applying for work, is an invitee. *Steiskal v. Marshall, Field & Co.*, 238 Ill. 92, 87 N.E. 117; *McDonough v. James Reilly, etc., Co.*, 45 Misc. 334, 90 N.Y.S. 358; *Warner v. Mier Carriage & Buggy Co.*, 26 Ind.App. 350, 58 N.E. 554, 59 N.E. 873; *Shelby's Adm'r v. Cincinnati, etc., Ry. Co.*, 85 Ky. 224, 3 S.W. 157; *Brigman v. Fiske-Carter Const. Co.*, 192 N.C. 791, 136 S.E. 125, 49 A.L.R. 773; *Crane v. Smith Metropolitan Market Co.*, 23 Cal.2d 288, 144 P.2d 356. Defendants' argument that plaintiff was a trespasser as to that portion of the premises upon which she received her injuries is without merit. It is true, as contended by them, that one may be an invitee to a certain portion of the premises and a licensee or trespasser as to other portions. The evidence fully supports the conclusion that plaintiff was an invitee at the time of her injury. The question as to whether the invitation, express or implied, included that part of the premises where the injury occurred is generally not one of law. On the contrary, it is usually a question of fact for the determination of the court or jury. *Dobbie v. Pacific Gas & Elec. Co.*, 95 Cal.App. 781, 787, 273 P. 630; *State Compensation Ins. Fund v. Allen*, 104 Cal.App. 400, 407, 285 P.1053; *Bush v. Weed Lumber Co.*, supra. The invitation of a proprietor extends not only to all parts of the premises which the patron expressly is invited to use, but also to such parts as he or she is impliedly invited to enter, and the invitation also extends to those portions of the premises where the invitee, under circumstances and conditions of his invitation, would naturally be likely to go. *Stewart v. Lido Cafe*, supra. In this case, the plaintiff was expected to be ready for her performance when the previous act was terminated. She was sorting her music for the orchestra so as to be ready for her performance. It was essential that she wear the type of dancing shoes best fitted to the nature of the stage upon which she was to

perform. It was likewise essential that she test this surface for such purpose. Having completed the task of arranging her music, she glanced up and noticed that no performer was occupying the stage. It appeared to be an appropriate opportunity for her to test the stage surface. Defendants' orchestra leader testified that he had observed other dancers testing the stage surface preparatory to demonstrating their acts. In so entering upon the steps and over the ramp to test the stage, she was not engaged in an unexpected or unreasonable activity. Under the facts presented the question of the status of plaintiff was one of fact upon which the determination of the trial court is conclusive. *Dobbie v. Pacific Gas & Electric Co.*, supra.

[7] In support of the court's finding as to the lighting conditions, the evidence shows that the trial judge visited the premises during the course of the trial and viewed the scene of the accident. He observed the method of operation of the inner stage and the various lighting conditions as explained by the witnesses. This, in itself, was evidence in the case. *Ethel D. Co. v. Indiana Acc. Comm.*, 219 Cal. 699, 704, 28 P.2d 919; *Rickards v. Noonan*, 40 Cal.App.2d 266, 274, 104 P.2d 839; *McManus v. Otis*, 61 Cal.App.2d 432, 143 P.2d 380.

Plaintiff testified that the premises were poorly and dimly lighted and that the center chandelier was not turned on; that as she moved near the end of the ramp she looked upon what appeared to her to be, and which she, due to the faulty lighting conditions, mistook to be a dark colored stage surface. It has been held that under certain circumstances failure to have proper or sufficient lighting conditions alone is sufficient to support a finding of negligence. *DeGraf v. Anglo Calif. Nat. Bank*, 14 Cal.2d 87, 92 P.2d 899; *Sheyer v. Lowell*, 134 Cal. 357, 66 P. 307; *Moore v. Marshall*, 41 Cal.App. 2d 490, 107 P.2d 89; *Herold v. P. H. Matthews Paint House*, 39 Cal.App. 489, 179 P. 414.

[8] As to the lowering of the inner stage and failure to employ proper precautions and warnings, it is true that the evidence does not definitely show by whom the stage was lowered. Apparently, it was lowered by the performers immediately preceding the accident, who had had the operation of the stage explained to them. This was done under defendants' instructions

through their manager. Defendants had the right to control the operation of the stage and to see that it was at the proper level so that it would not create an open, unguarded shaft when plaintiff was to be rightfully using it in a manner to be anticipated by defendants. This fact, when considered in conjunction with the fact that there was no guard, chain or other obstacle of any kind placed across the steps or ramp leading to the stage, the poor lighting condition found by the court to exist, and the failure of defendants to warn plaintiff of such condition, which condition was known by them to exist, would, if true, support a finding of negligence on the part of defendants. *Goldberger v. Market Street Ry. Co.*, 130 Cal.App. 597, 603, 20 P.2d 351; *Dobbie v. Pacific Gas & Elec. Co.*, supra; *Blaylock v. Jensen*, 44 Cal.App.2d 850, 852, 113 P.2d 256.

[9, 10] The evidence was conflicting as to whether or not plaintiff had personal knowledge of the dangerous condition. She understood and believed the platform to be stationary. It is defendants' theory that since Miss Lening was plaintiff's agent, to a certain extent, and knew it was an elevator stage, her knowledge was imputed to the plaintiff. Miss Lening's uncommunicated knowledge of the nature of the elevator stage, under the facts here presented, cannot affect plaintiff's right of recovery. *Dobbie v. Pacific Gas & Elec. Co.*, supra. Whether plaintiff acted as a reasonable and prudent person under the circumstances was for the trial court to determine. The entire question of plaintiff's contributory negligence was one of fact and not of law. *Colombo v. Axelrad*, 45 Cal.App.2d 439, 114 P.2d 425.

The last question considered is novel, and no authority is cited which is directly in point. The evidence discloses that defendant Mrs. Ewing tried to call a certain doctor to attend plaintiff, but being unable to reach him, called a Dr. Denny. He in turn called upon a Dr. West, orthopedic surgeon, for consultation and aid in treating plaintiff. Defendants do not question but that the treatment and care rendered by these doctors were necessitated by plaintiff's injuries and that their respective charges constituted the reasonable value of their services. The amount of Dr. West's charge was \$500. His certificate to practice medicine was issued on August 23, 1933. He came to San Diego County to practice

medicine in 1941 but his certificate was not registered in the county clerk's office of this county until February 9, 1943, which registration was about one year after the rendition of the doctor's services. It is contended that plaintiff cannot recover for the reasonable value of the services performed by Dr. West because he had not complied with section 2340 of the Business and Professions Code St. 1937, p. 1272. Citing 48 C.J. 1159 and 7 C.J.S., Attorney and Client, § 165, p. 1022.

As to the claim here involved, Dr. West, an admitted specialist in the field of orthopedic surgery, testified that the amount of his charges (\$500) made to plaintiff for services performed was reasonable and fair.

The record is silent as to whether plaintiff paid that bill prior to the trial of the action.

The form of the question presented, as set forth in defendants' opening brief, clearly indicates that plaintiff had paid it. The question reads: "Is an injured person entitled to recover money paid for professional services to an unlicensed doctor?" In answering this question we will assume that the bill was paid.

In 128 A.L.R. 686, the right of an injured party to recover the value of services gratuitously rendered is discussed. It was there said that: "In a majority of the cases the position is taken that the services were rendered for the benefit of the injured plaintiff, that the defendant, the wrongdoer, should not be permitted to profit by any gratuity extended to his victim, and that consequently the reasonable value of such services may be recovered."

In the annotations found in 18 A.L.R. 678, and 95 A.L.R. 575, the rule governing the right of an injured plaintiff to recover damages, although plaintiff had received compensation from some other source, is discussed. See also, *Brosman v. Sweetser*, 127 Ind. 1, 26 N.E. 555 and *Wells v. Minneapolis Baseball, etc. Ass'n*, 122 Minn. 327, 142 N. W. 706, 46 L.R.A., N.S., 606, Ann.Cas.1914D, 922.

Bearing upon the majority view of the question, see *Purcell v. Goldberg*, 34 Cal. App.2d 344, 350, 93 P.2d 578; *Reichle v. Hazie*, 22 Cal.App.2d 543, 547, 71 P.2d 849; *Loggie v. Interstate Transit Co.*, 108 Cal. App. 165, 169, 291 P. 618.

[11] In the present action, in answer to the propounded question, we adopt the reasoning and holding expressed in *Miller*

v. City of Eldon, 185 Iowa 307, 170 N.W. 377, which was an action against a city for personal injuries where plaintiff had employed a chiropractor and paid her for services rendered in good faith. It was found that the chiropractor was not authorized to practice medicine within the state. The court there concluded, as we must here, that plaintiff, notwithstanding, was entitled to recover the reasonable value of such services. Many cases are cited in support of that conclusion. The award here made properly included the reasonable value of the services performed by the doctor, which amount we assume was paid by or on behalf of the plaintiff.

This disposes of the questions here presented.

The judgment is affirmed.

BARNARD, P. J., and MARKS, J., concur.



LASHLEY v. KOERBER.*
No. 12569.

District Court of Appeal, First District,
Division 1, California.
July 7, 1944.

Rehearing Denied Aug. 5, 1944.

Hearing Granted Aug. 30, 1944.

1. Physicians and surgeons ⇐14(4)

A physician or surgeon is not liable for every untoward result occurring in his medical practice, but is required only to have degree of learning and skill ordinarily possessed by physicians of good standing practicing in same locality and to use ordinary care and diligence in applying such learning and skill to treatment of patient.

2. Physicians and surgeons ⇐18(8)

Whether physicians or surgeons use ordinary care and diligence, in applying degree of learning and skill ordinarily possessed by physician of good standing in same locality to treatment of patient, can be established only by experts' testimony.

3. Evidence ⇐570

Expert evidence, concerning matter within knowledge of experts only and not

* Subsequent opinion 156 P.2d 441.

within common knowledge of laymen, is conclusive.

4. Physicians and surgeons ⇨18(6)

Negligence of physician or surgeon treating patient will not be presumed, but must be affirmatively proved.

5. Physicians and surgeons ⇨18(6)

In absence of expert evidence, it will be presumed that physician or surgeon exercised ordinary care and skill required of him in treating patient.

6. Physicians and surgeons ⇨18(8)

In action against physician for malpractice in treating broken finger, it was necessary for plaintiff to produce expert testimony that defendant should have taken X-ray of finger, in order to establish his negligence in failing to take X-ray thereof.

7. Physicians and surgeons ⇨14(4)

Whether reduction and treatment of bone fracture without use of X-ray machine constituted negligence depends on what ordinarily skilled physician practicing in same vicinity would be required to do under like circumstances in exercise of due care and professional judgment.

8. Physicians and surgeons ⇨15

A physician's failure to discover arthritis causing deformation of patient's broken finger as soon as he might have done so if he had taken X-ray of finger sooner would constitute mere error in judgment not actionable negligence.

9. Physicians and surgeons ⇨18(8)

In action against physician for malpractice in treating broken finger, defendant's own testimony was insufficient to establish his negligence as showing material variance between treatment outlined by him as in accord with good practice and that actually administered by him.

10. Physicians and surgeons ⇨18(9)

In action against physician for malpractice, defendant's admission to be sufficient to take case to jury must be admission of negligence or lack of skill ordinarily required for performance of work undertaken.

11. Physicians and surgeons ⇨18(9)

In action against physician for malpractice in treating broken finger, testimony of plaintiff and her husband as to defendant's admission, in conversation with them some time after termination of his

services, that he should have had X-ray taken at beginning of treatment, was insufficient to take to jury question of defendant's negligence in failing to take X-ray pictures of finger at such time, in view of uncontradicted evidence that X-rays would merely have enabled him to obtain more positive evidence of nature of injury in confirmation of facts with which he was already familiar by observation and palpation, and would not have affected his method of treatment or result thereof.

12. Physicians and surgeons ⇨18(9)

In action against physician for malpractice in treating broken finger, evidence was insufficient to take to jury question of defendant's negligence.

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by Thelma L. Lashley against George E. Koerber, M. D., for malpractice. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Charles Reagh, of San Francisco, for appellant.

Appelbaum & Mitchell and John Jewett Earle, all of Oakland, for respondent.

KNIGHT, Justice.

This is an action for malpractice growing out of the treatment by defendant of the fractured terminal phalanx or end joint of plaintiff's right ring finger. The action was based on allegations to the effect that the defendant did not exercise proper care and skill in ascertaining the true condition of the fracture and in the treatment thereof, and that because of such failure the end joint of the finger became permanently crooked, which greatly interfered with plaintiff's ability to follow her usual employment as a waitress. The main ground upon which plaintiff bases her claim of negligence was that defendant failed to have X-rays taken of the finger. After plaintiff had testified concerning the manner in which the finger had been treated and as to the conversations she claimed took place between herself and the defendant on the several visits she made to his office, the defendant was called as a witness under the provisions of section 2055 of the Code of Civil Procedure; and the only other witness produced by plaintiff was her

husband, who related one of the conversations had between his wife and the defendant. Plaintiff then rested her case, whereupon defendant moved for a nonsuit on the ground that plaintiff had produced no expert testimony to show that defendant's treatment of the finger was not in accordance with the usual practice or that the failure to have an X-ray taken in treating an injury of this kind constituted negligence. After hearing the arguments on the motion the court expressed the opinion that in the absence of expert testimony a case of negligence legally sufficient to go to the jury had not been made out, adding that if plaintiff desired to supply such testimony she would be permitted to do so, otherwise the court would have to grant the motion. Counsel for plaintiff replied that he had no expert testimony, whereupon the motion for nonsuit was granted. From the judgment entered thereon plaintiff appeals. We are of the opinion that no ground for reversal has been shown.

The finger was injured on August 30, 1941, while plaintiff was adjusting a folding bed. It was the Saturday before Labor Day, and plaintiff was unable to get in touch with the defendant until the following Tuesday morning, September 2nd. In the meantime, pursuant to advice given by the person answering the defendant's telephone, plaintiff soaked the finger in hot epsom salts. On Monday, the day before she saw the defendant, she went to the Highland Hospital and was told that she was doing all she could for the finger until she saw her doctor. On Tuesday morning she met the defendant at his office, and he diagnosed the injury as a fracture, but her hand was so swollen he could do nothing with it that day, and he told her to continue soaking it until Thursday, and that he believed it would then be possible to put it in splints. Plaintiff testified that during that visit she asked defendant if he did not want an X-ray taken and he replied that it would not be necessary; and that when she went back Thursday the finger was still so swollen and crooked that it could not be manipulated and that while it was in that condition defendant put it in splints. The defendant testified that before placing the finger in splints he put the finger in as full extension as possible; and that for splints he used several applicator sticks bound together with adhesive tape. The defendant changed the splints every few days, and plaintiff testi-

fied that on several of those visits to his office she asked him if he did not want to X-ray the finger and he said it was not necessary. Continuing, she testified that after some weeks the finger was still swollen and crooked and that on October 25th, of her own volition, she called on Dr. Stein in Albany and had the finger X-rayed; that the next month she went back to defendant and told him about the X-ray, but did not show it to him. She stated that at that time they discussed an operation but that defendant said it would not do any good to "rush the operation," that later on he would operate if she had an X-ray taken and at that time he believed the operation was advisable. On January 2, 1942, she again called on the defendant. She was accompanied by her husband; and she testified that on that visit they discussed the matter of the operation, but that defendant then told them that before he could operate it would be necessary for him to have another X-ray; and that he gave her the address of the place to have it taken. She had the X-ray taken, and it was sent to defendant. Two days later plaintiff returned to defendant's office and she testified that at that time the defendant told her that according to the X-ray he could not operate on the finger, that he would rather have an orthopedic specialist see it, and he requested her to take the X-ray to a Dr. Barnard. Dr. Barnard did not operate, but put tape on the finger, and later she returned to see the defendant. According to defendant, when she returned to him she had taken off the tape put on by Dr. Barnard because she said it was uncomfortable; whereupon he told her if she was not going to follow the treatment ordered for her there was nothing further he could do for her.

The report accompanying the X-ray taken in January stated that it showed a fracture of the base of the terminal phalanx whose shaft is markedly displaced in the volar direction. In this connection defendant explained that a chip of the bone to which a tendon was attached, had been broken off, and that the tendon had pulled the chip out of position; and that arthritis in the joint had prevented the chip from uniting to the bone. He further testified that if an X-ray had been taken when plaintiff was first injured it would only have confirmed his diagnosis; that it was not necessary to take an X-ray because he knew from the clinical examination that

she had fractured the terminal phalanx. Continuing he testified that if an X-ray had been taken at any time up to the first of October "The treatment would have been the same. X-ray is simply a form of diagnosis, it is not a treatment in itself. I knew there was a chip fracture at the base of that phalanx. I knew the finger had to be splinted in full extension, and simply having taken an X-ray would have perhaps added some slight confirmation to what I did but it would not have changed what I did in the slightest, nor would it have changed the eventual result." He also testified that he suspected she had a tendency toward arthritis, and that the X-ray taken in January showed arthritis present, but that even if an X-ray had shown acute arthritis the treatment would not have been any different. He also testified that the treatment given her was such as is generally given by physicians and surgeons of good repute in that community, and that seven out of eight doctors with whom he had discussed the matter said it was not their practice to always demand an X-ray in treating fractures.

[1-5] The general rule, as stated in *Engelking v. Carlson*, 13 Cal.2d 216, 88 P.2d 695, 697, is as follows: "The law has never held a physician or surgeon liable for every untoward result which may occur in medical practice. It requires only that he shall have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality and that he shall use ordinary care and diligence in applying that learning and skill to the treatment of his patient. *Hesler v. California Hospital Co.*, 178 Cal. 764, 174 P. 654. Whether he has done so in a particular case is a question for experts and can be established only by their testimony. *Perkins v. Trueblood*, 180 Cal. 437, 181 P. 642; *Patterson v. Marcus*, 203 Cal. 550, 265 P. 222. And when the matter in issue is one within the knowledge of experts only and is not within the common knowledge of laymen, the expert evidence is conclusive. *Wm. Simpson C. Co. v. Industrial Acc. Comm.*, 74 Cal.App. 239, 240 P. 58; *Johnson v. Clarke*, 98 Cal.App. 358, 276 P. 1052. Negligence on the part of a physician or surgeon will not be presumed; it must be affirmatively proved. On the contrary, in the absence of expert evidence, it will be presumed that a physician or surgeon exercised the ordinary care and skill required of him in treating his patient.

Donahoo v. Lovas, 105 Cal.App. 705, 288 P. 698. It is true that in a restricted class of cases the courts have applied the doctrine of *res ipsa loquitur* in malpractice cases. But it has only been invoked where a layman is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised."

[6, 7] In the present case the only testimony given upon the subject shows that the injury was correctly diagnosed, and that plaintiff had no expert testimony to offer to show that the doctor had been negligent in his treatment of her finger, or that the failure to take an X-ray in a case of this kind constituted negligence. She contends, however, that "The use of X-ray to determine the location of fractures and the progress of their healing is within the realm of judicial knowledge" and that therefore it was not necessary to produce expert testimony to the effect that the defendant should have taken an X-ray of her finger. The authorities do not support this view. As said in *Bickford v. Lawson*, 27 Cal.App.2d 416, 81 P.2d 216, 219, where a fractured leg failed to heal properly due to a lack of callus formation, and the plaintiff sought to hold the doctor because he did not take X-rays nor use traction in reducing the fracture: "It may not be said, as a matter of law, that the failure to use an X-ray machine in the reducing of a fractured limb constitutes negligence under all circumstances. The necessity of employing an X-ray apparatus in reducing a fractured limb depends entirely upon the circumstances of the particular case. The question as to whether the reduction and treatment of a fractured limb without the use of an X-ray machine constitutes negligence, depends upon what an ordinarily skilled physician practicing in that vicinity, in the exercise of due care and professional judgment, would be required to do under like circumstances. The determination of those questions depends upon expert testimony. (*Perkins v. Trueblood*, 180 Cal. 437, 443, 181 P. 642; *Arais v. Kalensnikoff* [10 Cal.2d 428], 74 P.2d 1043 [115 A.L.R. 163].)"

The cases cited by plaintiff in support of her contention are not in point. In each instance plaintiff had introduced expert testimony. Furthermore, the factual situation presented in each case is entirely different

from that here involved. In *Wires v. Little*, 27 Cal.App.2d 240, 80 P.2d 1010, 82 P.2d 388, the doctor attempted without success to remove a needle embedded in the plaintiff's finger, without having procured a clear X-ray to determine its position, and as a result of leaving the needle in the finger an infection developed which made it necessary later to amputate the finger. And in that case, it is to be noted that the Supreme Court in denying a petition for hearing expressly withheld approval of that portion of the opinion of the District Court of Appeal which comprised a "discussion concerning matters of common knowledge which, it is said, a jury may properly consider in an action for malpractice," the discussion referred to being that the jury can consider without expert testimony matters which are within the common knowledge of laymen; that a needle left in a finger will cause an infection, and that a clear X-ray picture would be of assistance to the surgeon in removing it. In each of the other cases, a mistake was made in diagnosis, due either to not taking X-rays or to faulty X-rays. In *Rankin v. Mills*, 207 Cal. 438, 278 P. 1044, the doctor diagnosed without the aid of X-rays that the plaintiff had a dislocated hip and treated her accordingly, when she had a fracture of the hip bone. In *Reynolds v. Struble*, 128 Cal.App. 716, 18 P.2d 690, X-rays were taken, but the physician failed to discover the badly fractured shoulder shown by the X-ray, and gave no treatment therefor. In *McBride v. Saylin*, 6 Cal.2d 134, 56 P.2d 941, the physician failed to take an X-ray of an injured eye, and therefore did not suspect the presence of a foreign body in the eye, which resulted in the loss of the sight in that eye.

[8] No such situation was presented here. The evidence shows without conflict that the doctor did know the nature of plaintiff's injury, and there is no evidence that his treatment would or should have been any different if X-rays had been taken. To the contrary, his own testimony showed that the treatment would not have been any different, and that an X-ray would only have confirmed his diagnosis. Nor is there any showing that his treatment in any way caused the deformation of the finger of which plaintiff now complains. The only medical testimony in the case was given by the defendant, and he testified that the present condition of the

finger was caused by arthritis. Even assuming that defendant might have discovered the arthritis sooner if he had taken an X-ray sooner, the failure to do so would constitute a mere error in judgment, not actionable negligence. As said in *Bickford v. Lawson*, supra: "From a careful reading of the entire record we are convinced that the only omission of which the plaintiff may reasonably complain is a failure to use X-ray pictures after the reducing of the fracture, at an earlier date, with the possibility that the defendant might have thus discovered the lack of callus and that he would then have advised his patient to consult a bone specialist. But the defendant testified that he had no intimation of that lack of callus until the X-ray picture was taken December 20th [two months after the injury]. That omission, if it may be said to have contributed to the injury of the patient, was a mere error in judgment which does not constitute actionable malpractice."

[9] Plaintiff contends that the defendant's own testimony was sufficient to establish negligence on his part; that there is a material variance between the treatment outlined by him as being in accord with good practice, and that actually administered by him as described by plaintiff. However, the record does not show any substantial conflict of testimony in this regard. The defendant described in detail his method of applying splints to the injured finger, stating that "the finger was splinted in as full extension as possible, that is, with the finger sticking out straight"; "with two of these splints applied and tape wrapped around them tightly, the finger must be extended straight out, or as near so as it was humanly possible to get it." He further testified, with reference to his first use of a splint, that "at the time this finger was splinted it was still slightly swollen and inflamed from the crushing force of her injury. The finger was brought up in as full extension as possible, and that is all that anybody can do to reduce that type of fracture." (Italics added.) These statements are not inconsistent with plaintiff's assertion that "the finger was not straightened out when the splint was put on"; that "he did put splints on it and left it crooked the way it was at that time, with the splints on, he didn't straighten it out with the splints on." She herself testified that on that occasion "the

finger was so swollen still and so crooked that he could not manipulate the finger even yet," from which statement it is manifest that the attainment of full extension was not then possible.

[10, 11] Finally plaintiff contends that she was entitled to have her case submitted to the jury because of the testimony of herself and her husband that in the course of a conversation between them and defendant some time subsequent to the termination of his services the latter admitted that he should have had an X-ray taken at the beginning of his treatment of her finger. According to her testimony, she said to him, "I have asked you over and over for X-rays," and he replied, "I know you have, Mrs. Lashley, and it is not your fault"; and her husband testified: "He told her to go down to a certain address in Oakland and have an X-ray taken, stating that he should have done it in the beginning, and my wife said, 'Yes, I know, Doctor, I insisted on that to start with.' Dr. Koerber stated, 'Yes,' he said, 'I know it is not your fault, Mrs. Lashley, it is all my own.'"

The general rule is, however, that an admission to be sufficient must be an admission of negligence or lack of the skill ordinarily required for the performance of the work undertaken. *Markart v. Zeimer*, 67 Cal.App. 363, 227 P. 683. Where the admission does not amount to an admission of negligence, it is held that the doctor is not responsible. *Phillips v. Powell*, 210 Cal. 39, 290 P. 441, 443. In that case a blade used in making an incision broke and became imbedded in the flesh, and testimony was introduced that the defendant had said, "It is my fault in using that kind of blade in that kind of an operation." The court held: "We are of the opinion that these statements or otherwise did not constitute admissions that the defendants 'did not possess and use that reasonable degree of learning and skill which was ordinarily possessed by the members of their profession in good standing practicing in their vicinity,' which is the only standard by which the liability of the defendants may be determined. See *Markart v. Zeimer*, 67 Cal.App. 363, 371, 227 P. 683; *Hessler v. California Hospital Co.*, 178 Cal. 764, 174 P. 654; *Perkins v. Trueblood*, 180 Cal. 437, 181 P. 642." And even where a doctor admits that he was in error in the treatment administered (*Donahoo v. Lovas*, 105

Cal.App. 705, 288 P. 698) or that he performed the wrong operation (*Markart v. Zeimer*, supra), it is held that such admissions are not sufficient to establish liability, where the admissions are not of negligence. As said in the latter case [67 Cal. App. 363, 227 P. 686]: "These admissions, therefore, are not admissions that the operation complained of was not performed with reasonable care, or that the defendants did not possess and use that reasonable degree of learning and skill which was ordinarily possessed by the members of their profession in good standing practicing in their vicinity. As a consequence, while they were competent as evidence of such facts as they admitted, they did not supply the absence of expert testimony in such particulars as expert testimony was otherwise required." Here the alleged admission pertained only to the failure of the defendant to obtain X-rays of the broken finger; and at most, the uncontradicted evidence shows that X-rays would merely have enabled him to obtain more positive evidence of the nature of the injury sustained, in confirmation of facts with which he was already familiar by observation and palpation. They would not have affected his method of treatment in the least; nor is there any evidence to show that the result would have been any different.

Plaintiff in support of her contention cites *Scott v. Sciaroni*, 66 Cal.App. 577, 226 P. 827, and *Walter v. England*, 133 Cal. App. 676, 24 P.2d 930. In both of these cases the admissions were of negligence, not of mere mistake, and therefore those cases are not controlling here. In *Scott v. Sciaroni*, supra, the defendant was reported to have said that he left the radium on too long, that it was his fault that the plaintiff was in her present condition. In distinguishing that case it was said in *Donahoo v. Lovas*, supra [105 Cal.App. 705, 288 P. 701]: "In that case the physician admitted that the condition of the plaintiff was due to his negligence." In *Walter v. England* [133 Cal.App. 676, 24 P.2d 934], the defendant stated that he had made a mistake in inserting a hypodermic needle, and it was held: "We are satisfied that, as used by the defendant, the word 'mistake' was synonymous with the word 'negligence.'"

[12] In the foregoing state of the evidence, and under the law as declared by the cases cited, we are of the opinion that the

trial court properly held that plaintiff failed to establish a case of negligence legally sufficient to justify the submission thereof to the jury. The judgment is therefore affirmed.

PETERS, P. J., and WARD, J., concur.

Rehearing denied; PETERS, P. J., not participating.



65 Cal.App.2d 425

VON GOERLITZ v. TURNER et al.

Civ. 7050.

District Court of Appeal, Third District,
California.

Aug. 2, 1944.

1. Licenses ⇨44(2)

The test in determining whether an agreement for the use of real estate is a "license" or a "lease" is whether the contract gives exclusive possession of premises as against all the world, including the owner, in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in which case it is a license.

See Words and Phrases, Permanent Edition, for all other definitions of "Lease" and "License".

2. Mines and minerals ⇨56

Where contract to operate a mine did not give operators exclusive right to the use thereof for any fixed term nor give them any interest in the mine or the ore, the contract was not a "lease" but merely a "license" which was revocable at will of owner.

3. Landlord and tenant ⇨1

To create relationship of landlord and tenant by a contract there must be an intention evidenced by the instrument to establish such relationship.

4. Mines and minerals ⇨83

Where operators' right to take ore from mine under contract was merely a license the right to the ore could arise only if and when it had been removed by op-

erators and if removed by another, operators could have no complaint.

5. Mines and minerals ⇨59

Where agreement for operation of a mine was but a license, it was revocable at will of owner, which was accomplished by written notice of termination.

6. Replevin ⇨8(5)

Where agreement for operation of mine was merely a license revocable at will of mine owners and licensees had never been in possession of the mine at any time prior to revocation of license, licensees' action in claim and delivery was not the proper form of action for recovery of ore taken by another licensee under subsequent agreement.

7. Mines and minerals ⇨51(1)

There can be no recovery of ore in specie, or of its value, in an action of trover when it has been taken from land in possession of defendant under claim and color of title asserted in good faith.

8. Pleading ⇨387

The rule that the allegations of complaint and the proof must be in agreement is based on the fundamental proposition that a party must recover if at all according to his pleadings, rather than upon some other cause which may be developed by the proof.

9. Trial ⇨159

Where plaintiff's pleading and proof are not in agreement a material variance is presented and the defendant is entitled to a nonsuit even though the objection might have been obviated by amendment.

10. Appeal and error ⇨1050(3)

Mines and minerals ⇨59

Where agreement for the operation of a mine was merely a license, as distinguished from a lease, and had been terminated by owners, operators could not recover value of ore mined by other operators under later agreement and the contention that evidence varying the terms of first agreement was erroneously admitted was immaterial to disposition of case.

11. Costs ⇨207

A verified cost bill was prima facie evidence that the items therein set forth were necessarily incurred, and by motion attacking cost bill plaintiff assumed burden

of showing wherein an item was not properly chargeable.

12. Appeal and error ⇐984(1)

A determination of the items allowable as cost is largely a question for the trial court in its discretion, and where record is devoid of any showing of improper exercise of that discretion such determination will not be disturbed on appeal.

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Action in claim and delivery by E. A. von Goerlitz against I. D. Turner and others for the possession of certain chrome ore or the value thereof, wherein the defendant named filed cross-complaint to quiet his title to the ore. From an order granting defendant's motion for nonsuit and from a decree quieting defendants' title to the property, plaintiff appeals.

Affirmed.

Manson & Allan, of San Francisco, for appellant.

Daniel S. Carlton, of Redding, and Floyd Merrill, of Yreka, for respondents.

PEEK, Justice.

The plaintiff herein appeals from an order granting defendants' motion for nonsuit, and from a decree quieting defendants' title to the property in controversy.

Plaintiff by his action entitled "Complaint in Claim and Delivery" alleged the conversion by defendants of approximately 200 tons of chrome ore of the value of \$4000, and prayed for judgment against defendants for the possession of the ore or the value thereof. The action was originally filed in the County of Siskiyou but was subsequently transferred to the County of Shasta for trial. Defendant Turner filed his answer denying the ownership and right of possession by plaintiff to the ore, alleged title and possession in himself, and filed a cross-complaint to quiet his title to the ore. The answer of the defendant Brown likewise denied ownership in the plaintiff. At the conclusion of the trial the court gave judgment as previously mentioned.

From the facts as disclosed by the record it appears that F. Brown and Dee Thomas were the owners of the Elk Chrome Mine situated in Siskiyou County.

On May 1, 1941, they entered into an agreement with one L. J. Campbell, which agreement is as follows:

"East Fork Chrome Mine
& Red Rock " "
Elk Creek

Buyer
L. J. Campbell

Happy Camp Mining District.

The Undersigned owners of the chrome mine have agreed to let this chrome mine out on Ten per cent 10 per cent royalty payable at the nearest rail road point. To be weighed on public scales.

This mine is to be worked continuous as price prevails until mine is worked out.

Price or weather conditions only stop

Dated May 1st 1941

Dee Thomas
Arnold Thomas

Fred W. Brown
(Endorsed)

Witness L. J. Campbell
H. F. Brown "

It is admitted that nothing was done under the May agreement. Thereafter Campbell and a new associate, Karl F. Autenreith, renewed negotiations with the owners, and a second instrument was executed on July 22, 1941, as follows:

" 7-22-41

Happy Camp Mining Dist.

Elk Chrome Mine

Located in elk creek drain

We the parties or miners to operate said chrome mine Less J. Campbell & Karl F. Autenreith will start road as soon as bulldozer can get on property.

We will start operation as soon as road is completed.

Will pay 10% at railroad price. Each car to be paid for at loading point.

This mine will be operated as long as ore can be found and price stays up.

Mine Owners	Operators
Dee Thomas	L. J. Campbell
F. W. Brown	Karl F. Autenreith"

The plaintiff is the assignee of Campbell by an instrument dated September 11, 1941, and the assignee of Autenreith by an instrument dated November 15, 1941.

According to the testimony of the defendant Thomas, the agreement of July 22, 1941, was terminated on or about August 9, 1941, for failure of Campbell and Autenreith to perform any of the terms of that agreement.

Shortly after the termination of said agreement the defendants Brown and Thomas executed a new agreement with the defendant Turner. He immediately took possession of the property, and during the early part of September 1941, commenced movement of the ore from the property and continued so to do until approximately 200 tons had been taken and placed in the U. S. Government stockpile in the City of Yreka.

By virtue of the testimony of plaintiff that he knew the instrument of May 1st had been superseded by the instrument of July 22d we may dismiss the first agreement from further consideration and direct our attention to the second agreement.

In reply to plaintiff's first contention that the agreement of July 22, 1941, was a lease, the respondents maintain that the instrument did not create a leasehold or other interest in the mine but was one of operation only.

[1,2] The test, as this court stated in *Shaw v. Caldwell*, 16 Cal.App. 1, 115 P. 941, 943, "whether an agreement for the use of real estate is a license or a lease is whether the contract gives exclusive possession of the premises against all the world, including the owner, in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in which case it is a license, and this is a question of law arising out of the construction of the instrument." It is readily apparent from the wording of the second instrument that it did not create a right in the plaintiff's assignors to the exclusive use of the mine for a fixed term nor did it create an interest in the mine or the ore. Thus, as the trial court found, it "was merely an agreement to operate said mine by said Karl Autenreith or L. J. Campbell, and/or Less Campbell, for and on behalf of F. Brown and Dee Thomas."

[3-5] That there must be an intention evidenced by the instrument to establish the relationship of the landlord and tenant, is likewise well established. *Beckett v. City of Paris Dry Goods Co.*, 14 Cal.2d 633, 96 P.2d 122; 15 Cal.Jur. 615. No such intention can be found in the instrument under consideration. It merely provides for the operation of the mine on shares with provision as regards the compensation of the parties. In effect it is but a contract of employment. *Hudepohl v. Liberty Hill Con. Mining & Water Co.*, 80 Cal. 553, 22

P. 339; 17 Cal.Jur. 431; *Michalek v. New Almaden Co., Inc.*, 42 Cal.App. 736, 184 P. 56. The agreement created no personal interest or right of exclusive possession, either in the mine or the ore, in plaintiff or his assignors. Being merely a license to take ore from the mine, plaintiff's right thereto could arise only if and when it had been removed by him or his assignors. *Wheeler v. West*, 71 Cal. 126, 11 P. 871. If another removed the ore, plaintiff could have no complaint, as his right of severance and removal was not exclusive "against all the world, including the owner." *Shaw v. Caldwell*, supra. Inasmuch as the agreement was but a license to operate the mine it was revocable at the will of the defendants (*Wheeler v. West*, supra), and, as the trial court found, was revoked by a written notice of termination mailed by the defendants Brown and Thomas to plaintiff's assignors on or about August 9, 1941.

[6] Appellant's second contention, that "Claim and Delivery", was a proper form of action for the recovery of the ore, is also untenable. It is true, that under our Code system of pleading, the distinction between forms in civil actions has been abolished; but the distinction between causes of actions, at least for some purposes, still remains, and on essential allegations of a complaint, remains the same as at common law.

By paragraph I of his complaint plaintiff alleged that at all times therein mentioned he was the "owner of and entitled to the possession of that certain personal property * * * described as follows: Two Hundred (200 Tons, * * * of Chrome Ore * * *)." Paragraph II alleged that defendants, without right and without the consent of plaintiff, had taken possession of such personal property and detained it without plaintiff's consent, to his damage in the sum of \$4000. Paragraph III contains the customary allegations and prayer relative to fictitious defendants. He then prays for a judgment against defendants for the possession of the property, or, in case delivery cannot be had, for the value thereof, the sum of \$4000.

The evidence in support of such allegations conclusively shows that neither plaintiff nor his assignors were ever in possession of the mine, nor had any actual work been done thereon; that the defendant Turner, immediately upon the execution of

his agreement with the owners, went into possession of the mine; that he was in possession thereof at and prior to the time the action was filed by plaintiff, and that prior to the time he removed the ore it was in its natural state.

Under such circumstances both the complaint and the evidence in support thereof were fatally defective.

[7] It was essential to plaintiff's case to first establish his title to and possession of the property involved, as "there can be no recovery of wood or ore or hay in specie, or of its value, in an action of trover when it has been taken from land in possession of the defendant under claim and color of title asserted in good faith." *Ophir Silver Min. Co. v. Superior Court*, 147 Cal. 467, 477, 82 P. 70, 74, 3 Ann.Cas. 34D; 17 Cal.Jur. 511, 512.

[8, 9] It is the well-established rule that the allegations of a complaint and the proof thereof must be in agreement. This rule is based upon the fundamental proposition that a party must recover, if at all, according to his pleadings, rather than upon some other or different cause which may have been developed by the proof. When such is the case there is presented a material variance, and the defendant is properly entitled to a nonsuit even though the objection might have been obviated by amendment. *Bailey v. Brown*, 4 Cal.App. 515, 88 P. 518; *Elmore v. Elmore*, 114 Cal. 516, 46 P. 458; 9 Cal.Jur. 561; 21 Cal.Jur. 267.

[10] Plaintiff's third charge is directed against what is alleged to have been the erroneous admission of evidence by defendants which plaintiff alleges varied the terms of the agreement of July 21, 1941.

If, as we have concluded, the agreement was not a lease but a license to operate the mine, and therefore revocable at any time, then in view of the facts and circumstances as disclosed by the pleadings and the record, the plaintiff was precluded from maintaining an action for the ore or for its value, and therefore such contention by plaintiff becomes wholly immaterial to a disposition of this case.

Plaintiff's final contention is that the court erred in denying his motion to strike one item from defendant's cost bill. The motion, which was not verified, or supported by affidavits, or other evidence, attacks an item relating to the mileage traveled by one witness, on the ground that it was "not

properly chargeable as a cost in said action."

[11, 12] The defendants' verified cost bill was prima facie evidence that the items therein set forth were necessarily incurred. Plaintiff, by his motion, assumed the burden of showing wherein the item was "not properly chargeable" or was otherwise improper for the reasons stated in said motion. *Fay v. Fay*, 165 Cal. 469, 132 P. 1040. The record discloses no showing whatever was made by plaintiff beyond the filing of his motion with the clerk of the court. The determination of the items allowable as costs is largely a question for the trial court in its discretion, and when the record is devoid of any showing of an improper exercise of such discretion this court will not disturb such determination on appeal. *Puppo v. Larosa*, 194 Cal. 721, 230 P. 440; *Murphy v. F. D. Cornell Co.*, 110 Cal.App. 452, 294 P. 490.

The judgments and order are affirmed.

ADAMS, P. J., and THOMPSON, J., concur.



65 Cal.App.2d 94

MEGEE v. FASULIS.
Civ. 7013.

District Court of Appeal, Third District, California.

June 27, 1944.

Hearing Denied Aug. 24, 1944.

1. Trial $\Rightarrow$ 234(7), 296(7)

In personal injury action, instruction that it was for jury to determine from evidence that if plaintiff fully understood contents of release when he signed it and whether it was fairly made without fraud or misrepresentation or undue influence on part of defendant, and unless jury did so determine, such release would not release defendant from liability if defendants were otherwise liable, was not erroneous as placing upon defendant burden of proving release was obtained without fraud, misrepresentation, or undue influence, especially in view of further instructions on burden of proof.

2. Trial ⇨228(1)

Each instruction need not embody every fact or element essential to sustain or defeat an action and it need not cover the entire case.

3. Trial ⇨295(2)

If instructions as a whole substantially and correctly cover the law applicable to issues, and the law has been fairly and correctly presented, judgment will not be reversed on appeal even though the instruction is otherwise open to criticism.

4. Theaters and shows ⇨6

In action for injuries to one falling while descending stairway in place of amusement, instruction in substance that if jury found plaintiff to be intoxicated then they should determine whether condition contributed to accident, and, if they found it did not, then any evidence of intoxication was immaterial, was proper under the evidence.

5. Appeal and error ⇨882(3)

Defendant cannot complain of an issue which he assisted in placing in evidence.

6. Trial ⇨109

In personal injury action where defendant in opening statement to jury referred to intoxication of plaintiff and intoxication was later alluded to by both parties, defendant made it a part of his defense of contributory negligence.

7. Trial ⇨251(8)

In personal injury action, it was not necessary to specifically plead intoxication of plaintiff as a defense to warrant an instruction on such question, since it was duty of court to give instructions expounding law upon every reasonable theory finding support in evidence.

8. Trial ⇨285

Instruction should be reasonably construed to uphold judgment without straining at overly nice construction, and, on review, the courts will give instructions a fair and reasonable construction with view to ascertaining the meaning which jury must have ascribed thereto.

9. Trial ⇨339(3)

Where jury returned verdict of \$5,000 for plaintiff including \$1,735.44, special damages, and there was no sufficient evidence as to special damages, and court sent jury back with instructions to bring in one

verdict without division as to special or general damages, and jury then returned verdict of one sum of \$5,000, court did not err in permitting jury to return a second verdict; there being no ground for new trial. Code Civ.Proc. § 619.

10. Theaters and shows ⇨6

Where plaintiff was on defendant's premises used for amusement devices as an invitee, defendant owed plaintiff duty of ordinary care in keeping stairway to basement in reasonably safe condition so as not to unnecessarily expose plaintiff to danger.

11. Negligence ⇨125

In action for injuries sustained by plaintiff who while descending stairway fell on empty cartridge case, evidence that plaintiff's witness between 7 and 7:30 P.M. on the same day fell on cartridge case was not inadmissible as too remote or speculative because defendant's testimony indicated plaintiff fell between 11 and 12:00 P.M., where plaintiff testified that accident occurred not very long after 5 P.M., since such evidence was sufficient to warrant jury in finding that plaintiff fell before plaintiff's witness fell.

12. Theaters and shows ⇨6

In action for injuries sustained by one falling while descending stairway in place of amusement, whether defendants had permitted discharged empty cartridge case to fall upon floor adjacent to stairway and to be upon stairway, and whether such condition existed at time plaintiff slipped and fell was question for jury under the evidence.

13. Appeal and error ⇨1001(1)**Theaters and shows** ⇨6

In action for injuries sustained when plaintiff fell while descending stairway in place of amusement, defendant's negligence was for jury, and its verdict will not be disturbed on appeal unless there was an entire lack of evidence, or reasonable inferences to be drawn from evidence to support its conclusion.

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Action by Robert L. Megee against John Fasulis, individually and as an individual doing business under the name and style of Star Rendezvous, for damages for person-

al injuries. From a judgment for plaintiff, defendant appeals.

Affirmed.

Van Dyke & Harris, of Sacramento, for appellant.

Manwell & Manwell, of Marysville, for respondent.

PEEK, Justice.

This is an appeal by defendant from a judgment awarding plaintiff damages for personal injuries alleged to have been suffered by him by reason of defendant's negligence. Upon the return of the verdict by the jury defendant moved for a judgment notwithstanding the verdict, which motion was granted. Plaintiff then appealed from such judgment and this court reversed the same with instructions to the trial court to enter judgment in favor of plaintiff in accordance with the verdict of the jury. *Megee v. Fasulis*, 57 Cal.App.2d 275, 134 P.2d 815. The defendant now appeals from the judgment so entered.

The pertinent facts are that defendant owned and operated the Star Rendezvous, a tavern, together with certain amusement devices, in the city of Marysville. The premises consisted of a bar and dance floor on the street level. Certain other rooms including a lavatory were located in the basement. Access to such rooms on the lower level was had by means of a flight of stairs. Immediately adjacent to the stairway was a contraption consisting of a conical shaped tube into which automatic .22 caliber rifles were discharged at small targets. The large end of the tube, that is, the end into which the rifles were discharged, was very close to the entrance to the stairway. The guns, when fired, automatically discharged the used cartridge cases downward causing them to strike a board and bounce or roll either into the tube or out upon the floor immediately adjacent to the head of the stairway.

The plaintiff, while descending this stairway sometime after 5 o'clock P.M. on January 13, 1940, for the purpose of going to the lavatory, slipped and fell. As a result of the fall he sustained certain injuries. His complaint for damages alleged that the defendant operated and conducted such device and stairway in a careless and negligent manner, allowing and permitting discharged .22 caliber cartridge cases ejected from rifles used in the shooting device to lie scattered upon the floor surrounding

such device and also upon the stairway, and that as a result of such negligence plaintiff fell and sustained certain injuries.

Defendant, by his answer, admitted ownership and operation of the premises; that plaintiff was an invitee, and that plaintiff fell on said stairway, but denied any negligence on his part, and alleged contributory negligence on the part of plaintiff. As a further affirmative defense defendant alleged that February 9, 1940, plaintiff and defendant compromised and settled their differences, and that in consideration of the sum of \$300 paid to plaintiff by defendant the plaintiff executed and delivered to defendant in writing, a full "release of all claims" resulting from his accident.

The plaintiff did not file an affidavit denying the release in accordance with the provisions of section 448 of the Code of Civil Procedure, but chose to rebut the presumption of full payment and satisfaction by attacking the release on the grounds of fraud, misrepresentation and undue influence.

As grounds for a reversal of the judgment defendant contends that (1) prejudicial error was committed by the trial court in the giving of an alleged erroneous instruction concerning the release given by plaintiff to defendant; (2) that the trial court erred in its instructions to the jury on the issue of contributory negligence; (3) that prejudicial error was committed at the time the jury returned its verdict, and (4) that further prejudicial error resulted from evidentiary rulings of the court.

[1] In defendant's first contention of error, the following instruction is attacked:

"You are instructed that it is for you to determine, from all the evidence and circumstances of this case, whether the plaintiff fully understood the contents of the release at the time the same was signed by him, and whether the same was fairly made with him, without fraud, misrepresentation or undue influence on the part of the defendants or their agents, and unless you do so determine, you are instructed that such release would not release the defendants from liability, if you further find from the evidence that the defendants are otherwise liable."

A reading of the three instructions given by the court upon the issue of the release, including the one attacked, discloses (1) that the first instruction informed the jury

that one of the defenses was that the plaintiff, in consideration of the sum of \$300, executed an agreement releasing the defendant of any further liability; (2) that the second instruction informed the jury that if they found from a preponderance of the evidence that plaintiff voluntarily accepted the sum in full settlement and in full knowledge of the significance of his acts, and with full knowledge of the nature and extent of his injuries, then it was their duty to find for defendant, and (3) that the third (the one above quoted) qualified the terms of the second, in effect saying that it was for them to determine first, if the plaintiff fully understood the contents of the release; second, whether such release was entered into by him without fraud or misrepresentation on the part of the defendants or their agents, and third, if the jury so found, then such instrument would release the defendant from all liability. On the other hand, if they did not determine that the release was free from fraud or misrepresentation the instrument would not serve to release the defendant from liability.

The defendant strenuously contends that the quoted instruction "not only misstates the law with respect to the burden of proof but misdirects the jury with respect to its quest", in that the effect of such instruction was to place upon the defendant the burden of proving that the release was obtained without fraud, misrepresentation or undue influence. We do not so understand the instruction.

[2,3] After reading all of the instructions in the light of a fair and reasonable construction without straining at any particular portion of the language, it cannot be said that the jury was not fairly and impartially instructed upon the law relating to the question of the release. By prior instructions the jury was properly informed concerning the assumption by the plaintiff of the burden of proving his case by a preponderance of the evidence. It is not necessary that each instruction embody every fact or element essential to sustain or defeat an action or that it cover the entire case. It is sufficient if the instructions, as a whole, substantially and correctly cover the law applicable to the issues. If, under such construction, the law has been fairly and correctly presented, a judgment will not be reversed on appeal even though the instruction is otherwise open to criti-

cism. *Nichols v. Pacific Electric Ry. Co.*, 178 Cal. 630, 174 P. 319; *Henderson v. Los Angeles Traction Co.*, 150 Cal. 689, 89 P. 976.

It is quite possible that the instruction so attacked by the defendant might have been worded differently so as to have met his objections. However, even framed as it is, it did not, as defendant contends, place the burden of proof upon him to show that the release was obtained without fraud.

[4-6] In regard to the second question raised by defendant it is contended that as his answer merely charged that the plaintiff was negligent in descending the stairway: that his falling and the resultant injury sustained was caused "solely, proximately and entirely by plaintiff's own carelessness and negligence", and that nothing was alleged in such defense relative to the question of intoxication of the plaintiff, that therefore plaintiff's instruction Number 17, which is as follows, was entirely improper:

"You are instructed that it is a question of fact for the decision of the jury, whether or not the plaintiff was intoxicated at the time this accident occurred, and if you should find from the evidence that the plaintiff was intoxicated at said time, then it is a question of fact for your decision whether under all the circumstances surrounding the case, such intoxication constituted negligence on the part of the plaintiff, and if you find from the evidence that the plaintiff was negligent then it is a question of fact for your decision whether or not, under all the circumstances, such negligence in any way contributed to the accident or the injuries received."

In amplification of defendant's contention in this regard it is argued that such instruction increased his burden of proof and completely wiped out the defense of contributory negligence unless he assumed and satisfied the burden of also proving intoxication.

Under such instruction the jury could have found that plaintiff was intoxicated and that such condition contributed to the accident, and therefore denied liability, or they could have found that although he was intoxicated, such condition did not contribute to his injuries, or lastly, that though he had consumed intoxicating liquor, he was not intoxicated, and therefore this element was not involved. In other

words, such instruction merely informed them that if they found him to be intoxicated, then they should determine whether such condition contributed to the accident, and if they found that it did not, then any evidence of intoxication would be immaterial. *Fidelity, etc., Co. v. Paraffine Paint Co.*, 188 Cal. 184, 204 P. 1076.

Under the evidence as introduced the jury was properly instructed upon the question of the intoxication, if any, of the plaintiff. This element of the case was placed in issue first by counsel for the defendant in his opening statement to the jury, and later was again alluded to by both parties. Defendant cannot complain of an issue which he assisted in placing in evidence. By so doing he made it a part of his defense of contributory negligence. *Olsen v. Standard Oil Co.*, 188 Cal. 20, 204 P. 393.

[7] It was not necessary to have specifically pleaded intoxication as a defense to have warranted an instruction on such question. It is the duty of the court to "give instructions expounding the law upon every reasonable theory of the case finding support in the evidence." *Raymond v. Hill*, 168 Cal. 473, 143 P. 743, 746. It cannot be said that the question of the plaintiff's intoxication was not a part of the case as presented to the jury for determination. The evidence introduced was sufficient to raise such question, and it cannot be denied that it was of such force that fair minded men might well have debated its effect upon plaintiff.

[8] Instructions should be reasonably construed to uphold the judgment without straining at overly nice construction, and on review, the courts will give to them a fair and reasonable construction and interpretation with a view to ascertaining the meaning which the jury must have ascribed thereto. *Reuter v. Hill*, 136 Cal.App. 67, 28 P.2d 390.

The third issue raised by defendant relates to alleged error committed by the trial court at the time the jury returned its verdict.

At the conclusion of the trial the jury retired and shortly thereafter returned, asking that the plaintiff's complaint be read to them. After some discussion they again retired to the jury room, and without objection of counsel took the complaint with them. However, they were admonished by

the court that although they might take the complaint and read it over, yet they were to understand that they were not to be wholly governed by what the complaint alleged—that it was only upon the evidence which they heard in the court room that they were to predicate their judgment. Thereafter the jury returned to the court room and informed the court that a verdict had been reached. Upon the reading of the verdict it was disclosed that they had found in favor of plaintiff in the sum of \$5000, "divided as follows: \$1,735.44 special damages and \$3,264.56 general damages."

The special damages granted were for the full sum as prayed in the complaint. Counsel for defendant strenuously argued before the trial court that there was no evidence whatsoever to support the verdict for such damages, while it was contended by plaintiff that the evidence relating to the loss of wages was sufficient. After further discussion the court stated that it felt there was not sufficient evidence to sustain the award as to the special damages, but, as the jury in the first instance had found in favor of the plaintiff in the total sum of \$5000, the subsequent division of the \$5000 did not appear to the court to vitiate the general finding; however, if any question existed, the jury would be sent back. As a result of the discussion the court sent the jury back with the instruction to retire for further deliberation, and bring in such a verdict as they felt was proper in the case, and if they found for the plaintiff, to bring in one verdict without division as to special or general damage or otherwise; that the verdict was not one which the court could accept under the evidence. Another form of verdict was prepared, and after retiring once more the jury again returned, this time with a verdict of one sum of \$5000.

[9] Defendant now contends on appeal that where a jury returns a verdict which does not conform to the evidence, the proper method of correction is not by having the jury rewrite the verdict until it does conform, but by granting a new trial at the request of the injured party: That although the original verdict was without support in so far as the award of special damages was concerned, yet it was none the less the verdict of the jury; that it was prejudicial error for the court to permit the jury, after having been polled, to

return a second and different verdict; that the second verdict was a nullity, and that the judgment herein is based upon no verdict at all.

We know of no rule which demands that a case be retried under such circumstances. To do so would be to deny the very purpose and intent of Section 619 of the Code of Civil Procedure, wherein it is provided that when the verdict is announced, if it is informal or insufficient, in not covering the issues submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out. In this regard it was held by the Supreme Court in *Sparks v. Berntsen*, 19 Cal.2d 308, page 313, 121 P.2d 497, at page 500, that "the trial court retains control over such proceedings with power to procure correction of informal or insufficient verdicts until the verdict is recorded and the jury finally discharged." Citing *Brown v. Regan*, 10 Cal.2d 519, 524, 75 P.2d 1063; *Redo y Cia v. First National Bank*, 200 Cal. 161, 166, 252 P. 587. It also was held in *Pray v. Trower Lumber Co.*, 101 Cal.App. 482, 281 P. 1036, 1039, that when objections have been raised as regards the uncertainty of a verdict "the court properly should have advised the jury to correct it."

We turn then to the final contention of defendant that the trial court erred in the admission of certain evidence which defendant charges was not confined or limited to the condition of the stairway at the time plaintiff fell.

[10] By his answer defendant admitted that plaintiff was on the premises as an invitee. Under such circumstances the law imposes upon him the duty of ordinary care in keeping the stairway in a reasonably safe condition, so as not to unnecessarily expose patrons to danger. *Schmidt v. Bauer*, 80 Cal. 565, 22 P. 256, 5 L.R.A. 580; *Means v. Southern California Ry. Co.*, 144 Cal. 473, 77 P. 1001, 1 Ann.Cas. 206; *Goldstein v. Healy*, 187 Cal. 206, 201 P. 462; *Brinkworth v. Sam Seelig Co.*, 51 Cal.App. 668, 197 P. 427. Stated differently but to the same effect, negligence in the protection of guests from personal injury has been defined to imply a "lack of due care." *Adams v. Dow Hotel*, 25 Cal. App.2d 51, 76 P.2d 210, 211.

[11] Plaintiff, in support of his allegations of negligence on the part of defendant in the manner in which the stairway was maintained, produced as a witness, one W. M. Bright, who testified that while

descending the stairway sometime between 7 and 7:30 o'clock P.M. on the same day, he slipped and fell on an empty cartridge case.

It is contended by defendant that Bright's testimony was incompetent, immaterial and irrelevant in that the defendant's testimony that plaintiff fell between the hour of 11 and 12 o'clock, P.M. was the only direct evidence as to the time of plaintiff's fall, and therefore Bright's testimony was too remote, as well as being speculative. Obviously such contention completely ignores the testimony of plaintiff that his fall occurred sometime after 5 o'clock P.M. It is true that plaintiff was not exact as to the time of his fall, but he did testify that he went to the Star Rendezvous "somewhere in the neighborhood of 5:00 o'clock," and that at the time the accident occurred he "hadn't been there very long." It cannot be said that such testimony was not sufficient to warrant the jury in finding that the plaintiff fell prior to the time Bright slipped and fell. In fact the jury was as free to reject the testimony of the defendant as it was to accept the testimony of the plaintiff.

[12] Likewise this court cannot say that the jury, as the sole judge of the credibility of the witnesses and the weight of the evidence, had not a right to conclude from such testimony that the defendant had permitted discharged empty cartridge cases to fall upon the floor adjacent to the stairway and to be upon the stairway, and that such condition existed at the time plaintiff slipped and fell.

[13] A decision upon a question such as is herein presented—the negligence of the defendant—was one solely within the province of the jury and its verdict will not be disturbed on appeal unless there is an entire lack of evidence or reasonable inferences to be drawn from the evidence to support its conclusions. *Adams v. Dow Hotel*, supra.

Our conclusion in this regard must be the same as in the previous hearing (*Megee v. Fasulis*, supra), that there is sufficient evidence in the record to sustain the verdict of the jury that the plaintiff's injuries were the proximate result of the negligence of defendant, and that plaintiff was not guilty of contributory negligence.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

65 Cal.App.2d 200

MILLER et al. v. HALL et al.
Civil 3311.

District Court of Appeal, Fourth District,
California.

July 12, 1944.

Hearing Denied Sept. 5, 1944.

1. Partnership ⇨310

Where value of good will of partnership business exists and it is appropriated by one of former partners for his own use and benefit, he may be required to account to the other partner for his interest in such value.

2. Partnership ⇨310

Where one of two partners in brokerage business suffered a paralytic stroke which permanently incapacitated him from engaging in business, partner who continued the business was under a duty to account for value of good will.

3. Partnership ⇨310

In action for accounting brought by partner who was incapacitated from continuing in business against the partner who continued the business, evidence sustained court's finding that good will of stockbrokerage business was valued at \$15,000.

4. Partnership ⇨67

Agreement between two members of partnership who had each insured his life that, upon death of either, amount of insurance on his life should be immediately collected by survivor and paid to widow of deceased partner in full payment of her share, did not apply where partnership was dissolved because one partner sustained a paralytic stroke.

5. Partnership ⇨67

Premiums having been paid on policies insuring lives of partners by the partnership, interest of the partners in the policies constituted a partnership asset.

6. Partnership ⇨344

Where policies insuring first partner's life, on which partnership had paid premiums, had higher cash value than the policies insuring the other partner because first partner was older, court properly divided such assets on dissolution of partnership on basis of present value, the surrender value of the policies, with an adjustment of the difference therein based upon the respective costs, and by allocating to

each party the policies on his own life, thus sharing the future obligations and values.

Appeal from Superior Court, San Diego County; Jacob Weinberger, Judge.

Action by Merrill T. Miller and another against G. Wesley Hall and others, for declaratory relief and for an accounting. From the judgment, defendants C. Wesley Hall and Lucy Hall appeal.

Affirmed.

Hillyer & Hillyer and Gray, Cary, Ames & Driscoll, all of San Diego, for appellants.

Monroe & McInnis, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action for declaratory relief and for an accounting. In September, 1931, Mr. Miller and Mr. Hall entered into a partnership known as Miller, Hall & Co. for the purpose of conducting a brokerage business dealing in stocks, bonds and securities.

On April 11, 1934, they signed a written agreement which recited that the death of either partner would result in financial loss to the survivor, and that each partner had taken out two policies in the New England Life Insurance Company for \$20,000 and \$10,000, respectively. It was then agreed that all premiums on these four policies should be paid from partnership funds, and that upon the death of either the amount of insurance on his life should be immediately collected by the survivor and paid over to the widow of the deceased partner in full payment for her share of the partnership property and assets, including prospect lists, good will, etc., with one exception which is not material here.

Four such policies of insurance were taken out, two on the life of each partner. One policy on the life of each was made payable to his wife, respectively, while the other policy was made payable to the other partner. This conformed to another provision in the contract which provided that the policies might be made payable "to the widow of the deceased direct", but with the same effect as described. The premiums on all four policies were paid out of the assets of the partnership until its dissolution.

Each of the partners had previously been in the same business. The partner-

ship occupied quarters in San Diego which had theretofore been occupied by a well-known brokerage firm of which Miller had been the manager. The business of the partnership prospered and it enjoyed an excellent reputation and built up a valuable good will. In addition to the list of investors brought into the firm by both partners and thereafter increased, the firm possessed several sets of records showing a complete history of certain bond issues, including one of municipal bonds originally brought into the firm by Miller and one of Canadian bonds built up by the firm, all being cross-indexed and of considerable value to anyone engaged in that business.

On August 8, 1941, Mr. Miller sustained a paralytic stroke, which has permanently incapacitated him from engaging in business. In a few months it became apparent that he could never return to the business and Hall sought a dissolution of the partnership to which Miller agreed. Before the affairs of the partnership were wound up Hall took possession of the quarters occupied by the firm, together with all records and fixtures, and had the lock on the door changed. He sent out a circular to the customers of the firm announcing a change in the name of "our firm" from Miller, Hall & Co. to Wesley Hall & Co., with the same address. This circular referred to one distributed seven years before by Miller, Hall & Co., announced that "our principles and policies haven't changed a bit," and clearly represented that the business of Miller, Hall & Co. was being continued under the new name.

Negotiations over the division of the assets of the firm continued over some months. Cash and securities and certain other things were divided equally between the former partners, but they were unable to reach an agreement with respect to the furniture and fixtures, the good will, including the lists and records, and the life insurance policies.

In this action which followed the court found the value of the furniture and fixtures and ordered the defendant Hall to account to the plaintiffs for one-half thereof. This item is not questioned on this appeal. The court also found that Hall had appropriated to himself the business, records and good will of the partnership and had held himself out as having succeeded to the same, and that he should account therefor as a part of the assets of the partnership. It was found that in view of all the

facts and circumstances surrounding the dissolution this good will was of the reasonable value of \$15,000, and Hall was ordered to account to the plaintiffs for one-half of that value. It was further found that the contract between the partners made no express provision for the disposition of the four policies of life insurance in case of a dissolution; that it was the intent and purpose of the parties that said policies should be carried for the mutual protection of the partners and their families; that it was not intended that either partner should retain insurance upon the life of the other, but that ultimately the proceeds of said policies should go to the family of each insured, respectively; that said policies are and in equity should be the property in each instance of the partner upon whose life they are written, respectively, and of his wife; and that by reason of the prior payment of the premiums by the partnership there should in equity be an adjustment of the difference in the surrender values of the policies, those upon the life of Miller being at a higher premium rate and having a higher surrender value. Miller was, therefore, ordered to account to Hall for this difference. A judgment was entered in accordance with the findings awarding the plaintiffs \$7584.74, after making the other adjustments referred to, decreeing that Hall is the owner of the business formerly conducted by the firm including the furniture, fixtures, records, prospect lists and good will; and that the insurance policies are the property of the parties on whose lives they were issued and their wives, respectively. From this judgment the defendants Hall have appealed.

It is first urged that the court erred in holding that the good will of this business had any value, and in requiring Hall to account to Miller for anything in that regard. It is conceded that under some circumstances the good will of a business may be of a considerable value. But it is argued that upon the dissolution of a partnership each of the partners has a right to continue in the same line of business. It is then argued that in view of that right to compete it must be held, as a matter of law, that upon such a dissolution the good will of the business is valueless and neither partner may be required to account to the other with respect thereto, and that this is true whether or not one of the partners does or can reengage in the same line of business since both have an equal right to

do so. Cases from this state are cited in support of the rule that in case of a dissolution each partner has a right to re-engage in the same line of business in the absence of an agreement to the contrary. This rule may be conceded but it is not controlling here. The appellants also cite *In re Brown's Will*, 242 N.Y. 1, 150 N.E. 581, 44 A.L.R. 510; *Von Bremen v. MacMonnies*, 200 N.Y. 41, 93 N.E. 186, 32 L.R.A., N.S., 293, 21 Ann.Cas. 423; *Hutchinson v. Nay*, 187 Mass. 262, 72 N.E. 974, 68 L.R.A. 186, 105 Am.St.Rep. 390; *Hutchins v. Page*, 204 Mass. 284, 90 N.E. 565, 134 Am.St.Rep. 656; *Williams v. Farrand*, 88 Mich. 473, 50 N.W. 446, 14 L.R.A. 161; and *Dyer v. Shove*, 20 R.I. 259, 38 A. 498. All of these recognize the fact that the good will of a business may have a value and that this value may be considerably less if one or all of the former owners are to continue in the same line of business. None of them, however, support the proposition, as a matter of law, that in the case of a dissolution of a partnership the theoretical right of each partner to continue in business will necessarily destroy all value of the good will as an asset of the partnership.

In *Moore v. Rawson*, 185 Mass. 264, 70 N.E. 64, 66, the question was presented as to whether a retiring partner was entitled to an accounting with respect to his interest in the good will of the business. The court there said:

"While no rule can be laid down by which the good will of a trading partnership in all cases can be ascertained and its value fixed with mathematical precision and accuracy, yet, if it be assumed that a firm has been in existence for a time long enough to establish a business sufficiently permanent in character to include not only its customers, but the incidents of locality, and a distinctive name, these advantages constitute a going business enterprise; and it may then be said that the name and what is done under it go together, and a good will exists which forms an asset of commercial value in a winding up between partners. The fact that such an asset may be difficult of appraisal is no legal reason for denying to the retiring partner an appraisal, if it be proved that he is entitled to it."

In *Griffith v. Kirley*, 189 Mass. 522, 76 N.E. 201, 202, where a similar question was involved, the court said:

"In the case before us, the defendant, as before stated, has taken exclusive possession of the firm property to which the good will is attached, and is carrying on the business exactly as though he were the purchaser of it. Under these circumstances the court may regard the defendant, so far as respects the good will, as though he had purchased under an order of the court for the sale of the property and good will, and therefore that he should be charged with the value of the good will."

In *Hutchins v. Page*, 204 Mass. 284, 90 N.E. 565, 566, 134 Am.St.Rep. 656, involving similar circumstances, the court said:

"Neither party had any right to avail himself of the good will of the business, after the termination of the partnership, without paying for it."

In *Ruppe v. Utter*, 76 Cal.App. 19, 243 P. 715, 717, the court said:

"Good will is property recognized and protected by the law as such, and capable of sale and transfer from one owner to another. It is an asset which may be sold in connection with a business. How far its value might be affected by the competition of the retiring partner is an element, of course, to be taken into consideration in fixing of such value. * * *"

[1] From all of these cases, and many others, it appears to be well recognized that the good will of a business may have a considerable value, that while this value may be seriously affected by the competition of a retiring partner the question of such value is one to be determined in the light of all the facts of a particular case, and that where such a value exists and is appropriated by one of the former partners for his own use and benefit he may be required to account to the other partner for his interest in any such value as may appear under the circumstances.

[2] In the instant case, beyond question, the good will of this business would have had a considerable value had the business been sold to a third party. Regardless of his theoretical right to continue in the same line of business it fully appears that the physical disqualification of Miller effectively eliminated the possibility of any such competition. At the time of the trial Miller had been unable to engage in business for a period of a year and eight months. His physician testified that his condition would never get any better. Under these circumstances, which were prop-

erly considered by the court, this good will had an actual value which was appropriated by Hall. In this situation, we are unable to hold, as a matter of law, that Hall was under no duty to account to Miller for the value of this good will.

[3] It is next contended that the evidence does not sustain the value of \$15,000 placed thereon by the court. It is argued that most or all of the witnesses testified to the general effect that they would not care to buy this business or allow much of anything for the good will on the basis and understanding that Miller would immediately enter into competition in the same line of business. Not only was this not the situation here but this was merely a matter to be taken into consideration in fixing the value. There was ample evidence that the value of this good will was from \$15,000 to \$25,000. The court fixed it at \$15,000 and ordered Hall to account for one-half of that, or \$7500. This was considerably less than the profits drawn by each partner during each of several years preceding the dissolution. There was much evidence of the value of the records and files as a part of the good will and the value fixed by the court is not only supported by the evidence but seems reasonable.

Appellants' final contention is that the court erred in awarding to each partner the insurance policies on his own life with an adjustment of the surrender values. It is argued that as partnership assets all four policies should have been divided equally, that is, that one-half of each of the policies should have been set aside to each of the partners. It is suggested that because of the state of Miller's health the policies on his life may be expected to mature at an earlier date than those on Hall's life, and that Hall should be entitled to any benefit resulting from this.

[4] The contract between the parties regarding this insurance makes no provision for what shall be done in case of a dissolution. It does indicate an intention that neither party should ever collect and retain any proceeds of the insurance on the life of the other. It was designed to apply in the event of an interruption of the partnership business due to the death of one of the partners. Its provisions are inapplicable now since the partnership has been dissolved. Moreover, no one can now collect the insurance money, and the par-

ties have distributed most of the assets of the firm, which the proceeds of the policies were to cover.

[5] The premiums having been paid by the partnership the interests of the parties in these policies at the time of the dissolution constituted a partnership asset. In an accounting between the partners, which is a matter of equity, that asset should be divided in a manner that is fair and equitable to both parties. Neither party then had an insurable interest in the life of the other and it would hardly seem equitable to force the parties to, in practical effect, continue the partnership with respect to this matter after all other elements had been fully settled and adjusted. The policies would lose any value beyond their surrender value if the premiums were not kept up, and the rights of one might be defeated by the failure of the other to pay his share of the premiums. One might desire to drop certain policies while the other wished to drop different policies. Any additional value from now on will be largely the result of subsequent payment of premiums rather than of payments made by the partnership. While the policies have potential values those values are not only dependent upon future conditions but they may be best preserved by continuing conditions which are favorable to keeping them in force.

[6] Under these circumstances, the most equitable way to divide this asset is on the basis of its present value, the surrender value of the policies, with an adjustment of the difference therein based upon the respective costs, and by allocating to each party the policies on his own life, thus sharing the future obligations and values. This is not only a fair division of both the present and future value, but it enables each to preserve and develop the potential value of his own policies free from any possibility of its being destroyed by any act of the other. In this way each receives a like share of the entire existing asset, and in a very real sense there is being returned to each partner that which he contributed to the partnership business. We find no error in the court's award with respect to this insurance.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

NIELSON v. ALLIED PETROLEUM CORPORATION.
Civ. 14290.

District Court of Appeal, Second District,
 Division 1, California.

July 12, 1944.

Rehearing Denied July 31, 1944.

Hearing Denied Sept. 5, 1944.

1. Judgment ☞585(4)

Where a prior declaratory relief action embraced same issues sought to be raised by lessor in action to recover royalties alleged to be due under oil and gas lease and was decided against lessor who was the defendant in that action, judgment in prior action was res judicata, so as to preclude bringing of present action.

2. Mines and minerals ☞59

Where community oil and gas lease contained provision that a majority of lessors should at all times prevail concerning any matters in connection therewith, and a subsequent agreement was entered into by lessee with consent of majority of lessors including an additional lot in area to be covered by lease in order to obtain permit to drill, a lessor was bound by the subsequent agreement though he did not sign it.

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Action by Andrew Nielson against Allied Petroleum Corporation to recover royalties alleged to be due under the terms of an oil and gas lease. From an adverse judgment, the plaintiff appeals.

Affirmed.

D. A. Boone and James T. Satchell, both of Long Beach, for appellant.

Wahlfred Jacobson, of Los Angeles, for respondent.

DORAN, Justice.

Plaintiff appeals from an adverse judgment in an action to recover royalties alleged to be due under the terms of an oil and gas lease wherein plaintiff is lessor and defendant is lessee.

The oil well, in connection with which the dispute herein arose, is located in the harbor area of the City of Long Beach, California. Drilling for oil was prohibited in the area in question until June 15, 1937, when by special election it was permitted,

subject to certain restrictions. Plaintiff and appellant, with others, executed a community lease which provided by its terms for the payment to the lessors by lessee, respondent herein, of certain royalties in the proportion that the area of each bore to the total area. The lease was dated June 12, 1937. The restrictions contained in the ordinance adopted three days later limited a drill site to one acre or more. Accordingly, two additional land owners were later included. An application by respondent for a permit to drill was refused because the area designated lacked 180 square feet of containing one acre. The respondent, in connection with the refusal, was notified by the Board of Harbor Commissioners that a certain lot owned by one Morrison must be included. This was to prevent the exclusion of the Morrison lot from participation in the benefits of oil production from adjoining land. Thereafter, by the terms of a memorandum dated September 19, 1938, Morrison's lot was included. The last mentioned memorandum was not signed by appellant but was signed by a majority of the signers and lessors of the original lease dated June 12, 1937. A well was drilled; and completed September 8, 1938. Royalties have been paid continuously by respondent according to the terms of the lease in question, as interpreted by respondent.

Plaintiff alleged two causes of action; the first in trespass and the second on the community lease contract. It was contended by plaintiff at the trial, and the contention is renewed on appeal, that the so called second contract, which includes the Morrison lot, can not be made the basis of computing the royalties except as to the lessors who signed the same. As above noted, plaintiff did not sign it. Respondent, to the contrary, contends that appellant is a party to the contract in question. Defendant's answer also set up the defense of estoppel and res judicata.

There is no dispute as to the pertinent facts. The evidence was presented at the trial by a series of stipulations.

The trial court found against plaintiff on all of the issues. The sufficiency of the evidence to support the findings, and the conclusions of law as well, are attacked on appeal.

[1] There is no merit to the appeal. The evidence supports the findings and there can be no criticism of the court's conclusions as to the law. The record reveals

that respondent's defense of *res judicata* was established beyond question. Without burdening the record with details, it is sufficient to note that respondent sought to, and did, in a former action for declaratory relief, effectively settle the identical dispute that appellant herein has sought to continue in the within action. It is idle to argue to the contrary. The declaratory relief action embraced the same issues and was decided against appellant herein, defendant in that action, on all of said issues. Incidentally, since the entry of the judgment in the action for declaratory relief, entered on March 8, 1940, appellant has accepted the royalties calculated according to said judgment.

[2] In connection with the contention that the so called second contract was not signed by appellant, reference need only be made to certain provisions of the original contract which appellant did in fact sign, viz., the one dated June 12, 1937. There it is provided that: "5. If lessee cannot legally drill on these demised premises alone, after drilling for oil is legally permitted in the Long Beach Industrial District, Lessors, or Lessee, at their respective options, may start legal proceedings within thirty days after such fact is determined by ordinance of said City of Long Beach, to get the right to permit drilling on these demised premises alone. If such right is denied after such litigation, then within ninety days after such final determination by law, Lessee must assemble sufficient area for drilling, when combined with these premises, to comply with the then existing law as to drilling, on the basis of the total royalty and rental for these demised premises as hereinafter provided, or this lease shall terminate at Lessors' option."

And paragraph 41 of said contract reads as follows: "It is understood and agreed that a majority in interest and number of the Lessors hereunder shall at all times prevail concerning any matters in connection herewith, and that Lessee hereunder shall at all times during the term hereof deal with such majority in number and persons owning a majority acreage or square footage hereunder. The decision in writing of such majority, filed with the Lessee, shall be as to all matters in connection herewith, binding upon all the Lessors hereunder." Thus appellant duly and legally empowered such majority of the signers of the community lease to act in

behalf of the others. The so called second lease was executed accordingly, by virtue of which appellant is bound thereby. As a matter of fact and as a matter of law, there was but one agreement; to describe a particular phase of the transaction as the "second lease" is misleading.

There are no errors in the record; wherefore the judgment, from which this appeal has been taken, is affirmed.

YORK, P. J., and WHITE, J., concur.



65 Cal.App.2d 145

CULVER v. CULVER,

Civ. 12617.

District Court of Appeal, First District,
Division 2, California.

July 11, 1944.

1. Appeal and error ⇐2

Where appeal was taken prior to effective date of New Rules on Appeal although hearing was had thereafter, record prepared in accordance with statutes and rules then in effect was prerequisite to consideration of appeal. Rules of Appeal, rule 53(b); Code Civ.Proc. § 953a et seq.

2. Appeal and error ⇐612(2)

One of the essential requirements for appeal prior to effective date of New Rules on Appeal is that clerk's and reporter's transcript should both be certified by trial court when appeal is based upon evidentiary matters. Code Civ.Proc. § 953a et seq.

3. Appeal and error ⇐612(2)

Where appeal was taken prior to effective date of New Rules on Appeal, and certificate of clerk merely recited that papers appearing in transcript were true and correct copies of those on file at his office, but where there was no certificate of trial judge attached and hence no authentication of documents used upon several hearings, appeal did not present debatable question. Rules on Appeal, rule 53(b), Code Civ. Proc. § 953a et seq.

4. Appeal and error ⇨607(1)

On appeal from order taken previous to effective date of new Rules on Appeal, complete record could be brought up under alternative method only in cases where all of the evidence was documentary or where transcription of oral evidence could be secured. Code Civ.Proc. § 953a et seq.

5. Appeal and error ⇨938(4)

Where appeal was taken prior to effective date of new Rules on Appeal, presumptions found in rule 52 that record is complete did not apply. Rules on Appeal, rules 52, 53(b).

6. Appeal and error ⇨945

Where orders appealed from are within trial court's jurisdiction and discretion, they can be attacked only upon showing that they were not supported by competent proof.

7. Appeal and error ⇨907(3)

Orders of trial court could not be attacked by aid of documents or testimony on judgment roll alone where such documents or testimony formed no part of judgment roll. Code Civ.Proc. § 670.

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Suit by Carol F. Culver against Elmer J. Culver, also known as E. Jack Culver, also known as Jack Culver, also known as E. J. Culver, for divorce. An interlocutory decree awarded plaintiff a divorce and approved a property settlement, wherein defendant was obligated to deliver to plaintiff certain personal property and effects. In contempt proceeding because of defendant's failure to deliver certain effects, defendant was found not guilty on ground that delivery was impossible and directed to pay value thereof in cash. Plaintiff who refused to accept payment was directed to enter a satisfaction of the terms of the interlocutory decree relating to personal property, and order granting counsel fees to plaintiff was vacated and later court denied plaintiff's motion for additional counsel fees to prosecute appeal from above order. From all such orders, plaintiff appeals.

Appeal dismissed. See also 150 P.2d 295.

William Berger, of San Francisco, for appellant.

John J. Goldberg, of San Francisco, for respondent.

NOURSE, Presiding Justice.

In a suit for divorce plaintiff had an interlocutory decree awarding her a divorce and approving a property settlement wherein defendant was obligated to deliver to plaintiff certain personal property and effects. The decree did not settle the dispute between the parties and sometime later the plaintiff cited defendant for contempt for failure to deliver some of the personal property. Upon the hearing the court found that it was impossible for defendant to make certain deliveries and directed him to pay the value of the articles in cash. It also awarded plaintiff additional counsel fees. The property was appraised and payment was tendered but refused by the plaintiff. The court directed plaintiff to enter a satisfaction of the terms of the interlocutory decree relating to the personal property, and vacated the order relating to counsel fees. Later the court denied plaintiff's motion for additional counsel fees to prosecute her appeals from these orders. The appeal is taken from all these orders.

[1] The respondent has moved for a dismissal of the appeal upon the ground that the record is insufficient. Since the appeal was taken prior to July 1, 1943, the effective date of the new Rules on Appeal, a record prepared in accordance with the statutes and rules then in effect is a prerequisite to a consideration of the appeal. Rule 53(b) of the Rules on Appeal provides that they shall govern the procedure "in all appeals taken on and after their effective date" but that "pending appeals" shall be governed by the statutes and rules theretofore in force "so far as pertains to the preparation and filing of the record on appeal. * * *". Hence, the preparation of the record on the instant appeal is governed by section 953a et seq. of the Code of Civil Procedure, and such of the old rules of court as were applicable at the time the appeal was taken.

[2] One of the essential requirements of the code section was that the clerk's and the reporter's transcripts should both be certified by the trial court when the appeal is based upon evidentiary matters, either documentary or oral. Wyncoop v. Superior Court, 17 Cal.2d 657, and cases cited on page 658, 111 P.2d 332, on page 333. In Luftenburg v. Luftenburg, 56 Cal.

App.2d 61, 132 P.2d 34, which was heard on a motion to dismiss an appeal from an order denying a motion to vacate a judgment, the court said: "The only certificate attached to the record is that of the county clerk, who certifies that the copies in the transcript are true and correct copies of the originals in his office. There is no certificate by the trial judge and nothing to show that the documents appearing in the clerk's transcript were used or considered on the hearing, or that the court's decision was not based upon others which are not in the record. There is, therefore, no record upon which the appeal could be considered or decided. Under these circumstances the motion must be granted. *Kwon v. Kwon*, 39 Cal.App.2d 232, 102 P.2d 808; *Bartholomew v. Cross*, 42 Cal.App.2d 28, 108 P.2d 49; *Svoboda v. Lambert*, 43 Cal. App.2d 378, 110 P.2d 1022."

[3, 4] Here the certificate of the clerk merely recites that the papers appearing in the transcript are true and correct copies of those on file in his office, but there is no certificate of the trial judge attached, and hence no authentication of documents used upon the several hearings. For this reason the appeal from these several orders presents no debatable question. If we might treat the appeal as one on the judgment roll alone, the presumption that the record is complete found in rule 52 of the Rules on Appeal is not applicable because of the exception found in rule 53(b). Affidavits filed on this motion by the trial judge and the court reporter recite that, pursuant to instructions by appellant, the clerk's transcript was not prepared by the court reporter, and that it includes documents not on file in the office of the clerk. From the same source it appears that appellant instructed the court reporter to include in the reporter's transcript "only the testimony of witnesses sworn at the hearings and to exclude all other statements and proceedings."

[5] In *Wynecoop v. Superior Court*, supra, 17 Cal.2d 658, 111 P.2d 333, the supreme court said: "In an appeal from an order, it is possible to bring up a complete record under the alternative method, Code Civ.Proc. § 953a et seq., only in cases where all of the evidence was documentary or where a transcription of oral evidence may be secured."

[6, 7] There seems to be no case expressly defining the composition of a judgment roll upon an appeal from an order made after final judgment. But if we may accept the definition of section 670 of the Code of Civil Procedure it would on this appeal consist of the pleadings, the findings, and the judgment. Here the first order appealed from was one adjudging defendant not guilty of contempt made after hearing of an order to show cause for that purpose; the second directed a satisfaction of the terms of the interlocutory decree and called for payments by defendant in cash in lieu of personal property which the court found it was impossible for defendant to deliver in kind. This order, as well as the third order appealed from, also related to counsel fees requested by the defendant for services rendered on the order to show cause, and to be rendered on appeal from foregoing orders. Manifestly, all these orders were within the court's jurisdiction and discretion, and can be attacked here only upon a showing that they were not supported by competent proof. They cannot be attacked by the aid of any of the documents or testimony upon which the appellant relies. The case is controlled by *Borenstein v. Borenstein*, 20 Cal. 2d 379, 381, 125 P.2d 465, 466, where the supreme court said: "Inasmuch as the papers relied on by appellant as assertedly disclosing the invalidity of the decrees form no part of the judgment roll, they can not be used on this attack. It will be presumed that appropriate proof was introduced satisfying the trial court of the fact of respondent's residence in the state and county for the necessary period prior to institution of the divorce action and of the continued existence of the marital status at that time. But even if we could go beyond the face of the judgment roll, it would still be necessary for the appellant to bring up a properly authenticated record, either a reporter's transcript or bill of exceptions, showing that the documents relied on by appellant were actually submitted to the court upon the motion to vacate. *Sutcliffe v. Sutcliffe*, 220 Cal. 398, 401, 31 P.2d 195; *Stern & Goodman Inv. Co. v. Danziger*, 206 Cal. 456, 458, 274 P. 748."

For these reasons the appeal is dismissed.

STURTEVANT, and SPENCE, JJ.,
concur.

65 Cal.App.2d 149

CULVER v. CULVER.

Civ. 12618.

District Court of Appeal, First District,
Division 2, California.

July 11, 1944.

1. Divorce ☞183

Where plaintiff, who appealed from order denying her motion to set aside final decree of divorce, relied on matters not appearing on judgment roll, such record was insufficient to support appeal.

2. Divorce ☞184(6)

Since trial court had power and jurisdiction to deny motion to set aside final decree of divorce upon ground of fraud in procuring its entry, question before reviewing court was whether order was supported by competent and substantial evidence.

3. Divorce ☞183

Although by stipulation and order of District Court of Appeal plaintiff's appeals from different orders in same divorce case have been consolidated for hearing, each rested on its own transcript.

4. Appeal and error ☞568, 607(1)

Appeal proceedings under rules 4 and 7 are initiated by service upon respondent and filing with clerk of notice of appellant's election to proceed under such rules and are terminated by certification of trial court that record is correct. Rules on Appeal, rules 4, 7.

5. Divorce ☞183

Where plaintiff who appealed from final divorce decree did not rely upon partial transcript or agreed on settled statement, appeal could be heard only upon judgment roll alone. Rules on Appeal, Rules 4, 6, 7.

6. Divorce ☞183

Where appeal was heard upon judgment roll alone, single question presented was whether, under any state of facts, trial court had jurisdiction to deny plaintiff's motion to vacate final decree of divorce, and since plaintiff did not argue such issue, but merely prayed that order should be reversed because some evidence was offered which would have supported order granting her motion, appeal presented no debatable issue.

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Suit by Carol F. Culver against Elmer J. Culver, also known as E. Jack Culver, also known as Jack Culver, also known as E. J. Culver, for divorce. From an order denying plaintiff's motion to set aside final decree of divorce, plaintiff appeals.

Appeal dismissed.

William Berger, of San Francisco, for appellant.

John J. Goldberg, of San Francisco, for respondent.

NOURSE, Presiding Justice.

This is a companion case to Culver v. Culver, 150 P.2d 292. The appeal is taken from an order denying plaintiff's motion to set aside the final decree of divorce. The order appealed from was entered July 16, 1943, and the notice of appeal was entered August 14, 1943. The proceedings are accordingly governed by the Rules on Appeal effective July 1, 1943. See Rule 53(b). The respondent has moved to dismiss the appeal upon the grounds that the clerk's transcript was not certified by the trial judge, and that the record does not contain a reporter's transcript, nor a bill of exceptions.

[1, 2] It is clear from what is said in the other opinion upon the authority of Wyncoop v. Superior Court, 17 Cal.2d 657, 111 P.2d 332, and Borenstein v. Borenstein, 20 Cal.2d 379, 125 P.2d 465, that the record is insufficient to support a review of any matters not appearing upon the judgment roll. As the trial court has power and jurisdiction to grant or deny a motion to set aside a final decree of divorce upon the ground of fraud in procuring its entry, the question before the reviewing court is whether the order appealed from is supported by competent and substantial evidence.

[3-5] Though by stipulation and order of this court the two appeals have been consolidated for hearing each rests upon its own transcript, and since the second appeal was taken after the effective date of the new rules, the appellant was entitled to proceed upon a partial transcript (Rule 4) or an agreed statement (Rule 6) or a settled statement (Rule 7). He did not follow any one of these modes. The proceedings under Rules 4 and 7 are initiated

by the service upon the respondent and the filing with the clerk of a notice of appellant's election to proceed under such rules and are terminated by the certification of the trial court that the record is correct. The record does not show that any notice required by Rules 6 or 7 was served upon respondent and, upon the hearing of this motion to dismiss the appeal, it appeared by affidavit that such notice was not served. It is not contended that an agreed statement was made under Rule 6.

[6] Hence, the appeal can be heard upon the judgment roll alone and this presents the single question whether, under any state of facts, the trial court has jurisdic-

tion to deny a motion to vacate a final decree of divorce. By consent the appellant was permitted to file one brief to cover both cases. She does not argue this issue, but merely prays that we reverse the order because some evidence was offered which would have supported an order granting her motion. What this evidence is we do not know and cannot consider on this appeal. For these reasons it is apparent that the appeal is frivolous and presents no debatable issue.

The appeal is dismissed.

STURTEVANT and SPENCE, JJ., concur.

24 Cal.2d 575

PEOPLE v. RALPH et al. (two cases).

Cr. 4533, 4535.

Supreme Court of California.

July 21, 1944.

1. Criminal law ⇨1208(9)

An indeterminate sentence for certain purposes under a law which fixes no maximum term, prior to action by the authorized board, is in effect a "life sentence".

See Words and Phrases, Permanent Edition, for all other definitions of "Life Sentence".

2. Infants ⇨69

It was the purpose of the Legislature in enacting the Youth Authority Act that as to youthful offenders within the limits prescribed, the indeterminate sentence law and the Youth Authority Act should be construed and applied to work together as complementary parts of a more enlightened penal system. St.1941, pp. 2522-2533, §§ 1700-1783; Pen.Code, § 1168.

3. Statutes ⇨241(1)

When language which is reasonably susceptible of two constructions is used in a penal law, ordinarily that construction which is more favorable to the offender will be adopted.

4. Infants ⇨69

Commitment to Youth Correction Authority is a "pronouncement of a sentence" for the offense, namely, commitment to the Authority for the term prescribed by law so the fact that literally no sentence has been imposed would not be material in determining right to be committed to Youth Correction Authority. St.1941, pp. 2522-2533, §§ 1700-1783.

See Words and Phrases, Permanent Edition, for all other definitions of "Pronouncement of a Sentence".

5. Infants ⇨69

Minor defendants who were convicted of robbery in the first degree, the minimum punishment for which is five years without any maximum prescribed, and who were given indeterminate sentences of not less than five years, were not "sentenced to imprisonment for life" within provision excluding from Youth Authority Act, a person sentenced to imprisonment for life. St. 1941, p. 2526, § 1731.5; Pen.Code, §§ 213, 3000, 3020.

150 P.2d—26

See Words and Phrases, Permanent Edition, for all other definitions of "Sentenced to Imprisonment for Life".

6. Constitutional law ⇨70(1)

The Legislature in adopting the Youth Authority Act, having failed to declare that all youth subject to indeterminate sentences for terms without fixed maximums should be excluded from the procedures of the act, the court will not read such an exclusion into the Act. St.1941, p. 2526, § 1731.5; Pen.Code, §§ 213, 3000, 3020.

7. Infants ⇨69

The fact that minors convicted of robbery in the first degree were entitled to be certified to the Youth Correction Authority does not mean that the Authority must accept them or that they are entitled to remain under it, such questions being for determination of administrators in exercise of a sound discretion. St.1941, p. 2526, § 1731.5; Pen.Code, § 213.

In Bank.

Appeals from Superior Court, Los Angeles County; Arthur Crum, Judge.

Edsel Gray Ralph, Clyde Dempsey Chandler, and Raymond James Cantlon were convicted of robbery in the first degree and their motions to be committed to the Youth Correction Authority were denied, and they appeal.

Reversed and remanded with directions.

Prior opinion, 143 P.2d 758.

Frederic H. Vercoe, Public Defender, William B. Neeley and H. R. Thomas, Deputy Public Defenders, and Gladys Towles Root, all of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

Each of the three defendants in these consolidated cases pleaded guilty to charges of committing robbery while armed with a deadly weapon. The court thereupon "Upon a statement of facts and by stipulation of counsel" found the crimes to be robbery of the first degree, granted the requests of defendants for leave to file applications for probation, and set a time (later postponed) for hearings upon such

applications and for the pronouncement of judgments and sentences. The record shows that defendant Cantlon was then 18 years of age and defendants Ralph and Chandler were each 20. On March 31, 1943, the day to which such hearings were continued, each defendant moved, under the provisions of the Youth Authority Act (Welfare & Institutions Code, §§ 1700-1783, St.1941, pp. 2522-2533), to be certified to the Youth Correction Authority (now known as the Youth Authority) pursuant to the terms of section 1731.5 of the act. The court denied the motions for such certification, as well as the applications for probation, and sentenced each defendant to the state prison for the term prescribed by law. Pen.Code, § 1168. From the judgment and sentence against him each defendant appeals.

The sole contention advanced is that the trial court erred in refusing to commit the defendants to the Youth Authority. We have concluded that a liberal interpretation of the Youth Authority Act, as intended by the Legislature (Welf. & Inst. Code, § 1700), requires that such contention be sustained.

Although section 1731.5 of the act has been amended in certain respects since these defendants were convicted, the amendments are not of such nature as to alter the construction or effect to be given the section on these appeals. Therefore, we are here quoting the section as it now reads, but with insertions indicating the amendments: "After certification to the Governor as provided in this article and until January 1, 1946 [formerly 1944], a court shall commit to the Authority any person convicted of a public offense whom the Authority believes can be materially benefited by the procedure herein provided for, and for whose care and maintenance there exists, in the opinion of the Authority, proper and adequate facilities, and who (a) Is found to be less than 21 [formerly 23] years of age at the time of apprehension. (b) Is not sentenced to death, imprisonment for life, imprisonment for not more than 90 days, or the payment of a fine. (c) [Added in 1944] Is not granted probation."

At the time defendants were convicted the Youth Authority had certified in writing to the Governor that it was prepared to properly discharge its duties and functions. See Welf. & Inst. Code, § 1730. Defend-

ants contend that therefore the court had no alternative but to commit them to the Youth Authority pursuant to the provision of section 1731.5 that a court "shall" so commit all persons falling within the specifications of the section. The state's position, however and its sole contention, is that by the provisions of subdivision (b) of the section defendants are barred from coming within such specifications, for the reason that although the minimum punishment for the crime of which they were convicted—first-degree robbery—is five years' imprisonment in the state prison, the maximum term is not prescribed by statute (see Pen.Code, § 213), and therefore the sentence for the crime is imprisonment for life until such time as a lesser term may be fixed by the Board of Prison Terms and Paroles. See Pen.Code, §§ 3000, 3020.

[1] That this court has held that for certain purposes an indeterminate sentence under a law which fixes no maximum term, prior to action by the authorized board, is in effect a "life sentence," is indisputable. In *People v. McNabb* (1935), 3 Cal.2d 441, 444, 445, 456, 457, 45 P.2d 334, 335, we said, "The penalty prescribed for robbery in the first degree is 'not less than five years.' Pen.Code, § 213. The maximum therefore is a life sentence, subject to be shortened by the action of the state board of prison terms and paroles, as provided by the provisions of section 1168, Penal Code. Until action is taken by said board fixing a shorter duration of imprisonment than life, it is uniformly held 'that the indeterminate sentence is in legal effect a sentence for the maximum term. It is on this basis that such sentences have been held to be certain and definite and therefore not void for uncertainty.' In *re Lee*, 177 Cal. 690, 171 P. 958, 959, citing many supporting cases. * * * The authorities of this and many sister states which have an indeterminate sentence law similar to ours hold that a statute which prescribes a minimum sentence of not less than five years and with no maximum is in law a life sentence until and unless a court or executive board charged with the duty of fixing prison terms remits a portion of the life term. This question was definitely settled by *In re Lee*, 177 Cal. 690, 171 P. 958, in 1918 and has been the pronounced law of the state since." See, also, *People v. Jones* (1936), 6 Cal.2d 554, 556, 59 P.2d 89; *In re Daniels* (1930), 106 Cal.App.

43, 45, 288 P. 1109; *People v. Hayes* (1935), 9 Cal.App.2d 157, 160, 49 P.2d 288; *People v. Meyers* (1939), 31 Cal.App.2d 515, 517, 88 P.2d 212.

For their side of the controversy defendants point to the line of cases, commencing with *People v. Clough* (1881), 59 Cal. 438, 441, and including *People v. Riley* (1884), 65 Cal. 107, 108, 109, 3 P. 413; *People v. Fultz* (1895), 109 Cal. 258, 259, 260, 41 P. 1040; *People v. Logan* (1899), 123 Cal. 414, 416, 417, 56 P. 56; *People v. Sullivan* (1901), 132 Cal. 93, 94, 64 P. 90, and *People v. Purio* (1920), 49 Cal.App. 685, 687, 194 P. 74, which have established and uninterruptedly held that although section 1070 of the Penal Code provides that a defendant charged with an offense "punishable with death, or with imprisonment in the state prison for life * * * is entitled to twenty * * * peremptory challenges" to jurors, and that "On a trial for any other offense, the defendant is entitled to ten * * * peremptory challenges," nevertheless it is "only in capital cases, or cases in which a life sentence is *in terms* affixed by the Legislature as the punishment of the crime, that the defendant is entitled to twenty peremptory challenges." *People v. Clough* (1881), *supra*. It may be noted that in *People v. Purio* (1920), *supra*, in which the trial court's action in allowing defendants accused of robbery (punishable by imprisonment in the state prison for not less than one year, Pen.Code, § 213) only ten peremptory challenges was approved on appeal, the further statement is made (at page 687 of 49 Cal. App., at page 76 of 194 P.) that "the recent [in 1917] change in the law providing for an indeterminate sentence has not affected the rule in reference to the number of peremptory challenges."

Defendants urge that the phrase "*punishable with * * * imprisonment * * * for life*" (italics added) as contained in section 1070 of the Penal Code is patently "broader in its inclusive effect" than the phrase "*sentenced to * * * imprisonment for life*" (italics added) which appears in subdivision (b) of section 1731.5 of the Youth Authority Act, and that if it is reasonable to construe the language of the Penal Code section as limiting a defendant to ten peremptory challenges excepting only when the crime of which he is accused carries a *minimum* punishment of life imprisonment, then the case is mani-

festly stronger for these defendants who seek commitment to the Youth Authority. That is to say, we cannot consistently hold that the phrase "sentenced to * * * imprisonment for life" is more inclusive than the phrase "punishable with * * * imprisonment * * * for life" when exactly the opposite would appear to be the more reasonable interpretation. And if we indulge that more reasonable interpretation it would seem that a defendant, for the purposes of the Youth Authority Act, could not be held to have been "sentenced to * * * imprisonment for life" unless the sentence prescribed by law carried a minimum or fixed punishment of life imprisonment.

The two lines of decisions hereinabove discussed are obviously conflicting insofar as their analogous application to the question involved in the cases of these appealing defendants is concerned. This, however, does not mean that either line need be overruled in order to dispose of the pending cases. Each line has become established over a long period of years as defining the law in the particular matters to which it respectively relates. The question before us is not one which is necessarily concluded by either of the two series of holdings. It is proper, therefore, in reaching a conclusion, to consider the purpose of the particular statute and certain fundamental rules governing the construction of criminal laws generally.

[2] In the statute itself the Legislature has declared (Welf. & Inst. Code, § 1700) that "The purpose of this [act] is to protect society more effectively by substituting for retributive punishment methods of training and treatment directed toward the correction and rehabilitation of young persons found guilty of public offenses. To this end it is the intent of the Legislature that the [act] be liberally interpreted in conformity with its declared purpose." A similar purpose motivated the adoption of the Indeterminate Sentence Law (Pen. Code, § 1168) under which defendants were sentenced. It apparently is the purpose of the Legislature that, as to youthful offenders within the limits prescribed (whatever they may be), the Indeterminate Sentence Law and the Youth Authority Act shall be construed and applied to work together as complementary parts of a more enlightened penal system. Apropos of the purpose of the Indeterminate Sentence Law (in Re

Lee (1918), 177 Cal. 690, 692, 693, 171 P. 958, 959) this court stated, "It is generally recognized by the courts and by modern penologists that the purpose of the indeterminate sentence law, like other modern laws in relation to the administration of the criminal law, is to mitigate the punishment which would otherwise be imposed upon the offender. These laws place emphasis upon the reformation of the offender. They seek to make the punishment fit the criminal rather than the crime. They endeavor to put before the prisoner great incentive to well-doing in order that his will to do well should be strengthened and confirmed by the habit of well-doing. Instead of trying to break the will of the offender and make him submissive, the purpose is to strengthen his will to do right and lessen his temptation to do wrong." From the foregoing discussion and quotations it appears that adoption of the construction of the Youth Authority Act sought by defendants would be consistent with the declared and recognized ideals of both that act and the indeterminate sentence law.

[3] When language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted. In other words, criminal statutes will not be built up "by judicial grafting upon legislation. * * * [I]t is also true that the defendant is entitled to the benefit of every reasonable doubt, whether it arises out of a question of fact, or as to the true interpretation of words, or the construction of language used in a statute." *Ex parte Rosenheim* (1890), 83 Cal. 388, 391, 23 P. 372, 373; *People v. Sayre* (1937), 26 Cal.App.2d Supp. 757, 761, 70 P.2d 546.

[4] We have noted that the motion of each defendant to be committed to the Youth Authority was made prior to the actual imposition of any sentence upon him, and that therefore, strictly speaking none of the defendants had been "sentenced to * * * imprisonment for life" (§ 1731.5, subd. (b) of the act) or to any other term at the time he moved to be so committed. However, we have recently held that commitment to the Authority is "a pronouncement of the sentence for the offense, namely, commitment to the Authority for the term prescribed by law." *In re Herrera* (1943), 23 Cal.2d 206, 214, 143 P.2d 345,

349. Therefore, in reaching our conclusion herein, we do not rely in any degree upon the fact that literally no sentence had been pronounced against any of the defendants at the time they moved to be committed to the Youth Authority.

[5] Assuming, however, that the sentences had been pronounced at the time defendants moved for certification to the Authority it is still true that in literal actuality these defendants had not been sentenced to *life imprisonment*. As stated in the persuasive argument of Deputy Public Defender William B. Neeley, "They are sentenced to the term prescribed by law and the *legal effect* of such a sentence is to place them under the control of the Parole Board for the possible maximum term, to wit, life imprisonment. There has, however, been no *sentence* to life imprisonment and sentence is an essential element of the exception stated in Section 1732 [and Section 1731.5]." We are not disposed to hold that the fact that *the legal effect of the sentences for some purposes* is equivalent to that of sentences to life imprisonment, operates to deprive the defendants of a right to which they may be entitled if they have not been "sentenced to * * * imprisonment for life."

There is a cognizable difference between a sentence to imprisonment for "the term prescribed by law" which it is the duty of the authorized board to resolve into a sentence to imprisonment for a term of five years or more, and a sentence to imprisonment for life. The difference is similar to that which has been recognized in a long line of decisions beginning with *Ex parte Rosenheim* (1890), *supra*, 83 Cal. 388, 23 P. 372, and including *In re Collins* (Cal.Sup. 1890), 23 P. 374; *People v. Hamberg* (1890), 84 Cal. 468, 475, 24 P. 298; *Lowrey v. Hogue* (1890), 85 Cal. 600, 602, 24 P. 995; *People v. Brown* (1896), 113 Cal. 35, 36, 45 P. 181; *Roberts v. Howells* (1900), 22 Utah 389, 62 P. 892; *People v. Kerr* (1911), 15 Cal.App. 273, 276, 114 P. 584; *Reese v. Olsen* (1914), 44 Utah 318, 139 P. 941, 942; *People v. Pera* (1918), 36 Cal.App. 292, 307, 171 P. 1091; *People v. Velarde* (1920), 45 Cal.App. 520, 530, 188 P. 59; *People v. Sayre* (1937), *supra*, 26 Cal.App.2d Supp. 757, 766, 70 P.2d 546.

[6] In the *Rosenheim* case this court considered and construed the language of

PRATHER et al. v. HOBERG.

Sac. 5352.

Supreme Court of California.

July 21, 1944.

Rehearing Denied Aug. 17, 1944.

section 1205 of the Penal Code providing that "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied * * *," and held that (page 390 of 83 Cal., page 373 of 23 P.) "section 1205 is inapplicable to cases in which the court has imposed a term of imprisonment *and also* a fine. [Italics added.] * * * There is nothing in the letter of this statute, we think, which indicates an intention to make it applicable to cases in which the court itself fixes a term of imprisonment absolute, and then imposes a fine. * * * If those who framed and adopted section 1205 had intended it to apply to judgments that the defendant be imprisoned for a certain term fixed by the court, and pay a fine, it would have been easy to have so declared." It may be said with equal verity that if those who framed and adopted the Youth Authority Act had intended that all youths subject to indeterminate sentences for terms without fixed maximums should be excluded from the procedures of the act it would have been easy to have so declared. In the absence of such express legislative exclusion we shall not read it into the statute.

[7] The conclusion that these defendants are entitled to be *certified to the Authority* obviously does not mean that the Authority must accept them or that they are entitled to remain under it. Those are questions which the administrators of the act must determine, in the exercise of a sound discretion, and unless they are satisfied as to each defendant that he "can be materially benefited" by the procedure and that for his "care and maintenance there exists * * * proper and adequate facilities" (Welf. & Inst. Code, § 1731.5), it will be their duty to return such defendant to the superior court or to take such other action as under the circumstances may be proper, to the end that he shall be committed to the proper penal institution.

The judgments of commitment to the state prison are reversed and the causes are remanded to the trial court, with directions to grant the respective motions of the defendants for certification to the Youth Authority.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concur.

1. Judgment ☞5

Where trial court expressly found that part of one of defendant's parcels was in a different water shed from the underground stream in question and not riparian, but reserved for future adjudication the character of the remainder of such parcel, the case was partially undecided and an essential element to support judgment for plaintiffs was lacking.

2. Waters and water courses ☞49, 87

Where litigants own all land bordering on stream, court may not apportion water and award damages for diversion without considering all the lands and determining the riparian or nonriparian character of each parcel.

3. Waters and water courses ☞107(3)

Where court reserved jurisdiction to determine essential issue of whether part of one of defendant's parcels was riparian to underground stream, subsequent refusal to receive additional evidence on the issue to complete the record was an abuse of discretion.

4. Waters and water courses ☞101

If one of defendant's lots and other lot or major portion thereof are both riparian to underground stream, defendant is entitled to make reasonable and beneficial use of diverted water on both areas.

5. Waters and water courses ☞107(3)

Where part at least of defendant's land is riparian to underground stream, damages for excessive diversion from such stream cannot be adjudicated without first determining to what extent the diversion and use of water was wrongful, as affected by extent of defendant's riparian right.

6. Waters and water courses ☞49, 107(3)

In action for apportionment of water rights among riparian owners and damages for diversion from underground stream, trial court was not warranted in cutting defendant's water supply to one-fifth on basis of finding that one-fifth of dependable supply was reasonable for use on one of defendant's lots, where question of defend-

ant's right to apportionment for another lot or part thereof was also in issue and not decided.

7. Waters and water courses ☞107(3)

Allotting 6,000 gallons a day from underground stream to defendant who needed and had been diverting 50,000 gallons a day, out of estimated dependable supply at defendant's diversion point of 30,000 gallons per day, was disproportionately small where 371,520 gallons per day were available to plaintiffs, without adding 73 gallons a minute allowed for six months' pumping.

8. Waters and water courses ☞49, 107(3)

In action for apportionment of water rights among riparian owners and damages for diversion from underground stream, judgment limiting defendant to specified amount per day and in effect allowing plaintiffs all water over that amount irrespective of the available supply, without providing for seasonal fluctuation in quantity available to both parties, was improper.

9. Waters and water courses ☞49

As between riparian owners it is preferable, whenever possible, to decree apportionment of water in terms of percentage or proportion.

10. Waters and water courses ☞42

A riparian owner has no right to any mathematical or specific amount of water of a stream as against other like owners, but only a right in common to take a proportional share.

11. Waters and water courses ☞42

Reasonable amount of water which riparian owner may take from stream may not be determined by mathematical rule but varies with circumstances of each case, and also from year to year and season to season.

12. Waters and water courses ☞49

Apportionment of water rights among riparian owners should be measured in the manner best calculated to a reasonable result, and court may adopt any standard that is reasonable on the facts to secure equality.

13. Waters and water courses ☞49, 107(3)

In action for apportionment of water rights among riparian owners and damages for diversion from underground stream, consideration of greater past commercial use by plaintiffs than by defendant would

be immaterial, since the present reasonable beneficial uses, giving consideration to preferential uses, determine apportionment.

14. Waters and water courses ☞49

In apportioning water rights among riparian owners, consideration of comparative acreage was improper in absence of determination of what part of defendant's acreage in particular parcel was riparian, on what part of it the water might rightly be used, what portion was under or susceptible of present cultivation, and what portion was devoted to resort purposes.

15. Waters and water courses ☞49

In apportioning water rights among riparian owners, preference should be given to use for "domestic purposes", which includes consumption for sustenance of human beings, not necessarily excluding occupants of hotels, apartment houses, boarding houses, auto camps or resorts, household conveniences, and care of livestock.

See Words and Phrases, Permanent Edition, for all other definitions of "Domestic Purpose".

16. Waters and water courses ☞42

The commercial character of upper riparian proprietor's business in serving guests may be so extensive that a lower riparian whose domestic use, whether or not commercialized, would be prejudiced by business activities of upper riparian so as to require interposition of equity to safeguard his rights, especially where swimming pools, ornamental pools, boating, and the like are part of service to guests.

17. Waters and water courses ☞49

In apportioning water rights among riparian owners, as between domestic and commercial uses, question is whether under all circumstances the use of water by one is reasonable and consistent with corresponding enjoyment of the right by the other.

18. Appeal and error ☞1008(1)

What constitutes reasonable use of water, as basis for apportioning rights among riparian owners, is for the trier of facts in the first instance.

19. Waters and water courses ☞49, 107(3)

In action for apportionment of water rights among riparian owners and damages for diversion from underground stream, judgment should not leave defendant un-

able to use diverted water upon particular parcel unless or until court should exercise its reserved jurisdiction to determine what portion of that parcel was riparian.

In Bank.

Appeal from Superior Court, Lake County; Hilliard Comstock, Judge.

Actions by Robert Lilburn Prather and others as owners of land against Max Hoberg to quiet title to waters of a stream, to restrain an adjoining landowner from diminishing the flow, and for damages and other relief. From a judgment for plaintiffs, defendant appeals.

Reversed.

Prior opinion, 142 P.2d 470.

Breed, Burpee & Robinson, of Oakland, and Derby, Sharp, Quinby & Tweedt, of San Francisco, for appellant.

Huston, Huston & Huston, of Sacramento, H. G. Crawford, of Lakeport, and T. P. Wittschen, of Oakland, for respondent.

SHENK, Justice.

This is an appeal by defendant from a judgment apportioning certain waters between himself and plaintiffs as riparian owners, awarding damages to plaintiffs for wrongful diversion from an underground stream, and enjoining defendant from using any of the water upon a certain parcel of his property until such time as its riparian character may be determined. The questions argued before this court concern in the main the sufficiency of the relief accorded by the decree.

The plaintiffs and the defendant maintain respective summer resorts on adjoining properties located in the Boggs Mountain district of Lake County. Defendant's land located at the higher elevation, consists of three parcels, Lot One of 17 acres on which the resort is largely located, Parcel Two to the south containing 160 acres designated as Lots 2, 3 and 4, on which his resort is partly located, and Parcel Three to the west, which is not involved in this litigation. Plaintiff's own two northerly contiguous tracts. Tract One consisting of 160 acres known as the Price Ranch, and Tract Two, consisting of about 200 acres, upon which their resort is located.

On the Price Ranch, about 100 feet north of its common boundary with defendant's Lot One, is located a perennial spring known

as Prather Spring, which is fed by an underground stream. This underground stream, the trial court found, flows beneath plaintiffs' property and also beneath defendant's Lot One, but the court reserved for future adjudication the question whether it flows beneath defendant's Parcel Two. At Prather Spring the water emerges above the surface of the ground, and a small stream called Big Canyon Creek flows down a well-defined channel through a swale or gulch on a portion of the Price Ranch, and thence northeasterly over plaintiffs' Tract Two to an angle from which it continues southeasterly across that tract. Both of the plaintiffs' tracts of land border on both sides of the creek, and for many years plaintiffs had sufficient water for the purposes of their resort and for the irrigation of about 15 acres of the Price Ranch. For more than 40 years prior to this litigation their resort had been patronized annually by hundreds of guests.

In 1921, at a point near the common boundary, or northerly line of defendant's Lot One, and about 200 feet south of Prather Spring, defendant started to construct, without the knowledge or consent of plaintiffs, a tunnel which extended for some distance into Boggs Mountain and tapped the water supply in the underground stream. By means of this tunnel, which was completed in 1924, the defendant diverted what the trial court found to be "unreasonably large portions of water" and used it exclusively to supply the needs of his resort, both the portion located on Lot One and that located on Parcel Two.

Prior to the time of this diversion defendant's resort had not had a patronage of guests approximating the number which annually visited plaintiffs' resort. But after the diversion, the supply of water in Prather Spring and Big Canyon Creek increasingly diminished from year to year, so that plaintiffs were finally obliged to abandon the cultivation of acreage on the Price Ranch and to discontinue the maintenance of a small dairy and garden on their other tract, and they were also faced with an insufficient supply of water for maintenance of their resort. The result was that the number of transient guests at defendant's resort in subsequent years approximated those at plaintiffs' resort, and this growth, the trial court found, had to a material extent been made possible by defendant's "diversion of the water supply to his whole resort and not alone Lot One (1) to plaintiff's substantial injury."

Plaintiffs first discovered the diversion in 1929, and brought this action in August, 1930, seeking to quiet their title to the waters of the stream, to restrain defendant from diminishing the flow, and for damages and general relief. Issues were joined by answer, cross-complaint and answer to cross-complaint.

A prolonged hearing was had commencing in the year 1933. Extensive tests were conducted for the purpose of determining whether there was any relation between defendant's diversion at the tunnel from the underground stream and the diminishing flow in Prather Spring and Big Canyon Creek, or whether said diminishing flow was due to natural causes resulting from the dry cycle which Lake County and the rest of the state had experienced for some years. Defendant asserted that when water was first struck at the end of the tunnel he had investigated the effect on the Prather Spring and found that the flow had not been affected. Plaintiffs introduced evidence to the contrary indicating that there was a substantial connection between the supply in the tunnel and the supply in the Prather Spring. The result of the tests was not conclusive. Finally, in July, 1936, the trial judge rendered a preliminary opinion wherein he expressed himself as "abundantly satisfied that a substantial and relatively direct connection exists between the two points" of water supply, and declared the case to be "a very proper one for the application of the doctrine of apportionment."

Before the case was concluded the dry cycle was broken by the wet winter of 1937-1938. In August, 1938, the trial judge rendered a second memorandum opinion announcing his views on the matter of apportionment, and his intention to award plaintiffs \$2,500 damages. In October, 1938, defendant sought to have the case reopened for the purpose of introducing evidence of the effect of the preceding heavy winter rains on the water sources involved, of requiring continuous pumping tests under court order, of showing the results of the drilling of many new wells upon defendant's property, and for a reference of issues of fact required to be determined as a result of this new evidence to a court expert or to the State Water Commission. In November, 1938, the trial court denied the motion to reopen; in February, 1939, it denied a similar motion to reopen or for an interlocutory judgment; in April, 1939,

findings of fact and conclusions of law were made and filed and judgment was rendered in plaintiffs' favor; and in May, 1939, a motion for new trial was denied. Defendant appealed.

One of the main points urged by defendant on the appeal is that of abuse of discretion on the part of the trial court in refusing to reopen the case for further and determinative evidence upon disputed issues and issues reserved for future adjudication, and in refusing to grant a new trial. Insufficiency of the evidence to support the findings, inconsistencies in the findings and judgment, error in failing to determine whether defendant's Parcel Two is or is not riparian to the underground stream, and improprieties in the type of relief accorded are other grounds urged for reversal.

For present purposes it may be assumed, without determining the issue, that the record contains sufficient evidence to support the findings to the effect that the underground stream is a source of supply both for defendant's diversion at the tunnel and for Prather Spring, and that there is a direct connection between the two so that any taking at the tunnel is reflected in a proportionately diminished flow at the spring and down Big Canyon Creek.

In addition to the foregoing, the record shows and the court found and concluded:

1. That plaintiffs' lands are traversed by the underground stream; that defendant's Lot One is riparian to it, but that the question whether defendant's Parcel Two is also riparian is reserved for future adjudication. More specifically the court found that all water diverted by defendant prior to the commencement of this action in excess of the amount apportioned to him, as hereinafter set forth, was in excess of the amount required for reasonable and beneficial use on Lot One; and that "the evidence is insufficient to enable the court to specifically determine whether or not any part of Parcel Two * * * is riparian to the said underground stream, and therefore jurisdiction is hereby reserved for future determination and adjudication by the court as to whether there are any other underground stream or streams or sources of water supply on said Lot One (1) other than stated in these findings. The court reserves jurisdiction to adjudge and determine the quantity of water said defendant may be entitled to divert from said underground stream on Parcel Two."

2. That plaintiffs have a much greater need for irrigation for agricultural purposes based upon acreage and considerations of past and possible future use than defendant; that there is no substantial agricultural use on defendant's Lot One. That nevertheless defendant, by means of his tunnel and pumping system, diverted "an unreasonably large portion" of the flow of the underground stream, amounting in some instances to approximately 50,000 gallons of water a day. That the more recent growth of defendant's resort has been made possible by his diversion of the water supply "to his whole resort and not alone Lot One (1) to plaintiff's substantial injury."

3. That the water diverted by defendant was used upon all of his property, "including portions of said Parcel Two * * * not situated within the same watershed as Parcel One (1) and the Prather Spring but being situated in Kelsey Creek watershed; that said defendant so diverted waters from said tunnel for use upon lands which are not riparian to said stream." That defendant diverted more water than could be applied to a beneficial use on Lot One, "substantial portions thereof having been diverted to and used upon lands not in the watershed of the said underground stream."

4. That the amount of water required by plaintiffs "for natural and domestic use" and the use of the resort is a flow of 258 gallons per minute; and the reasonable quantity required by plaintiffs for irrigation of 15 acres of the Price Ranch "is not less than two acre feet per acre per annum"; that prior to defendant's diversion this amount of supply was, under normal conditions, available to plaintiffs, but since the diversion there has not been enough water to supply plaintiffs' reasonable and actual needs.

5. That the tunnel is not the sole source of defendant's water supply as defendant has, since the filing of this action, developed a supply from wells situated on his land, but not on Lot One and not within the watershed of Big Canyon Creek. That "the quantity of water reasonably required and which can be applied to a beneficial use" on Lot One by defendant is "one-fifth ($\frac{1}{5}$) of the dependable supply at Hoberg tunnel without change of the physical condition of the tunnel or the present method of making such diversion, or its capacity, which, until further order of the

court, is fixed at six thousand (6000) gallons per day pumped by the said defendant at the rate of sixteen (16) gallons per minute."

6. That as against defendant, plaintiffs are entitled to use all of the water flowing into Prather Spring and Big Canyon Creek except the quantity so apportioned to defendant, being the amount he requires for a reasonable or beneficial use on Lot One, "and such waters, if any as the Court may hereafter determine the said defendant may divert [for] Parcel Two"; that the water which defendant "is entitled to is equal to one-fifth ($\frac{1}{5}$) of the dependable daily supply" at the tunnel "pumped at the time and manner hereinbefore fixed."

7. That "by reason of the acts of the said defendant, the said plaintiff has been and is damaged in the sum" of \$2,500.

8. That defendant's Lot One is riparian; that defendant "has no right to divert water from the said underground stream described in the findings, except as apportioned to the said defendant for use on said Lot One (1) mentioned in the findings and this judgment, and upon such portions of Parcel Two (2) mentioned in the findings as may hereafter be determined to be riparian."

[1] By comparing the findings described in Item 1 with those described in Item 3 and the provision of the judgment mentioned in Item 8, it is seen that although the trial court more than once specifically reserved for future adjudication the question whether defendant's Parcel Two is riparian to the underground stream (Item 1), yet it also more than once expressly declared that portions of Parcel Two were not situated within the same watershed as Parcel One and Prather Spring, but were situated in Kelsey Creek watershed, and that part of the water diverted was being used upon said lands "which are not riparian to said stream" (Item 3). By thus expressly finding that part of Parcel Two is in a different watershed and not riparian, and leaving the question open as to the character of the remainder of that parcel the case is left in part undecided and thus one of the essential foundation elements to support the judgment is lacking.

Plaintiffs argue that the burden was upon defendant to show that Parcel Two or some part thereof is riparian and, having failed to sustain this burden, he was benefited and not injured by the court's reserva-

tion of jurisdiction, for if the court had made any determination on the evidence, it would have been, necessarily, that the land was nonriparian.

[2,3] Whether under the pleadings in this case the burden was upon the defendant to prove that Parcel Two or some part thereof is riparian need not be decided for the reason that the defendant offered to assume that burden and was denied the right to sustain it. Furthermore, the defendant received no benefit from the reservation of jurisdiction. In fact he sought to avoid it by his successive motions to reopen the case and for an interlocutory judgment. He asserts that if he had been permitted to introduce additional evidence establishing at least a portion of Parcel Two as riparian, he would have been entitled not only to a greater apportionment of water, but also to a reduction in the damages, if any, to be awarded. In a case such as this, where the parties litigant own all of the land bordering on the stream, there being no other riparian owners, a trial court may not properly make an apportionment of water and award of damages without taking all of the lands into consideration and determining the riparian or nonriparian character of each parcel. The hiatus in the evidence may well have been anticipated by the defendant when he offered to produce additional evidence to supply any deficiencies or uncertainties in the proof. To reserve jurisdiction to determine an issue so essential to a just and equitable determination of the case was in effect to fail to decide the case in a very substantial respect. Then to refuse to receive additional evidence to complete the record on this material issue amounted to an abuse of discretion. In other words, until the court had determined what part of defendant's land is riparian to the water supply, no proper basis was established for determining either the portion of the water to which defendant is entitled, the land upon which the water may rightfully be used, or the damage, if any, caused by defendant's wrongful use.

[4,5] The findings do not show the precise basis for the award of damages to plaintiff in the sum of \$2,500. The judgment appears to rest upon the general finding of damage "by reason of the acts of said defendant." Just what those acts were is uncertain. If they consisted in taking the water diverted at the tunnel out of the watershed and using it upon the nonriparian

portion of Parcel Two located in a different watershed, actionable damage would result. If, however, they included the use by defendant of the diverted water upon portions of Parcel Two which are riparian, then the remedy as to the riparian use is not in damages but for apportionment. The uncertainty in the findings on this point emphasizes the error of the trial court in failing to fix the character of Parcel Two. If Lot One and Parcel Two or a major portion of the latter parcel are both riparian, then defendant is entitled to make reasonable and beneficial use of the diverted water on both areas. The extent of his riparian right necessarily affects directly the amount of damages, if any, to which the plaintiffs may be entitled. It is impossible to adjudicate the amount of damage without first determining to what extent the diversion and use of the water was wrongful.

[6] A like problem arises with reference to the issue of apportionment. The court found that all water diverted by defendant prior to the filing of this action in excess of the amount apportioned was in excess of the amount required for reasonable and beneficial use on Lot One; that other sources of water supply were available on portions of Parcel Two located without the watershed; and that the quantity reasonably required for beneficial use on Lot One was one-fifth of the dependable supply at the tunnel. But if Parcel Two or any part of it is riparian, the apportionment should include the amount of water reasonably required for beneficial use on so much of that parcel as is riparian. The trial court was not warranted in cutting defendant's supply to one-fifth, thus endangering the life of his resort unless other water sources could be developed, when there was also placed in issue the question whether defendant was entitled to an apportionment for Parcel Two, or some part of it.

The trial court described the apportionment to defendant as "one fifth ($\frac{1}{5}$) of the dependable supply at Hoberg tunnel without change of the physical condition of the tunnel or the present method of making such diversion, or its capacity, which, until further order of the court, is fixed at six thousand (6000) gallons per day pumped by the said defendant at the rate of sixteen (16) gallons per minute."

It is to be noted that 6,000 gallons per day would be $4\frac{1}{6}$ gallons per minute for a

twenty-four hour day, whereas 16 gallons per minute would be 23,040 gallons for such a day. What is meant, we assume, is that defendant could pump daily at the rate of 16 gallons per minute until 6,000 gallons had been taken.

[7] Defendant's unreasonable diversion at the tunnel, and hence impliedly his need, was found to have approximated 50,000 gallons a day, or $34\frac{1}{18}$ gallons per minute. Assuming, as the trial court found, that the entire water supply from Prather Spring and Big Canyon Creek was sufficient, prior to any diversion at the tunnel, to meet plaintiffs' requirement of an estimated 258 gallons per minute or 371,520 gallons a day, plus two acre feet per acre per annum to irrigate 15 acres of the Price Ranch, which according to counsel's computation is the equivalent of 73 gallons per minute for six months' continuous pumping, it is seen how disproportionately small is the allotment to defendant of but 6,000 gallons a day. While that is one-fifth of the estimated dependable supply at the tunnel of 30,000 gallons per day, it is less than one-sixtieth of the supply normally available to the plaintiffs of 371,520 gallons per day, without adding the estimated 73 gallons per minute allowed for six months' pumping for the Price Ranch. Under this calculation it is difficult to see how defendant's diversion of approximately 50,000 gallons per day could have appreciably affected the supply of water to plaintiffs' damage.

[8-12] Then, too, the judgment fails to make provision for seasonal fluctuation in the quantity of water available to both parties. By limiting defendant to 6,000 gallons a day it in effect allows plaintiffs all of the water over that amount irrespective of the available supply. As between riparian owners it is preferable, whenever possible, to have an apportionment decreed in terms of a percentage or proportional allotment. The reason is obvious. A riparian owner has no right to any mathematical or specific amount of the water of a stream as against other like owners. He has only a right in common with the owners to take a proportional share from the stream—a correlative right which he shares reciprocally with the other riparian owners. No mathematical rule has been formulated to determine such a right, for what is a reasonable amount varies not only with the circumstances of each case but also varies from year to year and season to season.

Pabst v. Finmand, 190 Cal. 124, 211 P. 11; 25 Cal.Jur. pp. 1135-1146, and cases cited. Although problems of measurement and pumping engendered by reason of the underground character of the flow may have impelled the specific allotment in this case, it may be possible upon the retrial to decree an apportionment in a proportional or some other more equitable form. The apportionment should be measured in the "manner best calculated to a reasonable result," and the court may adopt any standard of measurement "that is reasonable on the facts to secure equality." *Wiel on Water Rights*, 3d Ed., p. 820, § 751.

In another respect the findings and judgment are uncertain in specifying the basis of the apportionment. The trial judge expressed the view that in an apportionment between riparian owners a "natural" as distinguished from an "artificial" use was entitled to preference; that a use for resort purposes was an artificial commercial use contributing to the land owner's profit in a business enterprise, a use not within the purview of a "natural use" by a riparian owner arising out of the necessities of life on the riparian land, such as a household and drinking use and the watering of stock, and that here, so far as any purely domestic need or natural use is concerned, the issue may be eliminated as each party has a sufficient water supply for such purpose distinct from the supply in controversy.

In the findings, however, the court declared, apparently as the basis for the apportionment, that there is no substantial agricultural use for any of the water on defendant's Lot One of 17 acres; that "the plaintiffs have a much greater need for irrigation for agricultural purposes based upon acreage and considerations of past and possible future use than the said defendant; that the resort * * * of plaintiffs has for a long time been larger than defendant's, and from the standpoint of existing permanent improvements as well as area of riparian land to be capable of greater expansion and under a heavier necessity for the use of the said water supply from the said underground stream supplying the said Hoberg tunnel and Prather Spring, than defendant herein; that only recently has the number even of transient guests at defendant's resort approximated those at plaintiffs', and the more recent growth of the said defendant's resort has, to a material extent been made possible by

the defendant's diversion of the water supply to his whole resort and not alone Lot One (1) to plaintiff's substantial injury."

[13] The consideration of the element of a greater past commercial use by plaintiffs than by defendant would seem to be immaterial, for it is the present reasonable beneficial uses to which the water may properly be put by the riparian owners, consideration being given of course to preferential uses, that determines an apportionment.

[14] So far as acreage is concerned, plaintiffs possess 200 acres in Tract Two, upon which their resort and former garden and dairy are located, and 160 acres in Tract One or the Price Ranch, only 15 acres of which were formerly cultivated, or 360 acres in all. Defendant's Lot One contains 17 acres, uncultivated, and Parcel Two contains 160 acres, or a total of 177 acres involved in this controversy. Assuming that in reaching a basis for computation of its apportionment the trial court compared the respective acreage which it considered to be entitled to preferential agricultural use, and then the water requirements of the respective competing resorts, which are now of about equal size, it would appear that the acreage was not properly considered as an element in the absence of a determination as to what part of defendant's acreage in Parcel Two is riparian, upon what part of it the water might rightly be used, what portion is under or susceptible of present cultivation, and what portion is devoted to resort purposes.

The question to what extent the use of water by paying guests residing on riparian land is a domestic use, sometimes called a natural use, as distinguished from a commercial use, often referred to as an artificial use, is one on which no authority directly in point is cited. The distinction between so-called natural and artificial uses of water and the elements to be considered in making an apportionment are discussed in *Lux v. Haggin*, 69 Cal. 255, 406-409, 4 P. 919, 10 P. 674; *Charnock v. Higuerra*, 111 Cal. 473, 478-481, 44 P. 171, 32 L.R.A. 190, 52 Am.St.Rep. 195; 25 Cal.Jur., pp. 1116-1119, 1139-1146; 1 *Wiel on Water Rights*, 3d Ed., pp. 795-831; and *Kinney on Irrigation and Water Rights*, 2d Ed., pp. 831 et seq.

[15-18] Without question the authorities approve the use of water for domestic purposes as first entitled to preference. That use includes consumption for the sustenance of human beings, for household

conveniences, and for the care of livestock. The fact that human beings are occupants of hotels, apartment houses, boarding houses, auto camps, or resorts such as those conducted by the parties to this action does not necessarily exclude them from the preferential class. *Frederick v. Bognor Water Co.*, 78 L.J. Ch. 40; 21 *Mews' Digest of English Case Law*, p. 738. But it may well be that the commercial character of the proprietor's business in serving his guests may be so extensive that a lower riparian whose domestic use, whether or not commercialized, would be prejudiced by the business activities of the upper riparian and to such an extent as to require the interposition of a court of equity to safeguard his rights. This would especially be true where swimming pools, ornamental pools, boating, and the like are furnished as a part of the service to the guests (see *Wiel*, supra, pp. 803-807), which uses, in themselves, have been held to be not domestic. *Bernard Castle Urban Council v. Wilson*, 71 L.J. Ch. 825, 21 *Mews' Digest of English Case Law*, p. 742. The question is whether under all the circumstances of the case the use of water by the one is reasonable and consistent with the corresponding enjoyment of the right by the other. *Dumont v. Kellogg*, 1874, 2 Mich. 420, 18 Am.Rep. 102. What constitutes reasonable use is, in the first instance, a question for the trier of facts.

[19] It will be noted that here the judgment places defendant in the position of being unable to use the diverted water upon Parcel Two unless or until the court exercises its reserved jurisdiction to determine what portion, if any, of that parcel is riparian. If any portion of Parcel Two is riparian defendant should not be restrained from using the water upon it or be required to suspend operations thereon.

Complaint is made of other provisions of the judgment, such as that which permits plaintiffs to develop a further water supply by pumping on condition that they deliver 6,000 gallons a day to defendant, but restrains defendant from augmenting his sources of supply by any pumping whatsoever upon Parcel One. As the questioned provisions will probably not be incorporated in a judgment to be entered on a retrial, they need not be here discussed.

The judgment is reversed.

GIBSON, C. J., and CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

24 Cal.2d 543

THOMSON v. BAYLESS et al.
L. A. 18969.

Supreme Court of California.
July 21, 1944.

1. Automobiles ⇨173(2)

The Vehicle Code section prohibiting parking of vehicles on paved portion of a highway outside of a business or residence district when it is practicable to park off such portion of highway is designed to protect persons traveling on highway and violation thereof constitutes negligence by operator of parked vehicle. Vehicle Code, § 582, St.1935, p. 190.

2. Automobiles ⇨242(3)

Proof that a vehicle was parked on paved portion of highway outside of a business or residential district establishes a prima facie case of negligence on part of operator of such vehicle, who then has burden to show that it was not practicable to drive off main traveled portion of highway. Vehicle Code, § 582, St.1935, p. 190.

3. Automobiles ⇨244(14)

Evidence that truck, which was not disabled, was parked with clearance lights burning at night on paved portion of straight highway next to curb which adjoined railroad right of way outside of business or residence district, but within 600 feet of an intersection and within 125 yards of a filling station, was insufficient to show that it was impracticable to have parked truck off main traveled portion of highway so as to excuse truck driver and truck owner of charge of negligence in action by guest in automobile which collided with truck. Vehicle Code, § 582, St. 1935, p. 190; § 583, St.1941, p. 2724; § 588, St.1939, p. 1504.

4. Automobiles ⇨173(2)

In determining whether it is "practicable" to park a nondisabled vehicle off paved portion of highway within meaning of Vehicle Code section requiring that vehicles be parked off paved portion of highway unless it is not practicable to do so, court must consider not only physical conditions immediately to right of place where vehicle is parked, but also any other possible parking spaces to which vehicle might reasonably be taken. Vehicle Code, § 582, St.1935, p. 190.

See Words and Phrases, Permanent Edition, for all other definitions of "Practicable".

5. Automobiles ⇨201(5)

A violation of a parking regulation may be the proximate cause of an accident when unlawfully parked vehicle is struck by another. Vehicle Code, § 582, St.1935, p. 190; § 583, St.1941, p. 2724; § 588, St.1939, p. 1504.

6. Negligence ⇨93(1)

The negligence of host whose automobile struck unlawfully parked truck could not be imputed to guest in guest's action against truck driver and truck owner, Vehicle Code, § 582, St.1935, p. 190; § 583, St.1941, p. 2724; § 588, St.1939, p. 1504.

7. Automobiles ⇨245(62)

In action by guest for injuries sustained when host's automobile collided with unlawfully parked truck, whether unlawful parking was proximate cause of collision was for jury notwithstanding that host was also negligent. Vehicle Code, § 582, St.1935, p. 190; § 583, St.1941, p. 2724; § 588, St.1939, p. 1504.

In Bank.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Culver E. Thomson against John R. Bayless and others for damages resulting from an automobile accident. Judgment for plaintiff, and defendants appeal.

Affirmed.

Prior opinion 144 P.2d 86.

Reginald I. Bauder, of Los Angeles, for appellants.

Arthur C. Miller and Lee A. Solomon, both of Los Angeles, for respondent.

GIBSON, Chief Justice.

Plaintiff was injured when the automobile in which he was riding ran into a parked truck and trailer in charge of the defendant Bayless and owned by his employers, the defendants Johnson. Defendants appeal from a judgment upon a jury verdict in favor of plaintiff.

Bayless was proceeding from Los Angeles to Richmond, California, driving the truck and trailer. Before the accident he had made approximately 100 round trips

over this route and was familiar with the road where the accident occurred. It was his custom on the trip north to stop for a nap beyond San Fernando. At about 10:00 p. m. on the night of the accident, he stopped the truck and trailer about five miles north of San Fernando and about 600 feet south of an intersection, parking on San Fernando Road within 12 inches of the curb in the right northbound lane. This is a four-lane highway, marked by white lines, with a double line in the center. The outside right lane is 14 feet eight inches wide; the inner lanes are ten feet four inches wide, and the outside left lane is 19 feet wide. There was a clearance of 16 or 17 feet between the truck and the center line. There is a curb on the right edge eight inches high, and adjacent thereto is a railroad right of way. On the left side of the highway there is a gravel shoulder ten feet wide and no curb. For several thousand feet south of the point of the accident the highway is straight. Bayless testified that after he parked the truck he checked the equipment and found that both the clearance lights and the tail lights were burning, and there is testimony that they were still burning after the accident.

The automobile in which plaintiff was riding as a guest was traveling north on San Fernando Road in the "extreme righthand lane" at a speed of about 35 miles an hour. Plaintiff testified that traffic on the highway was not heavy but that as the automobile approached the point of the accident another car with "unusually bright lights" passed, traveling in the opposite direction. After the car passed, plaintiff observed the parked truck about 40 feet ahead. At the same instant the automobile in which he was riding swerved to the left, but nevertheless the right side thereof hit the left rear portion of the parked truck and trailer. Prior to the accident, plaintiff did not observe any lights or reflectors on the truck and trailer, but after the accident he noticed clearance lights on the left side of the truck, but did not look to see if the tail lights were burning. He testified that the lights on the automobile were strong and should have disclosed an object as large as the truck at a distance of 200 feet.

Defendants contend that as a matter of law they were not guilty of negligence and that the negligence of the driver of

the automobile was the sole proximate cause of the accident.

[1] Accepting defendants' assertion that the parked truck and trailer were appropriately lighted, that they were parked within 18 inches of the curb on the right of the highway (Vehicle Code, § 588, St. 1939, p. 1504), and that there was more than 20 feet of unobstructed paved highway to the left (Vehicle Code, § 583, St. 1941, p. 2724), the question of defendants' negligence depends upon whether the evidence is sufficient to show that the truck and trailer were improperly parked in violation of section 582 of the Vehicle Code, St. 1935, p. 190, which provides: "Upon any highway outside of a business or residence district no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of the highway when it is practicable to stop, park or so leave such vehicle off such part or portion of said highway." A violation of this section, designed to protect persons traveling on the highway, constitutes negligence by the operator of the vehicle. See *Inai v. Ede*, 42 Cal.App. 2d 521, 523, 109 P.2d 400; *Thompson v. Steveson*, 52 Cal.App.2d 250, 253, 126 P. 2d 127; cf. *Fennessey v. Pacific Gas & Elec. Co.*, 20 Cal.2d 141, 124 P.2d 51. The evidence shows that the truck and trailer were parked "outside of a business or residence district * * * upon the paved or improved or main traveled portion of the highway" within the meaning of section 582, and defendants do not dispute this fact. It follows, therefore, insofar as defendants' negligence is concerned, the only question to be determined is whether or not it was "practicable" for Bayless to park off the highway.

[2] Although it may be inconsistent with general rules of statutory construction (see *Thompson v. San Francisco Gas, etc., Co.*, 20 Cal.App. 142, 145, 128 P. 347; 130 A.L.R. 440, 441, 475; cf. 23 Cal.Jur. 665-667; 21 Cal.Jur. 60), the courts in this state have uniformly held for the past 12 years that a prima facie case of negligence is established under section 582 by proof that the vehicle was left on the paved portion of the highway outside of a business or residential district and that the burden to show that it was not practicable to drive off the main traveled portion of the highway rests upon the operator

of such vehicle. See Callison v. Dondero, 51 Cal.App.2d 403, 408, 124 P.2d 852; Woods v. Walker, 51 Cal.App.2d 307, 310, 124 P.2d 844; Hunton v. California Portland Cement Co., 50 Cal.App.2d 684, 695, 696, 123 P.2d 947; Scoville v. Keglör, 27 Cal.App.2d 17, 32, 33, 80 P.2d 162; Breaux v. Soares, 18 Cal.App.2d 489, 493, 494, 64 P.2d 146; Casey v. Gritsch, 1 Cal.App.2d 206, 212, 36 P.2d 696; Smarda v. Fruit Growers' Supply Co., 1 Cal.App.2d 265, 272, 36 P.2d 701; Silvey v. Harm, 120 Cal.App. 561, 576, 8 P.2d 570. Defendants have conceded that the burden of proof with respect to this issue is upon them. They contend, however, that they have sustained this burden and that the evidence shows conclusively that it was not practicable to park off such portion of the highway. This contention is based entirely upon the presence of the eight-inch curb and the railroad to the right of the truck and trailer. It does not appear how far along the highway the curb extended. The evidence does show that there was an intersection about 600 feet north of the truck and trailer and that approximately 125 yards north of the scene of the accident, at or near the intersection, were a service station and restaurant. A gravel shoulder ten feet wide, with no intervening curb, was at the edge of the highway to the left of the truck. Testimony was offered by plaintiff concerning parking facilities at the service station and restaurant, but this was excluded upon defendants' objection.

[3,4] The evidence, contrary to defendants' contention, does not show that it was impracticable to park off the highway. Rather, if anything, it tends to show that the truck could have been parked at some other point along the highway without crossing the curb. If a vehicle is not disabled the question of whether or not it is "practicable" to park it off the main portion of the highway requires a consideration not only of the physical conditions immediately to the right but also of any other possible parking spaces to which the vehicle might reasonably be taken, no matter in what direction. As said in Wilson v. Droege, 110 Cal.App. 578, 586, 294 P. 726, 730 (speaking of contributory negligence): "It appears from the evidence that at the place where [the driver] drove partially off of the highway it was impossible for her to get farther off of the highway, but it may have been that * * * it

would have been possible for her to proceed in safety a short distance and come to a place where she could have driven her machine entirely off of the highway. *If such was the case, the statute imposed upon her the duty of so doing * * **" (Italics added.) See, also, Doane v. Smith, 63 Cal.App.2d 691, 147 P.2d 650, 651, where the court relied in part upon the fact that "with slight additional effort the truck could have been taken to a nearby point where the solid shoulder was much wider." In this case, other than showing the existence of a curb to the right of the truck, defendants made no attempt to prove any lack of suitable parking spaces within a reasonable distance. In fact, the only testimony relating to near-by parking facilities was excluded at defendants' own objection. Further, it is clear that the truck and trailer were not disabled and could have been moved to any such near-by parking space, because, as defendants state in their closing brief: "It is admitted that defendant driver in the case at bar stopped or parked for his personal convenience. Neither disability of his truck nor any other necessity compelled him to interrupt his journey." Under these circumstances, we cannot hold that as a matter of law defendants sustained their burden of showing it was impracticable to park the truck and trailer off the paved portion of the highway. The record supports the implied finding of the jury that defendant Bayless violated section 582 of the Vehicle Code, thus establishing defendants' negligence for the purposes of this action.

[5-7] Defendants next contend that any negligence on their part was not the proximate cause of the accident but that the sole proximate cause was the negligence of the driver of the automobile in which plaintiff was riding. The violation of a parking regulation may be the proximate cause of an accident where the unlawfully parked vehicle is struck by another vehicle. Doane v. Smith, 63 Cal.App.2d 691, 147 P.2d 650; Thompson v. Steveson, 52 Cal.App.2d 250, 126 P.2d 127; Mason v. Crawford, 17 Cal.App.2d 529, 62 P.2d 420. It is conceded that the driver's negligence, if any, may not be imputed to plaintiff. Accepting defendants' contention that the driver of the automobile in which plaintiff was riding was negligent, we nevertheless cannot on the record before us say, as a matter of law, that the negligence

of defendants was not also a proximate cause of the accident. It has recently been held that whether or not parking on the highway in violation of section 582 of the Vehicle Code constitutes a proximate cause of the accident where the driver of the car in motion might also have been negligent, is a question of fact for the jury if reasonable men can differ thereon. *Inai v. Ede*, 59 Cal.App.2d 549, 555, 139 P.2d 76; see, also, opinion on prior appeal, 42 Cal. App.2d 521, 526, 527, 109 P.2d 400; cf. *Fennessey v. Pacific Gas & Elec. Co.*, 20 Cal.2d 141, 124 P.2d 51; *Mason v. Crawford*, supra. The evidence here is sufficient to support a finding that the violation of the statute was a proximate cause of the accident.

The judgment is affirmed.

SHENK, CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ.
concur.



24 Cal.2d 485

BENNETT v. FORREST et al.
S. F. 16885.

Supreme Court of California.
July 10, 1944.

1. Executors and administrators ☞314(2)

Probate court, as ancillary to its jurisdiction, had power to determine effect of a property settlement agreement on husband's existing will, and to whom deceased husband's property was to be distributed.

2. Wills ☞63

An agreement to make a will or devise property to a designated person can have no effect upon a will or right to legacies, since agreement involves making of a will after agreement's execution.

3. Executors and administrators ☞314(2)

A probate court has power to determine whether a right under an existing will or legacy or devise was relinquished, or revoked under statute, by a property settlement agreement, since direct question presented to court is effectiveness of will and who may take thereunder. Probate Code, § 73.

4. Executors and administrators ☞314(2)

Where, after husband devised property to wife, wife, under a property settlement agreement, relinquished her right as an heir in favor of husband's heirs and legatees, in action by husband's sister to impress a trust on the property, sister was claiming as an heir, and not under the settlement agreement adversely to husband's estate, and probate court in distribution proceedings had jurisdiction to determine sister's claim.

5. Executors and administrators ☞315(6)

Where effect of a property settlement agreement on husband's existing will of property to wife was fully litigated in distribution proceeding in probate court, and husband's sister as a party took no appeal, the decree was res judicata in sister's action to impress a trust on the property whether right or wrong.

6. Appeal and error ☞907(3)

Where appeal was taken on the judgment roll alone and findings authorized conclusion that issue of legatee's right was determined in probate distribution proceeding pending when action was instituted, it would be assumed that any objection to defect in pleading defense of res judicata in not filing a supplemental pleading after distribution decree was made, was waived impliedly or by stipulation.

7. Appeal and error ☞842(2)

In action to impress a trust on a legacy, where factors necessary to make a prior probate court decree of distribution available as a bar were found, a statement by the court in the trust actions that the court did not find that its finding as to the distribution decree was res judicata, was a legal conclusion from facts found, upon which the Supreme Court could draw the correct conclusion to support the judgment for legatee, since ultimate conclusion of whether decree was res judicata was one of law.

8. Trusts ☞91

Where one unlawfully comes into possession of property of a decedent, the constructive trust is one imposed by law.

9. Trusts ☞371(5)

In action to impress a trust on a legacy, plaintiff's allegation that defendant's claim under a will was a violation of a property settlement agreement and constituted a fraud upon plaintiff, was insufficient where no specific acts of fraud were alleged.

In Bank.

Appeal from a Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Helen F. Bennett against Georgina E. Forrest, individually and as executrix of the will of Francis G. Forrest, deceased, and others, to impress a trust on the property received from decedent's estate, and for injunctive relief. From a judgment for defendants, plaintiff appeals.

Judgment affirmed.

Prior opinion, 141 P.2d 20.

Fletcher A. Cutler, Duncan A. McLeod, and Clarence M. Oddie, all of San Francisco, for appellant.

Marcel E. Cerf and Robinson & Leland, all of San Francisco, for respondent.

CARTER, Justice.

Plaintiff commenced this action against defendant Georgina E. Forrest individually and as executrix of the last will of Francis G. Forrest, her deceased husband, to impress a trust on properties received from his estate by defendant, as legatee.

In 1937, defendant commenced an action against her husband for separate maintenance. Finally, after various proceedings were taken in that action, and on February 28, 1938, the parties entered into a property settlement agreement adjusting all of their property rights. The complaint in the separate maintenance action was amended to state a cause of action for divorce. Defendant was granted an interlocutory decree of divorce in March, 1938. No final decree was ever entered. Defendant's husband died about 14 months after the interlocutory decree was granted.

The will of Mr. Forrest dated August 6, 1921, together with a codicil dated August 14, 1933, was admitted to probate, and defendant, being named therein as such, was appointed executrix. The will left all of decedent's property, with the exception of one legacy, to defendant. Plaintiff is a sister, and an heir at law of deceased, and she seeks by this action to have it determined that by the property settlement agreement defendant forfeited all right to inherit from the deceased, or take under his will, and that the will was revoked as to defendant, leaving plaintiff as sole heir of deceased.

The property settlement agreement, after disposing of the property, provides:

"Each party shall have the right to dispose of his or her property, by last will and testament, or otherwise, and each party agrees that all the estate of the other party shall, subject to the within agreement and to his or her debts and engagements, go and belong to the person, or persons, who would have become entitled thereto if the parties had never been married; and it is further covenanted and agreed that each party will permit any will of the other to be probated, and will allow administration upon his or her estate to be taken out by the persons or person who would have been entitled thereto, if the parties had never been married. * * *

"This agreement is intended to be, and is, a full, complete, entire and final settlement of all property rights between the parties and all rights, duties and obligations arising out of the marital relation now existing, and such rights, duties and obligations as might hereafter accrue but for this agreement; and each of the parties hereto does mutually agree to and does by these presents forever release and discharge the other party from all obligations, either in law, or in equity arising out of the marital relation, or otherwise, for support, maintenance, alimony, court costs or counsel fees, and shall thenceforth entertain no claim upon the other, either conjugal, or otherwise, except as set forth in this agreement. Each party hereto further agrees to, and by these presents does waive, relinquish, quitclaim and release all right, title, claim or demand of every nature in and to any property, either real, personal or mixed, to be held or owned at any time in the future by the other party hereto, whether acquired by purchase, gift, bequest, descent, devise, or in any other manner, and wheresoever such property may be situate. And the parties hereto, and each of them, do hereby expressly waive, relinquish and surrender any and all claims and rights to inherit or claim dower in, or family allowance or homestead from, or otherwise secure an interest in, any property whatsoever by, through or from the other party hereto, which claim and right said parties, and each of them, respectively do hereby relinquish and surrender in favor of all of the heirs, legatees, devisees and assigns of such party so dying, and to the exclusion of either and each of said first and second parties hereto, respectively, including the right to administer upon the estate of the other party."

It is alleged in the complaint that decedent's will was admitted to probate and defendant duly qualified as executrix thereof. Defendant, in her answer, denies the legal effect given to the property settlement agreement in the complaint and alleges in paragraph II of her first answer, "that heretofore in the probate proceedings (in decedent's estate) * * * in proceedings wherein plaintiff herein and defendants herein were parties and were on opposite sides, an order was duly made and entered in said proceedings wherein it was adjudicated that plaintiff was not the sole heir at law of said Francis G. Forrest, deceased; that plaintiff herein appealed from said order, and said order was affirmed on appeal, and remittitur filed in said proceedings." And in paragraph III of her first answer, that defendant "claims to be entitled to distribution of a portion of the property of said estate pursuant to the terms of said will referred to in said complaint; that Georgina E. Forrest, as such executrix, has filed in said probate proceedings a petition for distribution of said estate to Georgina E. Forrest, individually, and to Jane B. Forrest, pursuant to the terms of said will; that plaintiff herein has filed objections to said petition and has petitioned for distribution of said estate to herself; that said petition and the objections thereto have been heard and submitted to the court for decision, and decision thereon is now pending; that said objections seek distribution of said estate to plaintiff upon the same grounds asserted in the complaint herein." In her second separate answer she alleges "that the issues, if any, presented by the complaint have been determined in said probate proceedings." The court found that all of the foregoing allegations in defendant's answer are true, except in reference to the allegation in paragraph III of the first answer in which it found "that in said probate proceedings a decree of distribution was heretofore made and entered directing distribution of said estate as prayed in the petition for distribution therein, that no appeal was taken therefrom, and that said decree has become final." Upon plaintiff's motion for a new trial the court amended its finding that the allegations as to the second answer were true by stating that the decree of distribution contained a finding "that prior to the death of said Francis G. Forrest, and after the execution of said agreement, said decedent and Georgina E. Forrest effected and consummated a recon-

ciliation and resumed marital relations; that said agreement dated February 28th, 1938, including the provisions thereof set forth in the opposition of Helen F. Bennett to petition for final discharge, was not in force or effect at the time of the death of said decedent;

"That said decree of distribution was made and entered in said probate proceedings on December 18, 1941, and that no appeal has been taken from said decree of distribution, and that the time for appeal therefrom has expired.

"This court does not find that this finding is *res adjudicata*."

The allegation in paragraph II of the first answer of defendant, quoted above, referring to an order in the probate proceedings as having been affirmed on appeal, apparently refers to the order appointing defendant as executrix of the estate over the objection of plaintiff who there asserted that by the property settlement agreement defendant had waived her right to serve as executrix. See *Estate of Forrest*, 43 Cal.App.2d 347, 110 P.2d 1023. There the court affirmed the order of appointment, but stated that no issue was involved in regard to the right to take as a legatee under the will. *Estate of Forrest*, *supra*, 43 Cal.App.2d at page 350, 110 P.2d at page 1024.

The findings of the trial court above mentioned present the question of whether the decree of distribution was *res judicata* in the probate proceedings on the cause of action stated by plaintiff. The issues presented were whether or not decedent's will was revoked as to defendant by the property settlement agreement, who was entitled to take under the will, and the matters incidental thereto such as the validity and effect of the agreement.

[1] Ancillary to and as an incident of the probate court's jurisdiction it had power to determine, as it did, the effect of the agreement on the will and to whom the property of the estate was to be distributed. It has been held generally that "Under various circumstances the probate court may determine the validity and effect of contracts when ancillary to a proper judgment by it." *Dobbins v. Title Guarantee & Trust Co.*, 22 Cal.2d 64, 68, 136 P.2d 572, 574. It has been held particularly, that in a proceeding to remove a wife as administratrix of the husband's estate, on the ground that she has ceased to be an heir by virtue of a marriage settlement agreement, the probate court has jurisdiction to

adjudicate the validity and effect of the agreement (Estate of Cover, 188 Cal. 133, 204 P. 583; See *In re Estate of Warner*, 6 Cal.App. 361, 92 P. 191; *In re Estate of Dobbins*, 36 Cal.App.2d 536, 97 P.2d 1051; *In re Estate of McNutt*, 36 Cal.App.2d 542, 98 P.2d 253); that in passing upon a petition by a widow for family allowance from her deceased husband's estate the validity and effect of a property settlement agreement may be determined (*In re Estate of Yoell*, 164 Cal. 540, 129 P. 999; *In re Estate of Hamalian*, 57 Cal.App. 169, 206 P. 1011); that the validity and effect of a property settlement agreement could be considered in a will contest on the issue of sufficiency of the husband's interest to contest the will (*In re Estate of Edelman*, 148 Cal. 233, 82 P. 962, 113 Am.St.Rep. 231); that an agreement did or did not constitute a renunciation of heirship in proceedings to determine heirship, and the validity thereof (*In re Estate of McClelland*, 181 Cal. 227, 183 P. 798); and that a probate court in distribution proceedings may pass upon the question of whether or not one claiming to be an heir held such status by reason of an agreement between the deceased and another in which the former agreed to adopt the claimant. *Johnson v. Superior Court*, 102 Cal.App. 178, 283 P. 331. It is of some significance, although the particular point was not discussed, that in the following cases the issue of the effect of a property settlement agreement upon the right to take by will or succession was adjudicated by the probate court. *In re Estate of Crane*, 6 Cal.2d 218, 57 P.2d 476, 104 A.L.R. 1101; *In re Estate of Boeson*, 201 Cal. 36, 41, 255 P. 800; *In re Estate of Walker*, 169 Cal. 400, 146 P. 868; *In re Estate of Martin*, 166 Cal. 399, 137 P. 2; *In re Estate of Winslow*, 121 Cal. 92, 53 P. 362; *In re Davis' Estate*, 106 Cal. 453, 39 P. 756; *In re Estate of Minier*, 215 Cal. 31, 8 P.2d 123, 81 A.L.R. 689; *In re Estate of Johnson*, 31 Cal.App.2d 251, 87 P.2d 900; but see *Weinstein v. Moers*, 207 Cal. 534, 279 P. 444. In the distribution proceedings in the instant case the issue to be determined was: Who were entitled to take as beneficiaries of the estate? As an incident to that determination the effect of the property settlement agreement could be determined; that is, whether it be viewed as constituting a renunciation by the defendant of the legacy under the will or a revocation of such legacy pursuant to section 73 of the Probate Code.

Plaintiff cites and relies upon cases holding first, that a probate court may not determine the effect or validity of an agreement to make a will or devise property to a designated person in the probate proceeding following the death of one of the contracting parties (see 26 Cal.Jur. 834, § 163), and second, that a probate court has no jurisdiction to determine claims or titles adverse to the estate. *Wilkerson v. Seib*, 20 Cal.2d 556, 127 P.2d 904; see 11A Cal. Jur. 94-96.

[2,3] The first proposition is based upon the ambulatory character of a will and that a will cannot be made irrevocable. Such an agreement can have no effect upon the will or the right to legacies thereunder inasmuch as it involves the making of a will after its execution. A different situation is presented when we have an agreement following a will previously executed. Then the issue is not whether there has been a breach of the agreement. It becomes a question of what effect, if any, the agreement would have in respect to a revocation of the will or a legacy under section 73 of the Probate Code or a relinquishment of any legacy or devise made in the will. Certainly a determination of whether a will or a legacy or devise thereunder has been revoked or relinquished is for the probate court inasmuch as the direct problem presented is the effectiveness of the will and who may take thereunder. The effect of a contract bearing upon that subject is an incidental matter that may be determined. To epitomize what we have said, the agreement in the instant case is manifestly not one to make a will, and the issue here presented is the effect of an agreement on a will already made.

[4] The second rule above-mentioned is not applicable because the claim of plaintiff is not the assertion of a title or interest adverse to the estate in the sense that phrase is used. She is an heir of the deceased by reason of her kinship and she must rest her claim on that basis. True, the agreement provides as appears from the above-quoted excerpt therefrom that defendant relinquishes her right as an heir in favor of the heirs, devisees and legatees of the decedent, but that relinquishment takes nothing away from the estate. If it does anything it restores the property to the estate, the only issue being who are the heirs and qualified to take from the estate either by will or intestate succession. The

relinquishment amounts to nothing more than leaving the decedent free to dispose of his property as he pleases whether that be by an act during life or by operation of law on death under the rules of intestate succession. Basically, plaintiff's claim must be derived from her status as an heir. The agreement does not affect that circumstance. It comes into the picture only as a factor in determining whether she is an heir who is entitled to inherit, which involves such questions as the degree of kinship, the presence or absence of prior heirs, or the existence of property which may pass by intestate succession depending upon the presence or absence of a will under which others may take. Hence, we cannot agree with plaintiff's assertion that she is claiming the title to the property under the property settlement agreement and thus adverse to the estate.

[5,6] Plaintiff contends that the defense of *res judicata* was not pleaded and that the finding was against it. With respect to the pleading it is apparent from the heretofore quoted excerpts from defendant's answer that at the time it was filed the petition for the decree of distribution was pending in the probate court and defendant so asserted in her pleadings. She could do no more as the decree had not been rendered. Technically, the proper procedure would have been for her to file an amended or supplemental pleading after the decree of distribution was made. However, it is apparent from the findings that the issue was fully litigated. It is found that the identical issues raised in the trial in the instant case were determined in the probate proceedings, that is, the effect of the property settlement agreement on defendant's right to take under the will. All the customary elements such as identity of subject matter, parties and the like were adjudicated. It is true that the findings mention a reconciliation as being a determinative factor nullifying the effect of the agreement, but we are not concerned with the validity or invalidity of the rules of law applied. The probate court having jurisdiction, its conclusion, right or wrong, is binding. The appeal being taken upon the judgment roll alone, and findings having been made which lead to only one conclusion, namely, that the issue was determined in the probate proceedings, it will be assumed on appeal that any objection to defects or insufficiency in pleading the defense was waived impliedly or by stipulation. See *Sanguinetti v. Sanguinetti*, 9

Cal.2d 95, 69 P.2d 845, 111 A.L.R. 342; *Gin S. Chow v. City of Santa Barbara*, 217 Cal. 673, 22 P.2d 5; *Bonnellfillio v. Ricks*, 214 Cal. 287, 4 P.2d 929; *Newland v. Hatch*, 59 Cal.App.2d 13, 137 P.2d 884.

[7] Plaintiff asserts that the trial court's finding that: "This court does not find that this finding is *res judicata*" (that sentence appears in the foregoing quoted excerpt from the findings) eliminates the probate decree as being *res judicata* because the trial court must find on that issue. As we have seen all of the factors necessary to make the decree of distribution available as a bar were found. The ultimate conclusion of whether it was *res judicata* was one of law rather than fact. The statement is peculiarly worded and might imply that the court does not find on the law issue one way or the other. But assuming it is a negative finding it is nothing more than a legal conclusion from the facts found, a matter upon which this court is at liberty to draw the correct conclusion to support the judgment. There is nothing in *Reidy v. Superior Court*, 220 Cal. 111, 29 P.2d 780, contrary to those views. There this court merely refused to prohibit proceedings in an action in which the defense of *res judicata* was raised because such a plea did not oust the trial court of jurisdiction. Nor are the cases of *Baird v. Superior Court*, 204 Cal. 408, 268 P. 640; *Rideaux v. Torgrison*, 12 Cal.2d 633, 86 P.2d 826, and *United Security Bank & Trust Co. v. Superior Court*, 205 Cal. 167, 270 P. 184, contrary. Those cases merely adhere to the proposition that a claim of *res judicata* does not oust a court of jurisdiction and that once the trial court has made its final adjudication that a former judgment is not a bar in the instant action, that determination is final and conclusive whether right or wrong. They do not involve the question of whether a judgment may be affirmed on appeal on the ground that a former judgment is *res judicata* when in the light of the facts found the question of the legal effect of the former judgment is merely a legal conclusion and the trial court's contrary conclusion on that issue.

[8,9] The foregoing conclusions are not altered by the plaintiff's assertion that she claims that defendant holds the property for her as an involuntary trustee. A constructive trust where one unlawfully comes into possession of property of a decedent is one imposed by law. The essential question is whether it came to them unlawfully.

That issue as we have seen was determined adversely to plaintiff in the probate proceeding and is *res judicata*. Plaintiff alleged that defendant's claim under the will is in violation of the property settlement agreement and "constitutes a fraud upon plaintiff." At most the fraud would be constructive (see *Weinstein v. Moers*, *supra*); no specific acts of fraud are alleged and the court found those allegations untrue. There are no pleadings or findings even approaching a showing of extrinsic fraud in obtaining the decree of distribution.

For the foregoing reasons the judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and SCHAUER, JJ., concur.

TRAYNOR, Justice (concurring).

I concur in the judgment but for reasons other than in the majority opinion.

The majority opinion rejects plaintiff's contention that decedent revoked the legacy to his widow by executing the property settlement agreement, on the ground that the decree of distribution operates as a bar to this cause of action, that "ancillary to and incident of the probate court's jurisdiction it had power to determine, as it did, the effect of the agreement on the will and to whom the property of the estate was to be distributed." In concluding that the probate court decided the issue concerning the revocation of the legacy as an incident of the distribution of the estate, the majority opinion relies upon the finding in the distribution decree that the spouses had effected a reconciliation and that their agreement was not in effect at the time of decedent's death. It is my opinion that this finding has no bearing on the issue of revocation. If decedent revoked the legacy by executing the agreement, the subsequent suspension of the agreement by reconciliation would not revive the legacy. In *re Lones*, 108 Cal. 688, 41 P. 771; see *Ferrier*, *Revival of a Revoked Will*, 28 Cal.L.Rev. 265, 266. The finding in question simply indicates that the agreement did not prevent defendant from asserting rights to her husband's estate as a legatee under his will. The question whether the agreement had become inoperative before decedent's death was within the jurisdiction of the probate court, for that court may refuse to distribute any part of the estate to a legatee claiming under a valid will, if the legatee by a previous

agreement or otherwise is estopped to assert his rights under the will. In *re Estate of Crane*, 6 Cal.2d 218, 57 P.2d 476, 104 A.L.R. 1101. The probate court, however, has no jurisdiction, in a proceeding directed to the distribution of the estate, to determine whether the will was revoked. Since this question concerns the validity of the will submitted to probate, it can be litigated and decided only in a will contest. In *re Estate of Parsons*, 196 Cal. 294, 237 P. 744. If no contest is initiated within the period allowed in sections 380 and 384 of the Probate Code, the order admitting the will to probate is conclusive under section 384 as to the validity of the will. In *re Estate of Parsons*, *supra*; In *re Estate of Baker*, 170 Cal. 578, 585, 150 P. 989; In *re Estate of Duraind*, 51 Cal.App.2d 206, 213, 124 P.2d 330. Plaintiff did not institute a will contest within the six-month period allowed by section 380, and is therefore bound as to the issue of revocation by the finality of the order admitting the will to probate.

The question remains whether plaintiff in seeking to impress a trust on the property received by defendant from the estate can rely on the theory that she seeks specific performance of the property settlement agreement as a third party beneficiary. It is settled that a contract of a person to dispose of his property by will in a particular manner can be given effect as against the will, not by the probate court but by a court of equity, and that the remedy to impress a trust on the property received by the legatee is in the nature of specific performance of the contract. In *re Estate of Rolls*, 193 Cal. 594, 226 P. 608; *Wolf v. Donahue*, 206 Cal. 213, 220, 273 P. 547; *Notten v. Mensing*, 3 Cal.2d 469, 473, 45 P.2d 198. This remedy applies also to a contract between testator and legatee in which the legatee renounces the right to take under the will. *Weinstein v. Moers*, 207 Cal. 534, 279 P. 444. Since the remedy is in the nature of specific performance, it does not depend, as suggested in the majority opinion, upon extrinsic fraud. For another reason, however, plaintiff cannot have a trust impressed upon the property. She cannot have such relief without showing that the executory provisions of the agreement were in effect at the time of decedent's death. She is precluded from so doing by the probate court's finding that as a result of a reconciliation of the spouses, the agreement was not in effect at the time of decedent's death. This finding, though made upon another cause of ac-

tion, is conclusive upon plaintiff as to this previously litigated issue, since a decision rendered between the same parties on the same issue estops either party from relitigating the issue even in another court or on a different cause of action. *English v. English*, 9 Cal.2d 358, 70 P.2d 625, 128 A.L.R. 467; *Sutphin v. Speik*, 15 Cal.2d 195, 201, 99 P.2d 652, 101 P.2d 497; *Johnson v. Fontana County F. P. Dist.*, 15 Cal.2d 380, 389, 101 P.2d 1092; see *Restatement: Judgments*, § 68.



24 Cal.2d 563

ROESCH et al. v. DE MOTA et al.
Sac. 5513.

Supreme Court of California,
July 21, 1944.

1. Bills and notes ⇨499

Parties claiming that payment had been made on notes had burden of proof.

2. Appeal and error ⇨989

Whether parties having burden of proof on issue of payment of notes failed to prove their case by a preponderance of the evidence was a question for trial court and on appeal question was whether the evidence compelled the trial court to find in appellants' favor on such issue.

3. Appeal and error ⇨1010(I)

Evidence did not compel finding that payments had been made on notes involved where the memorandum introduced in evidence by adverse party allegedly showing such payments was of uncertain character as was testimony of the witnesses. *Code Civ.Proc.* § 1963, subd. 6.

4. Usury ⇨133

Where the availability of defense of usury was not known to either party at time of transfer of encumbered property, evidence did not establish that the parties to the agreement of transfer intended either to waive or to transfer the defense of usury.

5. Estoppel ⇨52

"Waiver" is the intentional relinquishment of a known right after knowledge of the facts and rests upon intent.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

6. Usury ⇨126, 130

Where the entire interests of original borrower and option holder in encumbered property was transferred to a newly formed corporation in exchange for all of corporation's stock, no cash consideration being received, the defense of usury was available to the original borrower as well as to the corporation.

7. Usury ⇨133

Where original borrower transferred encumbered property to newly organized corporation in exchange for corporation's stock and a witness testified that original borrower was still interested in the corporation and in the encumbered property, and there was nothing in the record to indicate that original borrower was not the owner of the stock at time of commencement of foreclosure action, it was sufficiently established that original borrower was owner of the stock so as to be entitled to avail itself of the defense of usury.

8. Usury ⇨132

Where encumbered property was transferred to a newly formed corporation in exchange for corporation's stock, under an agreement listing all of original borrower's creditors and giving corporation right to negotiate with creditors for settlement, and the only opportunity of creditors to receive payment was from the assets of the original borrower or the corporation on which property they had a judgment lien, the defense of usury was available to creditors in foreclosure action.

9. Usury ⇨130

Where contract gave purchaser of mortgaged property right to contest or settle and discharge any claims of original borrower's creditors, provision in agreement that purchaser was to pay the mortgage debt with interest did not deprive purchaser of right to assert defense of usury in foreclosure action.

—◆—
In Bank.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Action by Helen Roesch and others against Clara P. De Mota, Antonio Mota, E. O. Erickson, individually and as trustee, and the Victor Land & Mineral Company

and others for an accounting and to enjoin a sale by the trustee under trust deeds, wherein the Victor Land & Mineral Company filed a cross-complaint against Clara P. De Mota, Antonio Mota, and E. O. Erickson, individually and as trustee. From the judgment all parties appeal.

Affirmed.

Prior opinion, 143 P.2d 67.

Cornish & Cornish, of Berkeley, and Maurice H. Roach, of Oakland, for plaintiffs and appellants.

Virgil M. Airola, of San Andreas, and Jesse H. Steinhart and John J. Goldberg, both of San Francisco, for defendants and appellants.

Philip C. Boardman, of San Francisco, for cross-complainant and appellant.

SHENK, Justice.

This action was brought by the plaintiffs as parties beneficially interested in certain mining property in Calaveras County, for an accounting and to enjoin a scheduled sale by the trustee under two deeds of trust. Plaintiff Roesch is the beneficiary under a junior deed of trust held by her, and which was foreclosed. At the foreclosure sale John S. DeLancey bought the property and holds title for the benefit of plaintiffs and Calaveras Central Mining Corporation and Calaveras Central Gold Mining Co., Ltd., as their interests may appear. The other two plaintiffs are judgment creditors of the defendants Calaveras Central Mining Corporation and Victor Land & Mineral Company, respectively. The defendants Clara P. De Mota and Antonio Mota were not served nor did they appear in the action, although they are the holders of the two notes and deeds of trust sought to be foreclosed by the defendant E. O. Erickson, as trustee under the deeds of trust. Defendant Calaveras Central Gold Mining Co., Ltd., is the lessee of the real property. For the purposes of this opinion, Calaveras Central Mining Corporation will be referred to as Calaveras, and Victor Land & Mineral Company will be referred to as Victor.

On December 19, 1923, Victor as the owner of the mining property obtained a loan from the Manuel Estate Company, a corporation, in the sum of \$15,000 and executed a promissory note in that amount, secured by a deed of trust on the property. The note is admittedly usurious. It called for interest at the rate of 1 per cent per

month, compounded. After the maturity of that note, which was in default, Victor obtained a second loan from the Manuel Estate Company and executed another note of date January 5, 1925, for \$4,500, also secured by a deed of trust, and also usurious.

On March 6, 1926, Victor, whose affairs had become financially precarious, entered into an agreement with Harry Sears, whereby he obtained an option for four months to purchase and acquire at "the times and for the considerations and upon the terms and conditions as hereinafter stated" all the right, title, interest and estate of Victor in and to the land and personal property of the mine. One of the terms and conditions was that Sears organize a corporation under the laws of Delaware with a capitalization of \$1,000,000, divided into one million shares of the par value of \$1 each, of which Victor was to receive 150,276 shares. Another term of the agreement was that Sears would within four months "pay and discharge or secure the complete release and discharge of all indebtedness now owing by the corporation [Victor] * * * to the Manuel Estate Company, a corporation * * * and being the indebtedness now due and owing from two promissory notes executed by the said corporation [Victor] * * * the said Manuel Estate Company * * *", scribing them]; "that there is now accrued and unpaid upon said promissory notes not only the full amount of the said principal sums of said indebtedness but also interest thereon in accordance with the terms and conditions of said respective promissory notes, together with costs, charges, expenses, insurance premiums, taxes, charges for attorneys fees, costs of advertising, and other miscellaneous expenses incurred by the said Manuel Estate Company * * *". The agreement further provided for the payment and discharge or release and discharge of other obligations of Victor, including those in favor of the plaintiffs Anderson and Montreeville, and that during the life of the option any action taken by Manuel Estate Company or other creditors "shall be and is at the entire risk of the party of the second part [Sears] and that there is no duty imposed upon or to be undertaken by the party of the first part [Victor] to avoid any of such actions or the enforcement or the collection of any of such indebtedness owing by the said corporation * * * and that this option and agreement is executed by the said party

of the second part with all of such possible proceedings by creditors at his own risk. It is further understood and agreed, however, that the party of the second part shall have the right to negotiate with any of the said creditors to settle, discharge, compromise or in any other manner adjust the creditor's claims or any of them, so as to avoid any proceedings that may otherwise be taken by the said creditors against the said corporation or its said properties for the collection of said creditor's claims, or any of them."

The corporation was organized as provided for in the agreement, and is the defendant Calaveras. On April 15, 1926, Sears made a written offer to assign the option agreement to Calaveras in exchange for the balance of its stock and \$20,000 of its 8 per cent convertible notes. Calaveras accepted the offer, and Sears' rights in the agreement vested in the corporation. In March, 1927, Victor deeded the property to Calaveras, and Sears and Victor received the stock of Calaveras, in the proportions set forth.

In October, 1928, the defendant Clara P. De Mota became the holder of the two notes originally given by Victor to Manuel Estate Company, which notes were then in default. Proceedings to foreclose the deeds of trust were instituted, whereupon this action was brought by plaintiffs. Victor admitted the allegations of the complaint and filed a cross-complaint seeking the same relief as the plaintiffs, and setting up the defense of usury. In its cross-complaint Victor alleged, and the court found, that Calaveras was organized to purchase and own the real and personal property referred to and to conduct the mining operations; and that the property is the principal property of that corporation. Defendants Calaveras and Calaveras Central Gold Mining Co., Ltd., admitted the allegations of the complaint; defendant Erickson contested the claim that the notes had been paid in part and asserted that the defense of usury was not available to the plaintiffs, to Victor or to the Calaveras corporations.

The trial court found that the notes were usurious, that the defense of usury was available to the plaintiffs, and that no payments had been made on the notes. It enjoined the trustee, Erickson, from selling the property under the deeds of trust for amounts in excess of the face value of the notes plus charges and fees stipulated to be in the sum of \$3,750, or a total of \$23,250.

All of the parties appealed from the judgment. Plaintiffs and the defendants Calaveras appealed on the ground that the court erred in finding that no payments had been made on the \$15,000 note; Victor as cross-complainant appealed on the ground that the court erred in finding that the defense of usury was not available to it as an original borrower still interested in the property by reason of its shareholdings in Calaveras; Erickson, the trustee, appealed on the ground that the defense of usury was not available to any of the parties.

The questions on this appeal are (1) whether the evidence is sufficient to support the trial court's finding that no payments had been made on the notes; and (2) whether the defense of usury was available to the plaintiffs, Victor or the corporations Calaveras.

[1] With reference to the first point the state of the pleadings and the proof are of vital importance. The execution of the notes for the principal sums of \$15,000 and \$4,500 with interest was alleged by the plaintiffs. They also alleged that Calaveras and Sears had paid thereon in excess of \$15,000. Victor alleged that Calaveras and Sears had paid thereon in excess of \$10,000 and that the defendants De Mota knew of such payments when the notes were purchased in 1928. Calaveras, in its verified answer, admitted the allegations of the plaintiffs' complaint that over \$15,000 had been paid by Calaveras and Sears and prayed that the court determine the balance due after crediting those payments. The answer of Calaveras was verified by Sears, its president and general manager. There was no allegation or proof that Victor had paid anything on the notes either prior to March 6, 1926, or after that time. The plaintiffs and Calaveras and Victor all tendered the issue of part payment on the notes by Calaveras and Sears. The burden was upon them to prove such payments. When they presented their evidence on that issue, it must be assumed that they had or should have had available to them the testimony of the persons who had made the alleged payments on account or the records of the corporation on whose behalf the payments were made. It is true that Sears was in New York at the time of the trial, but his deposition was not taken and there was no showing that it could not have been taken. No canceled checks or books or business records of Calaveras or of Sears

were produced in support of the asserted payments, and no showing was made that the customary business records had been lost or destroyed. No officer or employee of Victor or Calaveras testified that payments had been made and there was no showing why such proof was omitted. None of the plaintiffs testified in support of their allegations that payments had been made. The only proof of payments tendered by those on whom rested the burden of establishing the same was the testimony of M. H. Manuel, president of the Manuel Estate Company, which was the payee of the promissory notes. He was called as a witness for the plaintiffs. He was shown a statement dated March 15, 1928, and headed "Manuel Estate Company * * * Victor Land & Mineral Co." This memorandum was produced on behalf of the plaintiffs and purported to show debits and credits on the account of the Victor Land & Mineral Company on the \$15,000 note, from 1923 to 1928. It also purported to credit payments of principal and interest at various dates and to debit the unpaid interest at 1 per cent per month, plus charges for insurance, taxes, attorneys' fees, etc. The trial occurred in April, 1941. Mr. Manuel testified that he had no independent recollection of payments made on this note or of preparing the statement, but that he believed it was in his handwriting; that the statement did not refresh his recollection as to whether payments had been made; it showed that it had been made from the records of his corporation for the purpose of indicating the payments made on and charges against the note; that in his opinion the statement was correct; that he would not have made it if it had not been correct. He based his testimony as to payments not on his knowledge or recollection that they had been made, but on his belief that items on the memorandum were correct. He did not testify that any of the payments shown on the statement had been made, but only that "the statement shows" that the several payments had been made. When asked about the payment of particular items, he said: "Well, according to the statement here" the payments were made.

The defendant Erickson was requested by the plaintiffs to stipulate with reference to the items on the statement showing payment. He agreed to do so on condition that opposing counsel would also stipulate to the correctness of the other items on the statement. This the plaintiffs refused to do.

After interrogating Mr. Manuel the plaintiffs did not offer the statement in evidence. The defendant Erickson called Mr. Manuel as his own witness and offered the memorandum in evidence in order that the trial court might have the document as a whole before it. The plaintiffs objected on the ground that the statement "expresses the opinion and conclusion of the witness." The objection was overruled and the document was received in evidence. No records of the Manuel Estate Company were produced and no proof was tendered that any attempt had been made to find, examine or produce its books or records. All that was elicited on this subject was the statement of Mr. Manuel: "I don't know whether I have them [the company's records] in detail or not—I don't know whether I could find them, it is so long ago."

With the foregoing evidence before it the trial court found "that there is considerable doubt as to what if any payments were made on account of the aforesaid promissory notes or either of them and the court therefore finds that nothing has been paid on account of the aforesaid notes or either of them."

[2, 3] In substance the trial court found and concluded that the plaintiffs and those equally charged with them in sustaining the burden had not proved payment by a preponderance of evidence. The problem here is not whether the appellants on the issue of payment failed to prove their case by a preponderance of the evidence. That was a question for the trial court and it was resolved against them. The question for this court to determine is whether the evidence compelled the trial court to find in their favor on that issue. These appellants contend that the testimony of Mr. Manuel was uncontroverted and that it required a finding in their favor. It may be assumed that his testimony was uncontradicted and unimpeached, but it would not necessarily follow that it was of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding in favor of payment. In the first place the testimony of Mr. Manuel independently of the memorandum was uncertain and obviously insufficient to establish payment. He had no recollection of payments having been made, and the memorandum did not refresh his recollection. Secondly, the memorandum was secondary evidence concerning which

the trial court might properly conclude that primary evidence of the facts of payment was within the power of these appellants to produce and that they had not done so. The officers or employees of the appellant corporations who might have made such payments did not testify and their failure to testify either in person or by deposition was not explained; nor was their failure to produce the books of these corporations accounted for. From these facts the trial court was entitled to infer that the primary evidence, if produced, would have been adverse. Code Civ.Proc. § 1963, subd. 6.

But the plaintiffs and the appellant corporations assert that the memorandum was introduced in evidence by the trustee; that although they objected to its introduction on other grounds no objection was made on the ground that it was secondary evidence or that a proper foundation had not been laid, and that therefore the trustee was bound by it. However, a reference to the circumstances of its receipt in evidence, above narrated, discloses at least two reasons why the trial court was not bound to apply the rule invoked or itself be required to hold the evidence sufficient to constitute proof of payment. One was the uncertain and unsatisfactory character of the testimony of Mr. Manuel and the other was the secondary character of the memorandum introduced. No other evidence on the issue of payment was offered. In view of this uncertainty and of the weakness of the memorandum as secondary evidence when primary evidence of its contents, so far as the record shows, was available to the plaintiffs, it may not properly be concluded that the trial court was compelled to find in favor of the plaintiffs and the defendant corporations on the issue of payment.

[4, 5] As to the second point, it is conceded that the question of usury was not in the minds of any of the parties at the time of the acquisition of the interests of Victor and Sears by Calaveras. It was not until some time after the decision of this court in the case of *Haines v. Commercial Mortgage Co.*, 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A.L.R. 725, that the notes were recognized as usurious. It cannot be said that the parties to the agreement intended either to waive or to transfer the defense of usury, since the availability of such a defense was not then within their knowledge. Waiver always rests upon intent. Waiver is the intentional relinquishment of

a known right after knowledge of the facts. *Wienke v. Smith*, 179 Cal. 220, 226, 176 P. 42; 25 Cal.Jur. 926. The parties did not know that the notes were usurious at the time they entered into the 1926 agreement, and the agreement cannot be interpreted as imputing to the parties an intention not within their contemplation at the time of the execution of the same.

The trial court found that the defense of usury was available to the plaintiffs. The defendants Victor and Calaveras contend that the defense should have also been found available to them.

[6] Victor claims the right to assert the defense of usury on the ground that it is the original borrower and still interested in the property by reason of its interest in Calaveras, and Calaveras asserts its right as the successor of the original borrower. The consideration for the transfer of the property from Victor and Sears to Calaveras was the issuance to them of the shares of stock of Calaveras, and the assumption of Victor's obligations. Victor did not receive a cash consideration for the property, but accepted shares of stock. This distinguishes the case from those in which the seller accepted a price for the property from which was deducted the amount due under the obligation, thereby waiving the defense of usury, and requiring the purchaser to pay the agreed price. *Ames v. Occidental Life Ins. Co.*, 210 Cal. 271, 291 P. 182; *Matthews v. Ormerd*, 140 Cal. 578, 74 P. 136; *Esposti v. Rivers Bros., Inc.*, 207 Cal. 570, 279 P. 423. Here, Victor and Sears transferred to the newly created corporation their interest in the real property and the option agreement. Their entire interest passed to the corporation and they acquired all of the stock of the corporation in return. By this transaction the corporation was substituted in the place of Victor and Sears. In the case of *Western States Acceptance Corporation v. Frank D. Tuttle, Inc.*, 210 Cal. 51, 290 P. 574, it was pointed out that the corporation defendant was the alter ego of Tuttle, the borrower, and the defense of usury was held available to it. The same rule should apply and the defense be held available where two persons have merged their holdings into a corporate entity. *Greengard v. Katz*, 270 Ill.App. 227; *Chas. S. Riley & Co. v. W. T. Sears & Co.*, 154 N.C. 509, 70 S.E. 997. The transaction is one where, as between the parties, the seller remains interested in

the property, and to enforce the usurious obligation would be to destroy or impair the property interests so retained.

[7] Defendant Erickson contends that Victor did not allege in its cross-complaint that it still owned the shares of stock of Calaveras issued to it. The evidence showed and the court found that the 150,-276 shares "were issued and delivered" to Victor in accordance with the contract of March 6, 1926, and the remainder to Harry Sears. One witness (counsel for Victor) testified that Victor was still interested in Calaveras and in the property. There is nothing in the record to indicate that Victor was not the owner of the stock at the time of the commencement of the action. Under such circumstances we think it is sufficiently established that it was the owner of the stock at the time. As such a shareholder in Calaveras, there can be no question but that a sale of the property for the amount of the notes and usurious interest would adversely affect Victor through a reduction in the value of its stock. By the agreement, Calaveras had the right to settle, discharge, compromise, or in any other manner adjust the creditors' claims "so as to avoid any proceeding that may otherwise be taken by said creditors against the said corporation or its said properties for the collection of said creditors' claims, or any of them." Any settlement or adjustment made by the new company with the creditors of Victor whereby any creditor accepted less than the amount claimed would enhance the value of Victor's stock and necessarily result in a direct benefit to that corporation. It would be to the direct financial interest of Victor that the defense of usury be held available to it, and to Calaveras, its successor.

[8] The plaintiffs Montreeville and Anderson are judgment creditors of Victor and Calaveras, respectively, and the indebtedness represented by the judgments was incurred prior to the execution of the deeds of trust sought to be foreclosed. The obligations were included in the list of creditors of Victor. The judgments in

favor of these plaintiffs provided that the payment of either judgment should be payment pro tanto of the other. These creditors never lost the right to look to Victor or to its properties for payment. If these plaintiffs are permitted to assert the defense of usury it will be to the immediate benefit of the original borrower, Victor. By the agreements with Sears and Calaveras, plaintiffs Montreeville and Anderson were brought into privity with Victor and Calaveras, and to that extent the agreement was for the benefit of these creditors. It is established law that one not a party to an usurious contract may not attack it unless he is injured by it. *Zimmerman v. Boyd*, 97 Cal.App. 406, 408, 275 P. 509; *Matthews v. Ormerd*, supra. In the present case it is clear that plaintiffs Montreeville and Anderson would be injured. Their only opportunity to receive payment of their judgment is from the assets of Victor or Calaveras, on which they have a judgment lien. The preservation of the property through the defense of usury is directly to their benefit.

[9] Defendant Erickson claims that under the contract Calaveras was to pay the obligation with interest, and that this provision would exclude the right to assert the defense of usury. It has been shown, however, that the agreement also provided that Calaveras should have the right to negotiate with any of the creditors to settle, discharge, compromise or in any other manner adjust the creditors' claims. Taken as a whole, the agreement served to list the obligations of Victor and to authorize Calaveras to contest any or all of them. It did not deprive Calaveras of the right to assert any defense to any of those obligations. It is therefore concluded that the defense of usury was not only available to the plaintiffs but to the defendants Victor and Calaveras as well.

The judgment is affirmed.

GIBSON, C. J., and CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

24 Cal.2d 468

IRVINE v. RECLAMATION DIST. NO. 108
et al.**BEKINS et al. v. RECLAMATION DIST.**
NO. 1500 et al.
Sac. 5616, 5610.Supreme Court of California.
July 10, 1944.

Rehearing Denied Aug. 7, 1944.

1. States ⇨167

Generally, interest will not run against the government on its obligations in the absence of special statutory authority, and general statutes providing for interest are not applicable.

2. States ⇨167

Where statute states that a government bond shall bear interest, the only reasonable implication is that it shall continue to bear interest after maturity.

3. States ⇨162

Government bonds are ordinarily classed with "negotiable instruments."

See Words and Phrases, Permanent Edition, for all other definitions of "Negotiable Instrument".

4. States ⇨167

Interest will not run against a government obligation unless it is imposed by statute or authorized contract.

5. Waters and water courses ⇨222

Under statutes relating to reclamation district bonds which provide that bonds shall bear interest until paid, interest is recoverable on the bonds after maturity. Pol.Code, §§ 3480, 3480a.

6. Waters and water courses ⇨222

Elimination by amendment of statutory provision expressly authorizing interest on coupons on bonds of reclamation districts indicated intention that coupons under amended act should not bear interest. Pol.Code, § 3480.

7. Waters and water courses ⇨222

That statute relating to bonds of reclamation districts contained no provision for realizing funds for payment of interest after maturity, or for payment thereof, did not evince a legislative intent that none should be payable, in view of clear implication in statute that bonds do bear

interest after maturity. Pol.Code, § 3480, 3480a.

8. Waters and water courses ⇨222

One of purposes of statute authorizing issuance of refunding bonds by a reclamation district was to provide for payment of post maturity interest on all bonds by a regular and systematic scheme which may well be advantageous to the governmental agency. Pol.Code, § 3480a.

9. Waters and water courses ⇨222

Even if supplemental assessments may not be made until all bonds of reclamation district mature, and all steps for enforcement of assessment have been taken, and may be made only when the supplemental assessment will not exceed value of benefits to landowner from project, that does not preclude running of interest on bonds after maturity. Pol.Code, § 3480.

10. Waters and water courses ⇨222

Post maturity interest is not recoverable on interest coupons attached to bonds of reclamation district. Pol.Code, § 3480.

In Bank.

Appeals from Superior Courts, Colusa and Sutter Counties; James O. Moncur, Judge.

Action by James Irvine against Reclamation District No. 108 and others, to recover interest on unpaid principal and interest represented by reclamation district bonds after their maturity, and separate action for like relief by Reed J. Bekins and Milo W. Bekins, as trustees appointed by the will of Martin Bekins, deceased, against Reclamation District No. 1500, and others. From judgments rendered against the respective plaintiffs after demurrers to the complaint had been sustained without leave to amend, plaintiffs separately appeal, and the appeals were consolidated.

Judgments reversed.

Prior opinion, 143 P.2d 713.

W. Coburn Cook, of Turlock, and A. A. Tiscornia, of San Francisco, for appellants.

Rutledge & Rutledge and Ralph Rutledge, all of Colusa, and Huston, Huston & Huston and Downey, Brand & Seymour, all of Sacramento, for respondents.

Lloyd E. Hewitt, Dist. Atty., of Yuba City, for Treasurer of Sutter County.

CARTER, Justice.

These consolidated actions present the question of the liability of reclamation districts for interest on their bonds and interest coupons after maturity. The Irvine case was before this court on a prior occasion but the issue was not passed upon. *Irvine v. Gibson*, 19 Cal.2d 14, 118 P.2d 812.

In the Irvine case it is charged in the complaint that the defendant Reclamation District No. 108 was organized under the general reclamation law of 1868; and issued on January 1, 1925, bonds of the denomination of \$1,000 each in the total principal sum of \$3,142,000, bearing interest at 6 per cent per annum and having attached thereto interest coupons for semiannual payment of interest. The bonds matured serially to January 1, 1943. Plaintiff is the holder of \$31,000 principal of such bonds, 15 of which matured on January 1, 1935, and 16 on January 1, 1936, the principal of which was not paid when plaintiff commenced his action; the interest was not paid for the last half of 1935 on the 16 bonds. Since the commencement of the action there has been paid the principal of the 15 bonds and \$650 on each of the 16 bonds together with \$19.50 on each of the interest coupons for the last half of 1936. Prior to the commencement of the action and on October 6, 1938, plaintiff demanded payment of the bonds which was refused, but the bonds were registered by the treasurer. He demands interest at 7 per cent per annum on the principal and the unpaid interest coupons from maturity.

In the Bekins case plaintiff alleges that defendant Reclamation District No. 1500, was created by a special act of the Legislature in 1913 (Stats.1913, p. 130), and issued bonds in 1920, having interest coupons bearing 6 per cent payable semiannually attached thereto. Plaintiff owns three bonds of this district maturing January 1, 1936, and two maturing January 1, 1938. Payment of said bonds was refused. Later the principal and interest coupons on said bonds were paid, but payment of interest on the principal since maturity was refused. Plaintiff claims such interest on a 7 per cent rate basis.

Demurrers were sustained to the complaints in both actions and judgments entered that plaintiffs take nothing.

It appears that defendant district in the Irvine action was organized prior to 1913, and thereafter Reclamation District No.

729 was consolidated therewith and reorganized, which consolidation was approved by the Legislature, and the Political Code provisions on reclamation districts made applicable. Stats.1913, ch. 62, p. 62. The reorganization was again ratified and validated in 1915, 1917, and 1919. Stats.1915, p. 559; Stats.1917, p. 1219; Stats.1919, p. 357.

The course of the decisions in this state upon the two questions of whether or not government bonds bear interest after maturity and whether the interest coupons bear interest after maturity is devious and confusing. In *Beals v. Board of Supervisors*, 28 Cal. 449, an indebtedness of one county was imposed on another by the Legislature. No bonds were involved. The debtor county issued a warrant to the creditor county, which upon presentation was refused payment because of lack of funds. Demand of an assignee for the payment of interest on the warrant was refused. The court denied recovery of interest because the statute imposing the obligation did not mention interest, there was no express contract for interest, no rule of law independent of statute required interest, and a general statute authorizing interest on warrants should not be applied because the statute imposing the debt fixed the obligation as only the principal and provided for a special fund out of which it was to be paid. Relying upon the *Beals* case, the rule was announced in *Soher v. Supervisors of Calaveras Co.*, 39 Cal. 134, that where no provision is made in the statute under which the bonds are issued for interest after maturity on county bonds, none is payable. In *Kendall v. Porter*, 120 Cal. 106, 110, 45 P. 333, 334, 52 P. 143, the *Beals* case was distinguished on the ground that the obligation was legislatively imposed and was not a contract like a bond. The *Soher* case was disapproved, because it was based on a false assumption of the holding in the *Beals* case. The *Kendall* case involved municipal bonds and stated the rule to be that:

"The statute being thus the measure of the bondholders' rights, it becomes important to consider its provisions in relation to the interest upon the bonds; for the bondholders will be entitled to just such interest, and no other, as by a fair intentment the statute provides that they shall have. * * *" It would appear from the rule that no interest is payable after maturity unless the statute so provides. The statute there involved did not express-

ly provide one way or the other and the court went on to say: "It is a rule so general and well established that it is not even controverted by respondents in this case that interest bearing coupon bonds continue to bear interest *after* their maturity."

* * *

"To take these bonds out of the operation of this rule, *there must be pointed out some language in the statute evincive of an intent so to do; some declaration which will justify the court in saying that it was designed that the interest should cease upon the maturity of the bonds.* * * *

(Italics added.) It therefore appears that the court intended to announce the general rule, that where government bonds are issued which provide for interest, the interest continues after maturity, even though there are interest coupons attached thereto covering only the period before maturity, unless there is some provision in the authorizing statute evincing an intent that they should not bear such interest. That view is further fortified by the dissenting opinion of Chief Justice Beatty in which he cites the cases of *Sawyer v. Colgan*, 102 Cal. 283, 36 P. 580, 834 and *Hopkins v. Contra Costa County*, 106 Cal. 566, 39 P. 933. Those cases must be deemed to have been overruled by the *Kendall* case. Moreover, the *Hopkins* case may be distinguished in that it merely announced the general rule that interest does not run on a claim against the state in the absence of a statute imposing it and that general provisions for interest (section 1917 of the Civil Code then provided for interest at 7 per cent on moneys after they became due unless the contract was to the contrary, and section 3287 allowed interest on damages which were certain) do not apply to the state, whereas in the case of bonds being issued that do bear interest, it may yet be said the interest continues after maturity. However, the *Sawyer* case is clearly contrary to the *Kendall* case. The *Kendall* case was followed by *Meyer v. City & County of San Francisco*, 150 Cal. 131, 88 P. 722, 10 L.R. A., N.S., 110, where it was held that bonds for street improvements to be paid by special assessments did not bear interest after maturity because the authorizing statute should not be so construed. The court seemed impressed by the special assessment feature as the sole source of payment of the bonds, and that there would not be sufficient funds raised thereby to pay post maturity interest. That is not wholly persuasive because it may be that,

although the assessment was intended to be sufficient to pay the principal, by virtue of delinquencies, it might not be. It may have some bearing as indicating the legislative intent with reference to interest continuing. Although the *Meyer* case purports to distinguish the *Kendall* case it is fundamentally opposed to it for it does not accept the rule that interest on bonds continues after maturity unless the statute evinces a contrary intent. Rather it assumes such interest does not accrue unless the authorizing statutes expressly so provide.

[1-3] There are cases which hold generally that interest will not run against the government on its obligations in the absence of special statutory authority and that general statutes providing for interest are not applicable. See *McNutt v. City of Los Angeles*, 187 Cal. 245, 201 P. 592, action for damages for change in grade of street; *Savings, etc., Soc., v. City and County of San Francisco*, 131 Cal. 356, 63 P. 665; *Columbia Sav. Bank v. Los Angeles County*, 137 Cal. 467, 70 P. 308; *Miller v. County of Kern*, 150 Cal. 797, 90 P. 119; *Spencer v. City of Los Angeles*, 180 Cal. 103, 179 P. 163; *Kern Valley W. Co. v. County of Kern*, 150 Cal. 801, 90 P. 121; see *Lockhart v. Wolden*, 17 Cal.2d 628, 633, 111 P.2d 319; *United Taxpayers' Co. v. City and County of San Francisco*, 55 Cal. App. 239, 203 P. 120; *Birch v. Board of Supervisors*, 191 Cal. 235, 215 P. 903; probably the weight of authority is to the contrary, see *Schlesinger v. State*, 195 Wis. 366, 218 N.W. 440, 57 A.L.R. 357; 76 A.L.R. 1012; *Hahne Realty Corp. v. City of Newark*, 119 N.J.L. 12, 194 A. 191, 112 A.L.R. 1183; actions to recover taxes illegally levied, *Engelbreton v. City of San Diego*, 185 Cal. 475, 197 P. 651; *Los Angeles Dredging Co. v. City of Long Beach*, 210 Cal. 348, 291 P. 839, 71 A.L.R. 161; *Reclamation D. No. 1500 v. Reclamation Bd.*, 197 Cal. 482, 241 P. 552; *Powell v. City of Los Angeles*, 95 Cal.App. 151, 272 P. 336; see *Sheehan v. Board of Police Com'rs.*, 188 Cal. 525, 206 P. 70. But there is a clear distinction between an obligation of the government which makes no mention of interest and an obligation such as a bond where the authorizing law and the bond itself provide for interest. See *City of Indianola v. Gates*, 181 Miss. 145, 179 So. 284. Even if we accept the general proposition that government obligations do not bear interest in the absence of statutory provision therefor, where the statute states that

the bond shall bear interest the only reasonable implication is that it shall continue to bear interest after maturity. Government bonds are ordinarily classed with negotiable instruments and pass freely from hand to hand. They are the solemn and binding obligation of the government. There is little doubt that it is the understanding of the purchasers of such bonds that the interest does not cease when the bond matures and the maker defaults. The interest accruing after maturity is not accurately speaking damages, rather it is an implied part of the basic contract. We see no derogation of sovereign immunity in that conclusion. Certainly considerations of merchantability and justice require that to that extent the government be placed in the same category as private individuals issuing bonds. Many cases have held that nongovernmental negotiable instruments bear interest after maturity at the same rate as stipulated for before maturity. See *Kohler v. Smith*, 2 Cal. 597, 56 Am.Dec. 369; *Casey v. Gibbons*, 136 Cal. 368, 68 P. 1032; *Guy v. Franklin*, 5 Cal. 416; *Molera v. Cooper*, 173 Cal. 259, 160 P. 231; *Puppo v. Larosa*, 194 Cal. 717, 230 P. 439; *Nesbit v. MacDonald*, 203 Cal. 219, 263 P. 1007. Although those cases may have been primarily concerned with the rate of the interest after maturity, yet they implicitly hold that interest does run after maturity. Some of them base their conclusion on section 3289 of the Civil Code which reads: "Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation." Others do not. They indicate the distinction between an obligation which does not call for interest at all and one that provides for interest before maturity but is silent as to interest thereafter, thus conveying the thought that allowance of interest after maturity is an implied part of the contract rather than damages for the wrongful detention of money. See *Casey v. Gibbons*, supra, 136 Cal. at page 371, 68 P. at page 1034, distinguishing *Malone v. Roy*, 107 Cal. 518, 40 P. 1040. It is said in *Nesbit v. MacDonald*, supra, 203 Cal. at page 222, 263 P. at page 1008, involving a promissory note that *did not provide for any interest*:

"In a case of this character the interest is not recoverable by virtue of any provision of the note or contract, but is in the nature of damages for detention of the debt. Furthermore, a prayer for 'interest,'

without specifying the rate, is deemed a prayer for legal interest. * * *

"This very question was before the court in the case of *Puppo v. Larosa*, 194 Cal. 717, 720, 721, 230 P. 439, 440, and it was there said: 'The promissory note by its terms bore no interest. The trial court allowed legal interest thereon from the date of its maturity. * * * If, * * * interest is not expressly reserved, and the paper matures at a time certain, it will draw interest from its maturity by operation of law without prior demand, and at the legal rate. In such case interest is in the nature of damages for the detention of the debt, and is not recoverable by virtue of any provision of the contract. (Civ.Code, § 3302; *Gray v. Bekins*, 186 Cal. 389, 399, 199 P. 767; 8 Cor.Jur., pp. 1095, 1096, secs. 1425-1427.) * * * The fact that the contract provides for no interest has nothing whatever to do with the damages due after the breach of the condition for payment on the due date of the note. * * * The action of the trial court in allowing legal interest on the amount due was, therefore, correct.'" (Italics added.) As stated before there is no invasion of sovereign immunity in applying the above principles to a government bond, or concluding that section 3289 of the Civil Code is applicable. It does nothing more than announce a rule that is fair and just and which should be applied by the court without reference to that section. The foregoing views are in accord with the rule enunciated in *Kendall v. Porter*, supra, and, as it appears that *Meyer v. City & County of San Francisco*, supra, is obviously inconsistent with that view it must be disapproved except to the extent that it may be said to have been justified on the ground that the authorizing statute there involved indicated that no interest would run after maturity. *Bullard v. Riverside County Drainage Dist.*, 41 Cal. App.2d 900, 107 P.2d 929, being based on the *Meyer* case must be likewise disapproved.

It has been determined in cases in other states, although there is contrary authority, that governmental bonds bearing interest continue to bear interest after maturity. *State v. Village of Brooklyn*, 141 Ohio St. 593, 49 N.E.2d 684; *City of Indianola v. Gates*, supra; *Peoples Bank & Trust Co. v. Sabougla Drainage Dist.*, 186 Miss. 539, 191 So. 93, 824; see 44 C.J. 1236; *Jones, Bonds & Securities*, 4th Ed., §§ 735, 739; *Quindry, Bonds and Bondholders*, § 122; *McQuillen, Municipal*

Corps., 2d Ed., vol. 6, § 2431. It is aptly said in *Peoples Bank & Trust Co. v. Sabougla Drainage Dist.*, supra:

"The sole question for determination in this case, * * * is whether interest is recoverable on the bonds and interest coupons of the drainage district after maturity and until paid. This question was answered in the affirmative in the recent decision in *City of Indianola v. Gates*, 181 Miss. 145, 179 So. 284, in respect to municipal bonds, and we see no sound reason for any distinction between municipal bonds and those of other political or taxing districts of the State, such as drainage districts.

"If it could be supposed that as to any of the subdivisions of the State, whether of counties, municipalities or districts, no interest after maturity could be recovered on their bonds issued for borrowed money, such bonds would be unsalable at any advantageous price; and we must assume that the legislature never for a moment thought that the statutes would be fairly capable of any such an interpretation as would bring about that self-destructive result."

Many of the authorities involve municipal corporations as distinguished from a state agency such as a county but we see no sound reason to apply a different rule.

[4] With regard to interest on the interest coupons on bonds after maturity of the coupons we find that the matter has been considered in several cases, the holding being that they do not bear interest after the maturity of the coupon. *Davis v. Porter*, 66 Cal. 658, 6 P. 746; *Bates v. Gerber*, 82 Cal. 550, 22 P. 1115; *Molineux v. State of California*, 109 Cal. 378, 42 P. 34, 50 Am.St.Rep. 49; *Davis v. State*, 121 Cal. 210, 53 P. 555; *Hewel v. Hogin*, 3 Cal.App. 248, 255, 84 P. 1002. *Davis v. County of Yuba*, 75 Cal. 452, 13 P. 874, 17 P. 533, took a contrary view but it was overruled in *Hopkins v. Contra Costa County*, 106 Cal. 566, 39 P. 933. It has been said that by the weight of authority interest coupons do bear interest. *Jones, Bonds & Bond Securities*, vol. 2, § 735; 27 A.L.R. 83. There is a difference between interest on interest coupons and on the principal of matured bonds. In the latter case the bonds call for interest and even though the statute is silent upon the question of interest after maturity that result should follow by necessary implication. There is ordinarily no provision for interest on the in-

terest coupons at any time and hence we must apply the general rule announced in the cases heretofore cited (*McNutt v. City of Los Angeles*, supra, et seq.) that interest will not run against a government obligation unless it is imposed by statute or authorized contract.

[5] With the foregoing in mind we turn to the statute under which the bonds in the instant cases were issued to determine if, with reference to interest on the bonds after maturity, the statute evinces an intent that it should not continue, and, in regard to interest on interest coupons, provision is made for such interest. The bonds in the *Irvine* case were issued in 1925 under section 3480 of the Political Code which provided at that time that an election shall be held to decide whether bonds shall be issued in the amount of assessments levied. If the bonds are authorized by the election they shall be of certain denominations and shall "bear interest at a rate not to exceed six per cent per annum, payable semi-annually on the first day of January and the first day of July in each year at the office of said county treasurer upon the presentation of the proper coupons therefor. Coupons for each installment of interest shall be attached to said bonds and shall bear the facsimile signature of the county auditor. The principal of said bonds shall be made payable on the first day of July, or the first day of January, and in such years as the trustees may prescribe, but said bonds shall be payable serially within twenty years from their date in the manner following, to wit: (1) Not less than ten per centum * * * within ten years from their date. (2) Not less than ten per centum of the aggregate face value of bonds remaining unpaid at the end of ten years shall be payable each year beginning with the eleventh year from their date, until the whole amount of said bonds has been paid. Said bonds shall be substantially in the following form: * * * Reclamation District No. —, * * * promises to pay to the holder hereof at the office of the treasurer * * * on the first day of —, 19—, the sum of \$—, * * * with interest thereon in like gold coin from date hereof until paid, at the rate of — per cent, per annum, payable at the office of said treasurer semi-annually on the first day of January and the first day of July in each year on presentation and surrender of the interest coupons hereto attached. This bond * * * is based

upon and secured by an assessment levied on the lands in said district, * * *. And the interest coupons may be substantially in the following form: No. _____ \$_____ The county treasurer of _____ county, California, will pay to the holder hereof on the _____ day of _____ 19____, at his office in said county of _____ the sum of \$_____ in gold coin of the United States out of the funds of Reclamation District No. _____ for interest on bond of said district numbered _____. * * * All moneys collected by any county treasurer upon any assessment upon which bonds shall have been issued, including all moneys derived from sale of land for delinquent installments, or from redemption thereof, or from sale of lands bought by the treasurer at any such sale, shall be by such treasurer forthwith paid into the main county treasury to the credit of the bond fund of such reclamation district, and shall be used exclusively for the payment of principal and interest of said bonds issued on such assessment, * * *. The lien of any unpaid assessment upon which bonds shall have been issued shall continue until all said bonds, and any refunding bonds which may be issued, shall have been paid in full, and if for any reason any part of such principal or interest of said bonds, or of refunding bonds shall remain unpaid after enforcement of said assessment as in this article provided, the board of supervisors of the main county shall order an additional or supplemental assessment to be made as provided in section three thousand four hundred fifty-nine, sufficient to pay such unpaid principal and interest; * * *. Where bonds of the district have been authorized to be issued on such assessments all unpaid assessments shall bear interest at the rate of seven per cent per annum from the date of the bonds originally issued thereon until such bonds and any refunding bonds issued thereon shall have been fully paid and discharged, and the interest due at any time on said unpaid assessments may be called without calling any installment of the said assessment. The word installment as used in this section shall be construed as applying to interest as well as the principal as the case may be.

"At least ninety days before any interest date of the bonds, including refunding bonds, the county treasurer of the main county shall estimate the amount of money necessary to pay interest and principal maturing on such interest date after credit-

ing thereon the funds in the treasury applicable to the payment thereof, and shall add thereto fifteen per cent of such aggregate sum to cover possible delinquencies. * * * The treasurer shall credit to the bond fund of the district all money collected by him by sale or otherwise, upon assessments against which bonds shall have been issued, including interest and penalties, and he shall likewise credit to said fund the amounts of purchase money paid in bonds or coupons on sales made for said assessments. * * * Any parcel of land bid in and purchased by a treasurer as aforesaid, as trustee of the bond fund of the district, may be sold * * * by him * * * at any time after the expiration of said redemption period of one year, * * * to any person paying him the amount for which said parcel was bid in by said treasurer at delinquent sale, with interest thereon at the date of seven per cent per annum, compounded yearly, from the date of said delinquent sale, and also the amount of all subsequent installments then delinquent, with accrued interest and penalties thereon. * * * Any balance remaining in such bond fund, after payment in full of the principal and interest of all outstanding bonds of the district, shall be by the treasurer transferred to the general fund of the district. * * * All bonds hereafter issued under this section or under section three thousand four hundred eighty and one-half shall contain a provision as follows: 'This bond is callable, in the manner provided by law, for payment on only interest-payment date, at its face value plus a premium of two per cent; and whenever, on or after such date, funds are provided for payment, interest hereon shall cease.' * * * the county treasurer, * * * shall publish a notice wherein he shall set forth said order of the trustees and shall notify all holders of said bonds to present the same for payment on the date specified and that whenever, on or after such date, funds are received by him for payment of said bonds with a premium of two per cent all interest thereon shall cease." (Italics added.) Deering's 1923, Pol.Code.

Prior to its amendment in 1917, that section made specific provisions concerning interest stating: "If any coupon shall not be paid when presented because there are no funds, the treasurer shall indorse such coupon 'not paid for want of funds' and thereafter the amount due on such coupon shall bear interest at the rate of six per

cent per annum compounded semi-annually. * * * If any bond shall not be presented for payment when the same becomes due, it shall cease to draw interest, but, if presented at such time and not paid for want of funds, the said county treasurer shall so indorse it and thereafter such bond shall draw interest until paid at said rate of six per centum per annum compounded semi-annually, until funds shall have been provided for its payment, * * *." Stats.1911, pp. 639, 650. Those sentences were eliminated by the 1917 amendment.

In the Bekins case at least a portion of the bonds were refunding bonds issued under section 3480a of the Political Code, formerly section 3480½. The provisions of that section are substantially the same as those of section 3480, in respect to the interest and form of bond.

[6] We find nothing in either of those sections which indicate that the bonds shall not bear interest after maturity or that the interest coupons shall bear interest. Indeed both acts in setting forth the form of the bond affirmatively specify that it shall bear interest *until paid*. While it does go on to state that the interest shall be payable semiannually on presentation of the interest coupon, that clause must refer to the interest before maturity and does not limit the major clause calling for interest until paid. With reference to the bonds issued under section 3480, it is plain from the reading of that section before its amendment in 1917 that interest did continue on the bonds after maturity but that it shall *cease* unless the bonds are presented and certain conditions exist. The elimination of that clause may be said to evince the thought that while interest continues, the restrictions on that continuance are no longer effective. In regard to coupons, interest was expressly authorized prior to the amendment under certain conditions only. The elimination of those conditions indicates an intention that coupons under the amended act shall not bear interest. It is also of interest to note that prior to the amendment of section 3480 in 1917, the form of the bond did not contain the phrase that it should bear interest from date until paid. The provision for attaching interest coupons to the bonds and payment thereof upon presentation to the treasurer is merely a method for having the interest before maturity represented by coupons. Although there is no provision for the attachment of coupons for post maturity interest, the obvious reason

for the absence of such provision is that it is not known whether the bonds will not be paid at maturity, and if not, how long thereafter payment will be delayed. Hence, it is not practicable to attach post maturity interest coupons to the bonds upon issuance. That reasoning does not refute the implication that the bonds continue to bear interest after maturity for the implication arises from the contract and the contingency that the principal may not be paid at maturity. Usually it is contemplated that a debtor or maker of a negotiable instrument will pay the obligation according to his promise, but that does not eliminate the practical supposition that he may not, or establish the proposition that he does not intend to have the interest continue after maturity.

[7] Defendants contend that the statute contains no provision for realizing funds for the payment of interest after maturity or for the payment thereof and hence evinces a legislative intent that none shall be payable. That argument is of doubtful persuasiveness in view of the clear implication in the statute that bonds do bear interest after maturity. If there is no other source for the payment of the bonds than that designated, and that is a part of the agreement, it might mean that the bondholder would never receive the full amount of the principal, but it would not indicate an intent that the principal was not payable under any circumstances. The same is true of the interest on the principal after maturity, which is an implied part of the bond. In any event we do not believe the statute is susceptible of that construction. The particular portion of section 3480 above mentioned states that within ninety days before any interest payable date of the bonds, the treasurer shall estimate the amount of money necessary to pay the interest and principal maturing on the interest payable date after crediting the funds on hand, and adding 15 per cent to cover delinquencies. Defendants claim the periods above-mentioned are for calls for the payment of assessments, and only at the time of the maturity dates of the bonds and coupons. But it is not to be supposed that the assessments on which the payment of the bonds are based would not include sufficient to pay interest after maturity. It will be noted that the provision as to calls does not refer to payment of coupons. It refers to interest generally which may well include interest after maturity. Presumably the assessment is levied

in the first instance to pay for the reclamation project or other expenses, and the bonds are a method of financing those obligations. The bonds are issued in an "amount equal to the amount of such assessment, or the part of such assessment remaining unpaid." Nothing is there said about interest before or after maturity, but it is not to be supposed that those words require that the assessment and the principal of the bonds be equal, thus excluding even interest before maturity. Defendants rely upon *Bekins v. Raub*, 40 Cal.App. 2d 709, 105 P.2d 625, as establishing that there may not be calls for assessments after maturity to pay interest, but that case merely involved the question of whether the treasurer could be compelled by mandamus to include in a call the amount necessary to pay bonds that had matured but which had not been paid out of funds raised by a previous call because section 3480 permitted the use of bonds maturing in the future to pay an assessment on a call therefor, thus leaving insufficient cash to pay maturing bonds. That does not mean that those maturing bonds were not to be paid. In the instant actions we are not concerned with when or in what manner the post maturity interest should be paid. If such interest is payable the demurrers should not have been sustained and plaintiffs are entitled to an adjudication of their rights. We find nothing in that case to indicate that the current interest after maturity may not be met by current calls for assessments. Indeed, if the doctrine announced in *Bekins v. Raub*, supra, and *Copeland v. Raub*, 36 Cal.App. 2d 441, 97 P.2d 859, is correct, the clear indication is that bonds do bear interest after maturity. In the *Copeland* case it was held that the provision in section 3480 of the Political Code, before its amendment in 1933 (Stats.1933, p. 1211), limiting the payment of assessments with bonds, to bonds maturing before 90 days after the call, authorized the use of both matured and unmatured bonds to pay assessments. Thereafter the *Bekins* case held that the treasurer could not be compelled to include in his assessment call any amount to pay bonds that had matured at the time of a prior call but were unpaid for the lack of funds at that time due to assessments having been paid in the prior call by unmatured bonds rather than cash. It cannot be presumed that the Legislature intended to achieve the unjust result that, although the bondhold-

er's bonds were not paid for the above reasons, and could not be paid by subsequent assessment calls and possibly not until all of the assessments had been enforced (see *Rohwer v. Gibson*, 126 Cal.App. 707, 14 P. 2d 1051), the bondholder would not be entitled to interest during that period.

There is a method provided by the Legislature in which the bonds may be refinanced and many of the difficulties arising out of the original financing program eliminated. Section 3480a (formerly 3480½) of the Political Code authorizes such refinancing of bonds issued under section 3480 by issuing refunding bonds for all or part of the installments of principal of outstanding bonds. Those bonds bear interest at not exceeding 6 per cent "from the dates, respectively, on which the bonds to be refunded shall mature." Thus the refunding bonds are in a sense a renewal of the old bonds, and the interest payable is in effect, the interest that would have accrued after maturity of the old bonds if they had not been refunded. The *same assessments* which secured the old bonds secure the refunding bonds. Section 3480a provides:

[8] "The principal and interest of refunding bonds shall be based on and payable out of the assessment or assessments upon which the bonds so refunded were payable, in accordance with the provisions of section 3480 of this code." One of the purposes of the statute authorizing the issuance of refunding bonds was to provide for the payment of post maturity interest on the old bonds by a regular and systematic scheme which may well be advantageous to the governmental agency. Implicit in that purpose is the thought that interest continues after maturity where no refunding bonds are issued. Moreover, inasmuch as the interest on the refunding bonds is in effect post maturity interest on the old bonds, and the *same assessments* stand as security, the reasonable implication is that such assessment in the first instance was intended to and did contemplate post maturity interest.

[9] Defendant complains that there is no source from which funds can be derived for the payment of post maturity interest, thus evincing a legislative intent that it is not payable. We have heretofore seen that the assessments do contemplate such interest and there are indications in the statute that such is the case. Also it

will be remembered that the statute provides for supplemental assessments when "any part of the principal or interest of said bonds * * * shall remain unpaid after enforcement of the assessments." Even if we assume that the supplemental assessment may not be made until all the bonds mature, and all steps for the enforcement of the assessment have been taken, and only when the supplemental assessment will not exceed the value of the benefits to the landowners from the project (see *Rohwer v. Gibson*, supra), that does not preclude the running of interest after maturity. Although the interest may run for a long time before the supplemental assessment is made, it cannot be said that economic chaos for the district will follow. It has its relief by way of refunding bond issues which have proven effective to relieve such districts of financial pressure.

There are affirmative indications that the original assessment is the source for the payment of post maturity interest as well as the principal and ante maturity interest. Although not conclusive and possibly subject to other interpretations, taken with the act as a whole, they certainly tend to show that there is no prohibition in the statute against the payment of such interest. We are not in a position to work out the minute details of the amounts that may be realized from those sources or precisely to what extent they extend to such interest, but we are concerned rather with the legislative intent. The statute provides that the lien of any unpaid assessment shall continue until the bonds shall have been paid in full. The unpaid assessments bear interest at the rate of 7 per cent per annum from the date the bonds are issued until the bonds are "fully paid and discharged." The maximum rate of interest on the bonds is 6 per cent. When the treasurer makes a call he shall add 15 per cent of the amount estimated to be required to cover possible delinquencies. A penalty of 10 per cent is added for delinquency in payment of assessments, and both a redemptioner and a purchaser after the redemption period must pay interest at the rate of 7 per cent per annum. Various other penalties are imposed and all of the funds thereby realized are payable into the bond fund.

[10] On the whole we think that the legislative intent is clear that post maturity interest is recoverable on the bonds involved in the instant actions, but is not re-

coverable on the interest coupons attached thereto.

For the foregoing reasons the judgments are and each of them is, reversed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, TRAYNOR, and SCHAUER, JJ., concur.



24 Cal.2d 453

**ESCOLA v. COCA COLA BOTTLING CO.
OF FRESNO.
S. F. 16951.**

Supreme Court of California.

July 5, 1944.

Rehearing Denied Aug. 3, 1944.

1. Negligence ⇨121(2)

"Res ipsa loquitur" does not apply unless defendant had exclusive control of thing causing the injury and the accident is of such a nature that it ordinarily would not occur in the absence of negligence by the defendant.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

2. Negligence ⇨121(2)

Res ipsa loquitur may be applied upon theory that defendant had control at the time of the alleged negligent act although not at the time of the accident, provided plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession.

3. Negligence ⇨121(3)

In action by waitress for injuries sustained when a bottle of carbonated beverage exploded, plaintiff relying upon res ipsa loquitur was required to prove that she handled the bottle carefully.

4. Negligence ⇨121(3)

In action by waitress for injuries sustained when bottle of carbonated beverage exploded, it was not necessary that plaintiff eliminate every remote possibility of injury to bottle after defendant lost control in order that res ipsa loquitur might be relied upon, but it was sufficient if there was evidence permitting a reasonable in-

ference that bottle was not accessible to extraneous harmful forces and that it was carefully handled by plaintiff, or by any third person who may have moved or touched it.

5. Negligence ⇐136(12)

Where waitress suing for injuries sustained when bottle of carbonated beverage exploded adduces evidence permitting a reasonable inference that bottle was not accessible to extraneous harmful forces and that it was carefully handled by plaintiff or any third person who may have moved or touched it after defendant had lost control thereof, defendant's negligence becomes a question for the trier of facts.

6. Negligence ⇐134(10)

In action by waitress for injuries sustained when bottle of carbonated beverage exploded, evidence supported a reasonable inference that the bottle was not damaged by any extraneous force after delivery to restaurant by defendant.

7. Negligence ⇐121(3)

Where one relies on *res ipsa loquitur* in action for injuries resulting from explosion of bottle of carbonated beverage, it must appear that bottles of carbonated liquid are not ordinarily defective without negligence by the bottling company.

8. Evidence ⇐7

It is common knowledge that an overcharge of a bottle of carbonated beverage would not ordinarily result without negligence.

9. Negligence ⇐27

If bottling company negligently failed to discover defective bottle containing a safe pressure of carbonated liquid, company would be liable for injuries from an explosion resulting from a defective bottle.

10. Negligence ⇐121(3)

If defect in bottle containing safe pressure of carbonated liquid is visible, an inference of negligence would arise from failure of bottling company to discover defect.

11. Negligence ⇐121(3)

Where defects are discoverable, it may be assumed that they will not ordinarily escape detection if a reasonable inspection is made, and if such a defect is overlooked, an inference arises that a proper inspection was not made.

12. Negligence ⇐121(3)

In action by waitress for injuries sustained when bottle of carbonated beverage exploded, evidence entitled plaintiff to rely on doctrine of *res ipsa loquitur*.

13. Negligence ⇐136(12)

When a defendant produces evidence to rebut inference of negligence which arises upon application of doctrine of *res ipsa loquitur*, it is ordinarily a question of fact for jury to determine whether the inference has been dispelled.

In Bank.

Appeal from Superior Court, Merced County; James D. Garibaldi, Judge.

Action by Gladys Escola against Coca Cola Bottling Company of Fresno for injuries sustained when a bottle containing a carbonated beverage exploded. From a judgment for plaintiff, the defendant appeals.

Judgment affirmed.

Prior opinion, 140 P.2d 107.

H. K. Landram, of Merced, for appellant.

C. Ray Robinson, Willard B. Treadwell, Dean S. Leshner, and Loraine B. Rogers, all of Merced, and Belli & Leahy and Melvin M. Belli, all of San Francisco, for respondent.

GIBSON, Chief Justice.

Plaintiff, a waitress in a restaurant, was injured when a bottle of Coca Cola broke in her hand. She alleged that defendant company, which had bottled and delivered the alleged defective bottle to her employer, was negligent in selling "bottles containing said beverage which on account of excessive pressure of gas or by reason of some defect in the bottle was dangerous * * * and likely to explode." This appeal is from a judgment upon a jury verdict in favor of plaintiff.

Defendant's driver delivered several cases of Coca Cola to the restaurant, placing them on the floor, one on top of the other, under and behind the counter, where they remained at least thirty-six hours. Immediately before the accident, plaintiff picked up the top case and set it upon a near-by ice cream cabinet in front of and about three feet from the refrigerator. She then proceeded to take the bottles from

the case with her right hand, one at a time, and put them into the refrigerator. Plaintiff testified that after she had placed three bottles in the refrigerator and had moved the fourth bottle about 18 inches from the case "it exploded in my hand." The bottle broke into two jagged pieces and inflicted a deep five-inch cut, severing blood vessels, nerves and muscles of the thumb and palm of the hand. Plaintiff further testified that when the bottle exploded, "It made a sound similar to an electric light bulb that would have dropped. It made a loud pop." Plaintiff's employer testified, "I was about twenty feet from where it actually happened and I heard the explosion." A fellow employee, on the opposite side of the counter, testified that plaintiff "had the bottle, I should judge, waist high, and I know that it didn't bang either the case or the door or another bottle * * * when it popped. It sounded just like a fruit jar would blow up * * *." The witness further testified that the contents of the bottle "flew all over herself and myself and the walls and one thing and another."

The top portion of the bottle, with the cap, remained in plaintiff's hand, and the lower portion fell to the floor but did not break. The broken bottle was not produced at the trial, the pieces having been thrown away by an employee of the restaurant shortly after the accident. Plaintiff, however, described the broken pieces, and a diagram of the bottle was made showing the location of the "fracture line" where the bottle broke in two.

One of defendant's drivers, called as a witness by plaintiff, testified that he had seen other bottles of Coca Cola in the past explode and had found broken bottles in the warehouse when he took the cases out, but that he did not know what made them blow up.

Plaintiff then rested her case, having announced to the court that being unable to show any specific acts of negligence she relied completely on the doctrine of *res ipsa loquitur*.

Defendant contends that the doctrine of *res ipsa loquitur* does not apply in this case, and that the evidence is insufficient to support the judgment.

Many jurisdictions have applied the doctrine in cases involving exploding bottles of carbonated beverages. See *Payne v. Rome Coca-Cola Bottling Co.*, 10 Ga.App. 762, 73 S.E. 1087; *Stolle v. Anheuser-*

Busch, 307 Mo. 520, 271 S.W. 497, 39 A.L.R. 1001; *Bradley v. Conway Springs Bottling Co.*, 154 Kan. 282, 118 P.2d 601; *Ortego v. Nehi Bottling Works*, 199 La. 599, 6 So.2d 677; *MacPherson v. Canada Dry Ginger Ale, Inc.*, 129 N.J.L. 365, 29 A.2d 868; *Macres v. Coca-Cola Bottling Co.*, 290 Mich. 567, 287 N.W. 922; *Benken-dorfer v. Garrett*, Tex.Civ.App., 143 S.W. 2d 1020. Other courts for varying reasons have refused to apply the doctrine in such cases. See *Gerber v. Faber*, 54 Cal.App.2d 674, 129 P.2d 485; *Loebig's Guardian v. Coca-Cola Bottling Co.*, 259 Ky. 124, 81 S.W.2d 910; *Stewart v. Crystal Coca-Cola Bottling Co.*, 50 Ariz. 60, 68 P.2d 952; *Glaser v. Seitz*, 35 Misc. 341, 71 N.Y.S. 942; *Lucians v. John Morgan, Inc.*, 267 App.Div. 785, 45 N.Y.S.2d 502; cf. *Berkens v. Denver Coca-Cola Bottling Co.*, 109 Colo. 140, 122 P.2d 884; *Ruffin v. Coca Cola Bottling Co.*, 311 Mass. 514, 42 N.E.2d 259; *Slack v. Premier-Pabst Corporation*, 1 Terry 97, 40 Del. 97, 5 A.2d 516; *Wheeler v. Laurel Bottling Works*, 111 Miss. 442, 71 So. 743, L.R.A.1916E, 1074; *Seven-Up Bottling Co. v. Gretes*, 182 Va. 138, 27 S.E.2d 925; *Dail v. Taylor*, 151 N.C. 284, 66 S.E. 135, 28 L.R.A.,N.S., 949. It would serve no useful purpose to discuss the reasoning of the foregoing cases in detail, since the problem is whether under the facts shown in the instant case the conditions warranting application of the doctrine have been satisfied.

[1] *Res ipsa loquitur* does not apply unless (1) defendant had exclusive control of the thing causing the injury and (2) the accident is of such a nature that it ordinarily would not occur in the absence of negligence by the defendant. *Honea v. City Dairy, Inc.*, 22 Cal.2d 614, 616, 617, 140 P.2d 369, and authorities there cited; cf. *Hinds v. Wheadon*, 19 Cal.2d 458, 461, 121 P.2d 724; *Prosser on Torts* [1941], 293-301.

[2-5] Many authorities state that the happening of the accident does not speak for itself where it took place some time after defendant had relinquished control of the instrumentality causing the injury. Under the more logical view, however, the doctrine may be applied upon the theory that defendant had control at the time of the alleged negligent act, although not at the time of the accident, *provided* plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession. See

cases collected in *Honea v. City Dairy, Inc.*, 22 Cal.2d 614, 617, 618, 140 P.2d 369. As said in *Dunn v. Hoffman Beverage Co.*, 126 N.J.L. 556, 20 A.2d 352, 354, "defendant is not charged with the duty of showing affirmatively that something happened to the bottle after it left its control or management; * * * to get to the jury the plaintiff must show that there was due care during that period." Plaintiff must also prove that she handled the bottle carefully. The reason for this prerequisite is set forth in *Prosser on Torts*, supra, at page 300, where the author states: "Allied to the condition of exclusive control in the defendant is that of absence of any action on the part of the plaintiff contributing to the accident. Its purpose, of course, is to eliminate the possibility that it was the plaintiff who was responsible. If the boiler of a locomotive explodes while the plaintiff engineer is operating it, the inference of his own negligence is at least as great as that of the defendant, and *res ipsa loquitur* will not apply until he has accounted for his own conduct." See, also, *Olson v. Whitthorne & Swan*, 203 Cal. 206, 208, 209, 263 P. 518, 58 A.L.R. 129. It is not necessary, of course, that plaintiff eliminate every remote possibility of injury to the bottle after defendant lost control, and the requirement is satisfied if there is evidence permitting a reasonable inference that it was not accessible to extraneous harmful forces and that it was carefully handled by plaintiff or any third person who may have moved or touched it. Cf. *Prosser*, supra, p. 300. If such evidence is presented, the question becomes one for the trier of fact (see, e. g., *MacPherson v. Canada Dry Ginger Ale, Inc.*, 129 N.J.L. 365, 29 A.2d 868, 869), and, accordingly, the issue should be submitted to the jury under proper instructions.

In the present case no instructions were requested or given on this phase of the case, although general instructions upon *res ipsa loquitur* were given. Defendant, however, has made no claim of error with reference thereto on this appeal.

[6] Upon an examination of the record, the evidence appears sufficient to support a reasonable inference that the bottle here involved was not damaged by any extraneous force after delivery to the restaurant by defendant. It follows, therefore, that the bottle was in some manner defective at the time defendant relinquished control, because sound and properly pre-

pared bottles of carbonated liquids do not ordinarily explode when carefully handled.

[7] The next question, then, is whether plaintiff may rely upon the doctrine of *res ipsa loquitur* to supply an inference that defendant's negligence was responsible for the defective condition of the bottle at the time it was delivered to the restaurant. Under the general rules pertaining to the doctrine, as set forth above, it must appear that bottles of carbonated liquid are not ordinarily defective without negligence by the bottling company. In 1 *Shearman and Redfield on Negligence* (Rev.Ed.1941), page 153, it is stated that: "The doctrine * * * requires evidence which shows at least the probability that a particular accident could not have occurred without legal wrong by the defendant."

An explosion such as took place here might have been caused by an excessive internal pressure in a sound bottle, by a defect in the glass of a bottle containing a safe pressure, or by a combination of these two possible causes. The question is whether under the evidence there was a probability that defendant was negligent in any of these respects. If so, the doctrine of *res ipsa loquitur* applies.

[8-11] The bottle was admittedly charged with gas under pressure, and the charging of the bottle was within the exclusive control of defendant. As it is a matter of common knowledge that an overcharge would not ordinarily result without negligence, it follows under the doctrine of *res ipsa loquitur* that if the bottle was in fact excessively charged an inference of defendant's negligence would arise. If the explosion resulted from a defective bottle containing a safe pressure, the defendant would be liable if it negligently failed to discover such flaw. If the defect were visible, an inference of negligence would arise from the failure of defendant to discover it. Where defects are discoverable, it may be assumed that they will not ordinarily escape detection if a reasonable inspection is made, and if such a defect is overlooked an inference arises that a proper inspection was not made. A difficult problem is presented where the defect is unknown and consequently might have been one not discoverable by a reasonable, practicable inspection. In the *Honea* case we refused to take judicial notice of the technical practices and information available to the bottling industry

for finding defects which cannot be seen. In the present case, however, we are supplied with evidence of the standard methods used for testing bottles.

A chemical engineer for the Owens-Illinois Glass Company and its Pacific Coast subsidiary, maker of Coca Cola bottles, explained how glass is manufactured and the methods used in testing and inspecting bottles. He testified that his company is the largest manufacturer of glass containers in the United States, and that it uses the standard methods for testing bottles recommended by the glass containers association. A pressure test is made by taking a sample from each mold every three hours—approximately one out of every 600 bottles—and subjecting the sample to an internal pressure of 450 pounds per square inch, which is sustained for one minute. (The normal pressure in Coca Cola bottles is less than 50 pounds per square inch.) The sample bottles are also subjected to the standard thermal shock test. The witness stated that these tests are “pretty near” infallible.

It thus appears that there is available to the industry a commonly-used method of testing bottles for defects not apparent to the eye, which is almost infallible. Since Coca Cola bottles are subjected to these tests by the manufacturer, it is not likely that they contain defects when delivered to the bottler which are not discoverable by visual inspection. Both new and used bottles are filled and distributed by defendant. The used bottles are not again subjected to the tests referred to above, and it may be inferred that defects not discoverable by visual inspection do not develop in bottles after they are manufactured. Obviously, if such defects do occur in used bottles there is a duty upon the bottler to make appropriate tests before they are refilled, and if such tests are not commercially practicable the bottles should not be re-used. This would seem to be particularly true where a charged liquid is placed in the bottle. It follows that a defect which would make the bottle unsound could be discovered by reasonable and practicable tests.

[12] Although it is not clear in this case whether the explosion was caused by an excessive charge or a defect in the glass there is a sufficient showing that neither cause would ordinarily have been present if due care had been used. Further, defendant had exclusive control over both the

charging and inspection of the bottles. Accordingly, all the requirements necessary to entitle plaintiff to rely on the doctrine of *res ipsa loquitur* to supply an inference of negligence are present.

[13] It is true that defendant presented evidence tending to show that it exercised considerable precaution by carefully regulating and checking the pressure in the bottles and by making visual inspections for defects in the glass at several stages during the bottling process. It is well settled, however, that when a defendant produces evidence to rebut the inference of negligence which arises upon application of the doctrine of *res ipsa loquitur*, it is ordinarily a question of fact for the jury to determine whether the inference has been dispelled. *Druzanich v. Criley*, 19 Cal.2d 439, 444, 122 P.2d 53; *Michener v. Hutton*, 203 Cal. 604, 610, 265 P. 238, 59 A.L.R. 480.

The judgment is affirmed.

SHENK, CURTIS, CARTER, and
SCHAUER, JJ., concurred.

TRAYNOR, Justice.

I concur in the judgment, but I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one. In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, L.R.A.1916F, 696, Ann.Cas.1916C, 440 established the principle, recognized by this court, that irrespective of privity of contract, the manufacturer is responsible for an injury caused by such an article to any person who comes in lawful contact with it. *Sheward v. Virtue*, 20 Cal.2d 410, 126 P.2d 345; *Kalash v. Los Angeles Ladder Co.*, 1 Cal.2d 229, 34 P.2d 481. In these cases the source of the manufacturer's liability was his negligence in the manufacturing process or in the inspection of component parts supplied by others. Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can antici-

pate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.

The injury from a defective product does not become a matter of indifference because the defect arises from causes other than the negligence of the manufacturer, such as negligence of a submanufacturer of a component part whose defects could not be revealed by inspection (see *Sheward v. Virtue*, 20 Cal.2d 410, 126 P.2d 345; *O'Rourke v. Day & Night Water Heater Co., Ltd.*, 31 Cal.App.2d 364, 88 P.2d 191; *Smith v. Peerless Glass Co.*, 259 N.Y. 292, 181 N.E. 576), or unknown causes that even by the device of *res ipsa loquitur* cannot be classified as negligence of the manufacturer. The inference of negligence may be dispelled by an affirmative showing of proper care. If the evidence against the fact inferred is "clear, positive, uncontradicted, and of such a nature that it can not rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law." *Blank v. Coffin*, 20 Cal.2d 457, 461, 126 P.2d 868, 870. An injured person, however, is not ordinarily in a position to refute such evidence or identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is. In leaving it to the jury to decide whether the inference has been dispelled, regardless of the evidence against it, the negligence rule ap-

proaches the rule of strict liability. It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence. If public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly.

In the case of foodstuffs, the public policy of the state is formulated in a criminal statute. Section 26510 of the Health and Safety Code, St.1939, p. 989, prohibits the manufacturing, preparing, compounding, packing, selling, offering for sale, or keeping for sale, or advertising within the state, of any adulterated food. Section 26470, St.1941, p. 2857, declares that food is adulterated when "it has been produced, prepared, packed or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered diseased, unwholesome or injurious to health." The statute imposes criminal liability not only if the food is adulterated, but if its container, which may be a bottle (§ 26451, St. 1939, p. 983), has any deleterious substance (§ 26470(6)), or renders the product injurious to health (§ 26470(4)). The criminal liability under the statute attaches without proof of fault, so that the manufacturer is under the duty of ascertaining whether an article manufactured by him is safe. *People v. Schwartz*, 28 Cal.App.2d Supp. 775, 70 P.2d 1017. Statutes of this kind result in a strict liability of the manufacturer in tort to the member of the public injured. See cases cited in *Prosser, Torts*, p. 693, note 69.

The statute may well be applicable to a bottle whose defects cause it to explode. In any event it is significant that the statute imposes criminal liability without fault, reflecting the public policy of protecting the public from dangerous products placed on the market, irrespective of negligence in their manufacture. While the Legislature imposes criminal liability only with regard to food products and their containers, there are many other sources of danger. It is to the public interest to prevent injury to the public from any defective goods by the imposition of civil liability generally.

The retailer, even though not equipped to test a product, is under an absolute liability to his customer, for the implied warranties of fitness for proposed use and merchantable quality include a warranty of

safety of the product. *Goetten v. Owl Drug Co.*, 6 Cal.2d 683, 59 P.2d 142; *Mix v. Ingersoll Candy Co.*, 6 Cal.2d 674, 59 P.2d 144; *Gindraux v. Maurice Mercantile Co.*, 4 Cal.2d 206, 47 P.2d 708; *Jensen v. Berris*, 31 Cal.App.2d 537, 88 P.2d 220; *Ryan v. Progressive Grocery Stores*, 255 N.Y. 388, 175 N.E. 105, 74 A.L.R. 339; *Race v. Krum*, 222 N.Y. 410, 118 N.E. 853, L.R.A.1918F, 1172. This warranty is not necessarily a contractual one (*Chamberlain Co. v. Allis-Chalmers, etc., Co.*, 51 Cal.App.2d 520, 524, 125 P.2d 113; see 1 Williston on Sales, 2d ed., §§ 197-201), for public policy requires that the buyer be insured at the seller's expense against injury. *Race v. Krum*, supra; *Ryan v. Progressive Grocery Stores*, supra; *Chapman v. Roggenkamp*, 182 Ill.App. 117, 121; *Ward v. Great Atlantic & Pacific Tea Co.*, 231 Mass. 90, 94, 120 N.E. 225, 5 A.L.R. 242; see *Prosser, The Implied Warranty of Merchantable Quality*, 27 Minn.L.Rev. 117, 124; *Brown, The Liability of Retail Dealers For Defective Food Products*, 23 Minn.L.Rev. 585. The courts recognize, however, that the retailer cannot bear the burden of this warranty, and allow him to recoup any losses by means of the warranty of safety attending the wholesaler's or manufacturer's sale to him. *Ward v. Great Atlantic & Pacific Tea Co.*, supra; see *Waite, Retail Responsibility and Judicial Law Making*, 34 Mich.L.Rev. 494, 509. Such a procedure, however, is needlessly circuitous and engenders wasteful litigation. Much would be gained if the injured person could base his action directly on the manufacturer's warranty.

The liability of the manufacturer to an immediate buyer injured by a defective product follows without proof of negligence from the implied warranty of safety attending the sale. Ordinarily, however, the immediate buyer is a dealer who does not intend to use the product himself, and if the warranty of safety is to serve the purpose of protecting health and safety it must give rights to others than the dealer. In the words of Judge Cardozo in the *MacPherson* case [217 N.Y. 382, 111 N.E. 1053, L.R.A.1916F, 696, Ann.Cas. 1916C, 440]: "The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it was under a legal duty to protect. The law does not lead us to so

inconsequent a conclusion." While the defendant's negligence in the *MacPherson* case made it unnecessary for the court to base liability on warranty, Judge Cardozo's reasoning recognized the injured person as the real party in interest and effectively disposed of the theory that the liability of the manufacturer incurred by his warranty should apply only to the immediate purchaser. It thus paves the way for a standard of liability that would make the manufacturer guarantee the safety of his product even when there is no negligence.

This court and many others have extended protection according to such a standard to consumers of food products, taking the view that the right of a consumer injured by unwholesome food does not depend "upon the intricacies of the law of sales" and that the warranty of the manufacturer to the consumer in absence of privity of contract rests on public policy. *Klein v. Duchess Sandwich Co., Ltd.*, 14 Cal.2d 272, 282, 93 P.2d 799, 803; *Ketterer v. Armour & Co., D.C.*, 200 F. 322, 323; *Id.*, 2 Cir., 247 F. 921, 160 C.C.A. 111, L.R.A.1918D, 798; *Decker & Sons v. Capps*, 139 Tex. 609, 164 S.W.2d 828, 142 A.L.R. 1479; see *Perkins, Unwholesome Food As A Source of Liability*, 5 Iowa L. Bull. 6, 86. Dangers to life and health inhere in other consumers' goods that are defective and there is no reason to differentiate them from the dangers of defective food products. See *Bohlen, Studies in Torts, Basis of Affirmative Obligations, American Cases Upon The Liability of Manufacturers and Vendors of Personal Property*, 109, 135; *Llewellyn, On Warranty of Quality and Society*, 36 Col.L.Rev. 699, 704, note 14; *Prosser, Torts*, p. 692.

In the food products cases the courts have resorted to various fictions to rationalize the extension of the manufacturer's warranty to the consumer: that a warranty runs with the chattel; that the cause of action of the dealer is assigned to the consumer; that the consumer is a third party beneficiary of the manufacturer's contract with the dealer. They have also held the manufacturer liable on a mere fiction of negligence: "Practically he must know it [the product] is fit, or take the consequences, if it proves destructive." *Parks v. C. C. Yost Pie Co.*, 93 Kan. 334, 144 P. 202, 203, L.R.A.1915C, 179; see *Jeanblanc, Manufacturer's Liability to Persons Other Than Their Immediate Vendees*, 24 Va.L.Rev. 134. Such fictions are

not necessary to fix the manufacturer's liability under a warranty if the warranty is severed from the contract of sale between the dealer and the consumer and based on the law of torts (Decker & Sons v. Capps, *supra*; Prosser, Torts, p. 689) as a strict liability. See Green v. General Petroleum Corp., 205 Cal. 328, 270 P. 952, 60 A.L.R. 475; McGrath v. Basich Bros. Const. Co., 7 Cal.App.2d 573, 46 P.2d 981; Prosser, Nuisance Without Fault, 20 Tex. L.Rev. 399, 403; Feezer, Capacity To Bear The Loss As A Factor In The Decision Of Certain Types of Tort Cases, 78 U. of Pa.L.Rev. 805, 79 U. of Pa. L.Rev. 742; Carpenter, The Doctrine of Green v. General Petroleum Corp., 5 So.Cal.L.Rev. 263, 271; Pound, The End of Law As Developed In Legal Rules And Doctrines, 27 Harv.L.Rev. 195, 233. Warranties are not necessarily rights arising under a contract. An action on a warranty "was, in its origin, a pure action of tort," and only late in the historical development of warranties was an action in *assumpsit* allowed. Ames, The History of *Assumpsit*, 2 Harv.L.Rev. 1, 8; 4 Williston on Contracts (1936) § 970. "And it is still generally possible where a distinction of procedure is observed between actions of tort and of contract to frame the declaration for breach of warranty in tort." Williston, *loc. cit.*; see Prosser, Warranty On Merchantable Quality, 27 Minn.L.Rev. 117, 118. On the basis of the tort character of an action on a warranty, recovery has been allowed for wrongful death as it could not be in an action for breach of contract. Greco v. S. S. Kresge Co., 277 N.Y. 26, 12 N.E.2d 557, 115 A.L.R. 1020; see Schlick v. New York Dugan Bros., 175 Misc. 182, 22 N.Y.S. 2d 238; Prosser, Torts, p. 119. As the court said in Greco v. S. S. Kresge Co., *supra* [277 N.Y. 26, 12 N.E.2d 561, 115 A.L.R. 1020], "Though the action may be brought solely for the breach of the implied warranty, the breach is a wrongful act, a default, and, in its essential nature, a tort." Even a seller's express warranty can arise from a noncontractual affirmation inducing a person to purchase the goods. Chamberlain Co. v. Allis-Chalmers, etc., Co., 51 Cal.App.2d 520, 125 P.2d 113. "As an actual agreement to contract is not essential, the obligation of a seller in such a case is one imposed by law as distinguished from one voluntarily assumed. It may be called an obligation either on a

quasi-contract or quasi-tort, because remedies appropriate to contract and also to tort are applicable." 1 Williston on Sales, 2d Ed. § 197; see Ballantine, Classification of Obligations, 15 Ill.L.Rev. 310, 325.

As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered. Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible to or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks. See Thomas v. Winchester, 6 N.Y. 397, 57 Am.Dec. 455; Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, 15 P.2d 1118, 88 A.L.R. 521; Crist v. Art Metal Works, 230 App. Div. 114, 243 N.Y.S. 496, affirmed 255 N.Y. 624, 175 N.E. 341; see Handler, False and Misleading Advertising, 39 Yale L.J. 22; Rogers, Good Will, Trade-Marks and Unfair Trading (1914) ch. VI, A Study of The Consumer, p. 65 et seq.; Williston, Liability For Honest Misrepresentation As Deceit, Negligence Or Warranty, 42 Harv.L.Rev. 733; 18 Cornell L. Q. 445. Consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trade mark. See Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 463, 55 P.2d 177; Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, 57 S.Ct. 139, 81 L.Ed. 109, 106 A.L.R. 1476; Schechter, The Rational Basis of Trade Mark Protection, 40 Harv.L.Rev. 813, 818. Manufacturers have sought to justify that faith by increasingly high standards of inspection and a readiness to make good on defective products by way of replacements and refunds. See Bogert and Fink, Business Practices Regarding Warranties In The Sale Of Goods, 25 Ill.L.Rev. 400. The manufacturer's obligation to the consumer must keep pace with the changing relationship between them; it cannot be escaped because the marketing of a product has become so complicated as to require one or more intermediaries. Certainly there is greater reason to impose liability on the

manufacturer than on the retailer who is but a conduit of a product that he is not himself able to test. See Soule, Consumer Protection, 4 Encyclopedia of The Social Sciences, 282; Freezer, Manufacturer's Liability For Injuries Caused By His Products: Defective Automobiles, 37 Mich.L. Rev. 1; Llewellyn, Cases And Materials on Sales, 340 et seq.

The manufacturer's liability should, of course, be defined in terms of the safety of the product in normal and proper use, and should not extend to injuries that cannot be traced to the product as it reached the market.

Rehearing denied; EDMONDS, J., dissenting.



24 Cal.2d 535

PEOPLE v. HOUGH.

Cr. 4441.

Supreme Court of California.

July 18, 1944.

1. Homicide ⇨253(3)

Evidence sustained conviction of first degree murder as against contention that evidence at most established manslaughter on ground that killing was done in heat of passion.

2. Homicide ⇨234(1), 252

In murder prosecution, the entire evidence should be considered in determining guilt and degree of crime.

3. Homicide ⇨253(3)

In prosecution for murder of wife who had obtained interlocutory decree of divorce, where defendant claimed that offense was not first degree murder because killing was done in heat of passion, evidence showed that intent to kill wife if she refused to return was formed at time accused purchased pistol on day of killing, if not before when he was endeavoring to buy a pistol.

In Bank.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

William Leva Hough was convicted of murder in the first degree after a prior conviction of a felony and he appeals under the automatic appeal provision of Penal Code, § 1239(b).

Judgment affirmed.

Prior opinion, 144 P.2d 581.

Frederic H. Vercoe, Public Defender, William B. Neeley, Deputy Public Defender, and Morris Lavine, all of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

CURTIS, Justice.

This is an automatic appeal taken under the provisions of subdivision (b) of section 1239 of the Penal Code from a judgment of death under an amended indictment charging the appellant with the crime of murder, after a prior conviction of a felony. The original indictment against appellant was in two counts. By count one he was charged with the murder of Inez Hough, wife of the appellant, and by count two he was charged with the murder of Frederick L. Culp. Each of said offenses was alleged to have been committed on the 13th day of June, 1942, in the county of Los Angeles. To this indictment the appellant entered a plea of not guilty to each count and not guilty by reason of insanity. At a later date an amended indictment was filed against him in which he was charged with the same two offenses and also with a prior conviction of a felony. Upon the filing of the amended indictment, the appellant withdrew his former pleas of not guilty and not guilty by reason of insanity, interposed to the original indictment. He thereafter pleaded guilty to the two charges of murder and admitted the prior conviction of a felony as alleged in the amended indictment. The court thereupon set the case for hearing to determine the degree of crime and to fix the punishment. At the conclusion of this hearing the trial judge determined the degree of the crime alleged in each count to be murder in the first degree and imposed upon the appellant the extreme penalty of the law.

The evidence produced before the trial court at this hearing is free from any serious conflict. The appellant and Inez Hough were married on February 2, 1940. He was 47 and she was 35 years of age at

the time of her death. It was his fifth marriage and her second. They had known each other about six months before their marriage. They were married in El Paso, Texas, and he brought her to Los Angeles. At that time he was engaged in transporting cars from Detroit, Michigan, to Los Angeles. They first lived at the Stadler Hotel in Los Angeles, but for only a few days, when they moved to Wilmington, California. While living in this latter place, the appellant on one of his trips to the east brought his wife's mother, Mrs. Katie M. Griggs, home with him from Kansas City, Missouri, and the three lived together for some months. In the meantime the appellant had given up transportation work and returned to his former trade of welding and was employed in the shipyards at Wilmington.

During the two years and more of their married life, appellant and his wife frequently had arguments and disagreements of such gravity as to cause their temporary separations. Their differences, however, were at least for the time adjusted, reconciliations were effected, and they resumed their marital relations as previously carried on. The most serious of these family jars occurred in August, 1941, and deserves special mention as shedding some light upon the question involved in this appeal. They started an argument as to why she had been away when he returned from one of his transportation trips. Appellant went into the bedroom and came out with a jacket over his arm and walked over to his wife and said, "I might just as well kill her now as any time and be done with it." There was a knock at the door and the wife answered it, then ran out of the house and down the street. Appellant with a gun in his hand ran after her. His mother-in-law telephoned the police. Before the police arrived appellant returned, got in his car and followed his wife. He returned in about fifteen minutes, retired to his bedroom, and went to bed. His wife returned with the police who came in and took the gun. It was in a dresser drawer in his bedroom. After this episode the parties separated, and appellant went to live again at the Stadler Hotel in Los Angeles. Mrs. Hough continued to reside at their Wilmington home for about two months when the mother went to live with another daughter and the wife went to work at a rest home.

Even after this violent disturbance of their domestic life, appellant and his wife patched up their differences and took up their residence in Long Beach. It was then that he went to work as a welder. This was about the 1st of December, 1941, according to his testimony. He bought furniture for their apartment at a cost of about \$900 and obligated himself to the extent of \$700 for jewelry for his wife. However, it does not appear that in their new home they enjoyed any greater domestic felicity than had previously existed in other places where they had lived. Appellant testified that "I and my wife would argue—we would have arguments and I could not take it." Finally, on Easter Sunday, which was April 5, 1942, Mrs. Hough left him. Appellant made numerous attempts to have her return to him. He even had the pastors of two of the local churches intercede with her in an endeavor to effect a reconciliation. The wife refused to be again reconciled or to live with him. She secured employment in a beauty parlor, and subsequently instituted an action for a divorce. In this action she recovered an interlocutory decree of divorce and an order to show cause why he should not be restrained from molesting her. The appellant testified that about this time and for some months previously, his health began to fail, that he had a number of fainting spells and was sent to hospitals for treatment. Only a few days on each of these occasions were spent by him in the hospitals and the doctors who attended him on these occasions were not of the opinion that his condition was as serious as he appeared to believe it to be.

Appellant returned to Los Angeles and again took up his residence at the Stadler Hotel. He there became acquainted with a Mr. Langley, from whom he purchased a .45 Colt automatic pistol on the afternoon of June 13, 1942. A few days prior to that date he had had conversations with Langley about the purchase of a pistol and stated at the time that if he had one he could get a job. Langley had one, but would not sell it to him as he needed it in his business. However, a day or so before June 13, 1942, he had acquired a second pistol and on that day sold one of them to the appellant at about 3 o'clock in the afternoon for \$32.50, receiving \$10 as a down payment. At the same time Langley delivered to appellant a clip containing

seven loaded cartridges. At 4 o'clock of the same day, after drinking a half pint of whiskey, appellant purchased a round-trip ticket from the Pacific Electric Railway Company and left for Long Beach. He took with him the pistol he had bought from Langley and the clip containing the seven loaded cartridges. These were not in the pistol at the time he purchased it from Langley, but appellant inserted the clip with the loaded cartridges into the gun after he boarded the street car for Long Beach. On arriving at Long Beach he went to the location of the Y.W.C.A. building, where he knew his wife was staying, and met her as she was coming out of the building. It does not appear just what the appellant did, after arriving at Long Beach before he met his wife. He must have reached Long Beach from Los Angeles between 5 and 6 o'clock, and his meeting with his wife, as she came out of the Y.W.C.A. building, was between 9 and 9:30 o'clock of the same evening. After meeting his wife, as just related, the two walked down the street toward the Pacific Electric Station, and when they were about a half block from the station the wife told appellant that she was to meet a lady friend at the station and she did not want to be seen with appellant. Thereupon the two parted.

Mrs. Hough went to the station where she met her friend, Mrs. Klaproth, who had just arrived from Wilmington accompanied by her daughter and a young man, a friend of the daughter. This meeting took place at about 9:30 p. m., as Mrs. Klaproth stated she left Wilmington on the 9:20 train. Immediately thereafter the four walked down to the Pike, a street on which is located the amusement zone of Long Beach. They walked along the Pike to a point opposite a fortune teller's concession. The two young people left the other two and went over to have their fortunes told. Mrs. Hough and Mrs. Klaproth were left standing on the sidewalk, and while there a gentleman, an entire stranger to the two ladies, by the name of Frederick L. Culp, approached and engaged them in conversation. These three then walked east along the Pike toward the 230 Club, referred to by the appellant as a saloon and situated about a half block from the fortune teller's concession. On their way there they were joined by a second gentleman, who was also an entire stranger to the two ladies, but an in-

timate friend of Mr. Culp. His name was John C. Parsons. The four continued their walk and entered the 230 Club. Not finding a booth near the entrance of the club, they walked along the bar to the rear of the room and entered a booth in which was located a table with a bench on either side of it. Mrs. Hough and Culp seated themselves on one of these benches and the other couple occupied the bench opposite them. Just as they were seated a waiter came in and wiped off the table and immediately after the waiter left, the appellant stepped up to the entrance of the booth in which the two couples were sitting and began shooting. He fired seven shots, five of which entered the body of Mrs. Hough and two entered the body of Mr. Culp, killing each of them instantly. Each bullet passed through the entire body of the unsuspecting victim. The appellant was overpowered by a couple of bystanders and his gun was taken from him. He was held and turned over to the police. Before he was disarmed he struck his wife on her head two or three times after he had shot her, and evidently addressing Culp, stated, "This will learn you a lesson, you son of a b——."

On the arrival of the officers the appellant was placed in their charge and taken to the police station in Long Beach. While at the police station, the appellant made the following statements to one of the police officers: "I shot that bastard for being out with my wife." "I told her if she did not come back something would happen." "I came here to kill them and, by God, I sure took care of them." "I would have shot the other man if I had not run out of ammunition." A few minutes later and while at the police station, appellant was asked by another officer whether he knew that his wife was dead and was informed that he (the officer) did not know. Appellant replied, "I hope she is because if she is not, my time is spent in vain." This officer further testified that at this same conversation "he also told me that he had told her three or four months previously that if he ever caught her running around with anybody he would kill her and, whoever it was, that he did not give a damn who it was."

The appellant took the stand and testified at the hearing. He made no denial that he had killed his wife and Culp. He admitted that he saw someone who looked like his wife enter the 230 Club, and that

after entering the place, he saw his wife sitting in a booth with a man. But he did not remember aiming the gun, or pulling the trigger, or firing the gun; that he did not remember saying anything, and to quote his own language: "I don't know what happened." He disclaimed any intention of killing anyone when he walked into the place, or when he walked up to the booth in which he found his wife.

He gave as reasons for buying the revolver just before going to Long Beach and taking it with him on his trip that he might get a job as guard and because he was short of money, he thought he could pawn the gun should he need some additional money while at Long Beach. He gave no reason for paying about the last dollar he had for the gun just before his trip to Long Beach, when he thought he might need more money before his return. He further testified to the failing condition of his health, which compelled him to give up his job as welder and seek lighter employment, which the position as guard seemed to promise.

[1] The sole contention of appellant on this appeal is that the evidence produced on the hearing before the trial court for the purpose of determining the degree of the crimes and fixing the punishment is not sufficient to sustain a conviction of murder in the first degree, but on the other hand it establishes a crime of no greater degree than manslaughter, in that it showed that the act of killing was done in the heat of passion. Appellant would limit the evidence against him to his acts and conduct between the time he first saw his wife with Culp and the time he fired the fatal shots which killed the two of them. His theory appears to be that the sight of his wife entering the club or saloon with a male companion and the two seating themselves at a table within one of the booths so inflamed his mind that he shot and killed them upon this sudden heat of passion, and not with that deliberation and intent which are necessarily elements of the crime of murder.

Were we to limit the evidence in this case as contended for by appellant, there might be some plausible reason in support of the theory advanced by him. But this evidence in order to determine the state of mind under which appellant acted at the time he shot and killed his two victims must be considered with other evidence

in the case reflecting his state of mind at the time. This other evidence which must be considered includes, of course, his previous conduct toward his wife, and particularly the threats made by him that if she did not come back to him something would happen, and that if he ever caught her running around with anybody he would kill the two of them; and the statements to the police officers shortly after his arrest, that he shot Culp for being out with his wife, and further to quote his own words: "I came here to kill them and by God, I sure took care of them"; also his statement later made to an officer, who told appellant that he did not know whether or not his wife was dead, "I hope she is because if she is not, my time is spent in vain." This undisputed evidence as a whole shows without a shadow of a doubt that appellant did not act "upon any sudden quarrel or heat of passion" in the slaying of his wife and her companion, but upon mature deliberation to kill and murder her and whomever he caught her running around with. It would be difficult to imagine a more complete and conclusive case of deliberate premeditated murder.

[2] The entire evidence in this case, as previously outlined, and without repetition, should be considered in determining the guilt of appellant and the degree of his crime. This would include practically the history of their married life; their relations toward each other after their marriage; their frequent separations; his attempt to use his pistol on one occasion coupled with a threat to kill her; her institution of an action for divorce resulting in an interlocutory decree of divorce against him, and an order to show cause why he should not be restrained from visiting her; his attempts to persuade her to return to him and her refusal to do so; his threats against her if she did not return to him; his purchase of the pistol on the day of the murder, and his immediate departure thereafter for Long Beach where his wife was living; their meeting and separation on that day; his subsequent sight of her as she entered the club with another man; his acts of following them into the club and shooting each of them to death on finding them seated in a booth together; his arrest, and subsequent statements to the police officers, not only admitting that he shot his wife and companion, but that he

came to Long Beach for that purpose, and that he shot to kill them.

[3] Viewing the evidence as a whole, we are of the opinion that the appellant's intent to kill his wife if she refused to return and live with him was formed at the time he purchased the pistol from Langley, if not long before when he was endeavoring to buy a pistol. This conclusion seems inevitable when considering the entire evidence in the case. The facts in this case are in some respects similar to those in the case of *People v. Coleman*, 20 Cal.2d 399, on page 409, 126 P.2d 349, on page 355, where this court reviewing the evidence in that case stated its conclusion as follows: "There is here an abundance of credible evidence to support the verdicts of the jury. Even if the jury believed the defendant's testimony that he had no recollection of what transpired after he left Laguna Beach until he awoke in the Coronado jail, there is sufficient in the record to justify the implied finding of the jury that the defendant formed the specific intent before he commenced the trip to San Diego, and that such intent continued to control his act. *People v. Norwood*, 39 Cal.App.2d 503, 505, 103 P.2d 618."

The evidence against the appellant is much stronger than that in the case just cited and supports in every respect the order of the trial court in determining the degree of the crime as murder in the first degree and fixing the extreme penalty as the punishment.

Appellant relies upon the cases of *People v. Howard*, 211 Cal. 322, 295 P. 333, 71 A.L.R. 1385, and *People v. Kelley*, 208 Cal. 387, 281 P. 609, in support of his contention that the evidence against him in this case is insufficient to show that he was guilty of murder in the first degree, and that under the rule announced and followed by this court in those cases, the facts here show the appellant to be guilty of no higher crime than that of manslaughter. We find nothing in either of those cases that tends in the slightest degree to support this contention of the appellant. The difference between the factual situation in those cases and that now before us is so apparent that we deem it unnecessary to discuss them further.

The judgment is affirmed.

GIBSON, C.J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

24 Cal.2d 522

Ex parte HOUGH.

Cr. 4500.

Supreme Court of California.

July 18, 1944.

1. Habeas corpus ☞85(1)

One sentenced to death on his pleas of guilty of murder was not entitled to release from prison in habeas corpus proceeding on ground that pleas were secured by illegal means, rendering his conviction void as depriving him of life without due process of law, in absence of showing that trial judge, district attorney or any one connected with prosecution made any promise or offered any inducement to petitioner or his attorney to withdraw his previous pleas of not guilty and enter pleas of guilty. U.S.C.A.Const. Amend. 14.

2. Criminal law ☞641

The public defender of county is not county officer representing state in prosecution of criminal actions. Gen.Laws 1937, Act 1910.

3. Criminal law ☞641

A public defender, appointed to represent one accused of crime, becomes accused's attorney for all purposes of case and to same extent as if regularly employed by accused and is free from any domination by district attorney or prosecuting authorities, so that accused is bound by his pleas of guilty as against contention that in so pleading he was misled by public defender's advice. Gen.Laws 1937, Act 1910, §§ 5, 6; Const. Cal. art. 1, § 8; U. S.C.A.Const. Amend. 6.

4. Habeas corpus ☞85(1)

One sentenced to death on his pleas of guilty of murder is not entitled to release from prison in habeas corpus proceeding on ground that he was misled into entering such pleas by deputy public defender's assurance that petitioner would not suffer death penalty if he pled guilty, in view of conclusive and overwhelming evidence of petitioner's guilt and such deputy's emphatic denial in his affidavit supporting petition that he made any such assertion.

5. Habeas corpus ☞25(1)

Failure of deputy public defender, representing one accused of murder, to inform accused of trial judge's statement, in conversation with such deputy and two deputy district attorneys just before court session at which accused withdrew his pleas

of not guilty and pleaded guilty, that judge wanted accused's counsel to know that judge might have to pronounce death penalty, so that such counsel would not plead defendant guilty with any expectations, furnished no legal ground for Supreme Court to set aside guilty pleas in habeas corpus proceeding, in view of interpretation of judge's remarks by deputy defender, who was experienced lawyer in whom accused had absolute confidence, as indicating no change of mind by trial judge.

6. Criminal law ⇨274

A proceeding to set aside judgment on plea of guilty may be resorted to only where defendant is deprived of right to trial on merits by duress, fraud, or other force overreaching his free will and judgment.

7. Habeas corpus. ⇨25(1)

One accused of murder was bound by his pleas of guilty, entered on advice of deputy public defender representing accused, and not entitled to have pleas set aside by reason of such advice or deputy's withholding from accused of information, which deputy honestly believed to be of no material assistance to accused, as to trial judge's statement just before entry of pleas that he might have to pronounce death penalty.

8. Criminal law ⇨625

Whether trial court should proceed with case against defendant, claimed to be in such highly nervous and irrational state of mind as to render him mentally incompetent to make proper defense and pleas of guilty, on which case was set for trial, was within trial judge's sound discretion.

9. Criminal law ⇨625

Where two of three alienists, appointed by trial court to examine accused after he pleaded not guilty of murder by reason of insanity, reported that accused was sane at times of homicide and examination, and third alienist reported that defendant would be legally insane at time set for trial of case, trial judge did not abuse his discretion in proceeding with trial two weeks later.

10. Habeas corpus ⇨30(3)

Where trial court spent greater part of three days in hearing evidence as to both degree of murder committed by one pleading guilty thereof and punishment to be fixed therefor and pronounced death sentence after both parties rested and de-

fendant waived time for sentence, defendant was not entitled to release from prison on writ of habeas corpus on ground that death penalty was imposed without taking any evidence to fix punishment, though hearing was had in answer to court's question as to how parties wanted to take care of matter of fixing degree of crime.

In Bank.

Habeas corpus proceeding by William Leva Hough for release from the custody of the warden of the state prison at San Quentin.

Writ discharged, and petitioner remanded to respondent's custody.

Prior opinion, 144 P.2d 585.

Morris Lavine, of Los Angeles, for petitioner.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

CURTIS, Justice.

The petitioner seeks his release from the custody of the warden of the State Prison at San Quentin after his pleas of guilty to two counts of murder upon which the death sentence was pronounced against him.

The ground upon which his petition for release is based is that the judgments of conviction are illegal and are violative of the Fourteenth Amendment of the Constitution of the United States, and deprive petitioner of his life without due process of law. His main complaint is that his pleas of guilty were secured and induced by improper and illegal means, which render his conviction void and of no legal effect. As will more fully hereinafter appear, petitioner was represented during the pendency of his action in the trial court and on the appeal of said action to this court by a representative of the public defender of the county. While his said appeal was pending, he changed attorneys and his newly acquired attorney represents him in the present proceeding.

Petitioner was indicted for the murder of his wife and her male companion on June 13, 1942, at Long Beach in the county of Los Angeles. The original indictment was in two counts. By count 1 he was charged with the murder of his wife, Inez Hough, and by count 2, with the murder of Frederick L. Culp. To each of these two counts he pleaded not guilty and not

guilty by reason of insanity. At a later date an amended indictment was filed against him in which he was charged with the same two offenses of murder and with a prior conviction of a felony. Upon filing the amended indictment petitioner withdrew his two former pleas of not guilty, and pleaded guilty to the two charges of murder and admitted the prior conviction of a felony.

He now contends, in the first place, that his counsel was misled by the trial judge and the prosecuting officers of the county by assurances that if petitioner would withdraw his pleas of not guilty and plead guilty to the amended indictment, the sentence of death would not be imposed. The case against petitioner was before us on appeal, and the factual situation therein involved is set forth in some detail in our opinion, therein this day filed. *People v. Hough*, 150 P.2d 444.

[1] The record before us in the present proceeding fails to show that either the trial judge or anyone connected with the district attorney's office or with the prosecution of the case against petitioner made any promise or commitment, directly or indirectly, to petitioner or to his counsel in consideration of his withdrawal of his pleas of not guilty and of his entry of pleas of guilty. Deputy District Attorney Sten was assigned by the district attorney's office to represent the prosecution, and Deputy District Attorney Hunt was assigned to assist Mr. Sten in the prosecution of the case. In the numerous conferences had between them and petitioner's counsel, Deputy District Attorney Sten informed the latter that the district attorney's office would not consent to life imprisonment, or any lesser punishment than the death penalty. The trial judge who took part in some of those conferences "hoping to get a satisfactory disposition of this case, stated that if the District Attorney would be satisfied with life imprisonment, it would be satisfactory to the Court." The trial judge, however, at no time promised or intimated to petitioner or his counsel that he would impose the penalty of life imprisonment in opposition to the recommendation of the district attorney's office.

The case after some continuances was set down for trial for August 11th. The day before, the trial judge called into his chambers the petitioner's attorney and the two deputy district attorneys, informed them that the case could not be tried on the

11th, due to an unfinished case then before the court, and suggested to counsel that the case be continued to the next day, August 12th. This was agreed to, and at the same meeting Mr. Sten informed the court that he intended to file an amended indictment charging petitioner with a prior felony conviction in addition to the two charges of murder. On the morning of August 11th, the case was called with counsel for all parties present. The amended indictment was filed, charging the two crimes of murder and the previous conviction of a felony. The petitioner was arraigned on these charges and the case continued to the following day, August 12th. On the evening of August 11th, petitioner's counsel informed the trial judge that the petitioner would withdraw his pleas of not guilty by reason of insanity and not guilty to each count of the amended indictment, and plead guilty and admit his prior conviction.

Before the opening of court the next morning, August 12th, the trial judge called petitioner's counsel and Mr. Sten and Mr. Hunt into his chambers and made the following statement to petitioner's counsel: "Before you proceed in this matter I don't want you to be misled by any of the conversations you have had with me, or by any conversation that you have had with anyone else, or by anything that you might have heard from anyone, because if I try this case I may have to pronounce the death penalty, and I want you to know this in advance so you won't plead the defendant guilty with any expectations. We have a jury panel present and you can have a jury trial." To this statement petitioner's counsel replied: "All I want to know is, do you start this case with an open mind?" In answer to this question Judge Still (the trial judge) states in his affidavit: "I told him that I did, and he [petitioner's counsel] said: 'I am going to proceed as I have advised you.'" Immediately following this meeting, court convened with petitioner and his counsel present. Petitioner withdrew his former pleas of not guilty and not guilty by reason of insanity and pleaded guilty to the two counts of murder contained in the amended indictment and admitted his prior felony conviction. Thereupon the court proceeded to take evidence to determine the degree of the crime and to fix the punishment. This hearing consumed the greater part of three days. At its close petitioner waived time for sentence. Thereupon, the court sentenced him to suffer the death penalty.

It will thus be seen that there is absolutely no showing that either the trial judge or the district attorney offered any promise or inducement to petitioner's attorney or to petitioner to withdraw his pleas of not guilty and enter pleas of guilty. There is no attempt to show that any person whatever connected with the prosecution of petitioner made any promise to either petitioner or his counsel or misled either of them as to the entry of petitioner's pleas of guilty. Petitioner leans heavily upon certain statements made to his attorney by Deputy District Attorney Hunt. He refers to him as the "veteran prosecutor," and a lawyer with much more experience in the prosecution of cases than Mr. Sten. But the record shows without conflict that Mr. Sten was in charge of the prosecution of the case against petitioner and that Mr. Hunt was assigned to assist Mr. Sten, but was without any authority whatever to bind the district attorney's office in any matter in reference to the case. The record further shows without dispute that Mr. Hunt at no time made any promise or inducement to petitioner or his counsel respecting petitioner's pleas in said action. Mr. Hunt did state to petitioner's counsel at various times before petitioner entered his pleas of guilty, that in his opinion a sentence of life imprisonment would satisfy the ends of justice, but, as just stated, he at no time promised directly, indirectly, or impliedly, that he would ask or recommend to the court a sentence of life imprisonment in case pleas of guilty were entered. Petitioner's counsel well knew of Mr. Hunt's position in the case and that he had no authority to bind the district attorney's office respecting any matter involved in the case and Mr. Hunt, realizing his subordinate position, never purported to do so. In the conferences before the trial judge he expressed his views respecting the punishment to be administered in the case, and that was all. According to the trial judge "Mr. Hunt took only a negligible part in the conversation." The attempt to show that petitioner or his attorney was misled by any statement or act on the part of Mr. Hunt finds no support whatever in the record before us.

[2] Petitioner's second contention rests upon the following state of facts: At the time of petitioner's arraignment upon the original indictment he was without any attorney and without funds to employ an attorney to defend him. For this reason the

court appointed the public defender of the county to represent him. Mr. E. J. Hovden, a regularly appointed and acting deputy in the office of the public defender, was assigned to conduct the defense of petitioner, and he acted as petitioner's attorney during the entire proceedings in said action up to and including the time that judgment was pronounced against him. It is petitioner's contention that the public defender is an officer of the county, and represents the state in the prosecution of criminal actions, in the same light and to the same extent as the district attorney, or other officer of the state or county connected with the prosecution of criminal cases. With this contention we cannot agree. Petitioner cites no authority in support of his contention and none has come to our attention.

[3] The office of public defender was created by an act of the Legislature enacted in 1921. See Stats.1921, p. 354, ch. 245, Deering's Gen.Laws 1937, Act 1910. By section 5 of this act the duties of such an officer are defined in the following terms, so far as pertinent to this proceeding: "Upon request of the defendant or upon order of the court, the public defender shall defend, without expense to them, all persons who are not financially able to employ counsel and who are charged with the commission of any contempt, misdemeanor, felony or other offense. He shall also, upon request, give counsel and advice to such persons, in and about any charge against them upon which he is conducting the defense, and he shall prosecute all appeals to a higher court or courts, of any person who has been convicted upon any such charge, where, in his opinion, such appeal will, or might reasonably be expected to, result in the reversal or modification of the judgment of conviction." While the act has been amended on two occasions (Stats. 1927, p. 1886; Stats.1931, p. 2566) the quoted portion of section 5 has not been changed in any respect. Section 6 of the act, both in its original and amended form, provides for the appointment by the board of supervisors of a sufficient number of deputies to properly conduct the office of public defender and fixes their salaries.

Under this statute when the public defender is appointed to represent a defendant accused of a crime, he becomes the attorney for said defendant for all purposes of the case and to the same extent as if regularly retained and employed by the defendant. The judge of the trial court has no more

authority or control of him than he has of any other attorney practicing before his court. The public defender is free from any restraint or domination by the district attorney or of the prosecuting authorities. He is as free to act in behalf of his client as if he had been regularly employed and retained by the defendant whom he represents. Were it not so his client would not be afforded the full right "to have the Assistance of Counsel for his defense" which the Constitutions, both state and federal, give to one accused of crime. Const.U.S.Amend. 6; Const.Cal. art. 1, § 8. With such plenary powers given a public defender when appointed to defend one accused of crime, it necessarily follows that no act of his in advising his client or in defending the latter upon the charge against him can be considered in any different light than if such act were performed by an attorney regularly employed and retained by the defendant. In no sense can it be held that the prosecuting officers of the county are in any respect charged with the consequences of such an act. The contention therefore that the petitioner is not bound by his pleas of guilty, on the ground that in so pleading he was misled by the advice of the public defender acting as his attorney, is not well taken.

[4] The further contention is made by petitioner that his former attorney assured him that should he plead guilty to the charges against him, he would not suffer the death penalty. In fact petitioner under oath states that Mr. Hovden stated to him, "I guarantee you that if you plead guilty you won't get gassed." Mr. Hovden filed a lengthy affidavit in support of petitioner's original application in this matter and in other ways has shown his willingness to assist petitioner in his present efforts to escape from the judgment rendered against him by the trial court. He has shown himself to be a most willing witness in petitioner's behalf. However, he expressly denies giving to petitioner any such assurance as petitioner claims, and he further denies making the statement quoted above or "any other statement which in substance or effect guaranteed or assured any particular punishment to be imposed." The record shows that Mr. Hovden had had over twelve years' experience as deputy public defender before his association as attorney for the petitioner. The evidence against petitioner, as briefly detailed in the opinion

of this court on the appeal from this judgment following petitioner's pleas of guilty, is so conclusive and overwhelming against petitioner that it is most unreasonable to believe that an attorney of Mr. Hovden's experience and ability would give any such guarantee or assurance as claimed by petitioner. Giving consideration to those facts and the further fact that Mr. Hovden emphatically denies making any such assertion as that attributed to him by petitioner, we are unable to give credence to petitioner's claim that he was misled in entering his pleas of guilty by any assurance or guarantee on the part of Mr. Hovden.

[5] In seeking to avoid the judgment in this case the petitioner claims further that his former attorney failed to fully advise him as to the attitude of the trial judge and district attorney's office respecting the punishment which might be imposed upon him in case he should plead guilty to the two charges against him. In support of this contention the only claim made by petitioner is that his former attorney failed to inform him of the conversation between the trial judge, the two deputy district attorneys and Mr. Hovden held on the morning of August 12th just prior to the session of the court at which petitioner withdrew his former pleas and pleaded guilty to the two charges of murder set forth in the amended indictment. Petitioner's former attorney admits that he did not inform petitioner of this conversation nor of the statement of the trial judge on that occasion for the reason that the remarks of the judge "were interpreted by affiant [his former attorney] not as indicating any change of mind of the trial court but as being a protective comment to absolve the court of any direct promise or commitment respecting punishment."

Did the failure of his attorney to inform petitioner of this statement of the trial judge furnish any legal ground upon which this court can base an order setting aside petitioner's pleas of guilty? Examining this matter in the light of all the surrounding circumstances and the law applicable thereto, we are of the opinion that the question just asked must be answered in the negative. The surrounding circumstances show that petitioner's former attorney was a lawyer of more than ordinary experience in the defense of persons accused of crime. Petitioner's present attorney referred to Mr. Hovden in his argu-

ment as a "high class attorney," "a courageous public defender" and that he "had no criticism of Mr. Hovden." The record shows that petitioner had absolute confidence in the ability and loyalty of Mr. Hovden. There can be no doubt that Mr. Hovden exercised his best judgment in advising petitioner in respect to the pleas the latter was called upon to make to the charges in the amended indictment. Had he informed petitioner of the statement of the trial judge just prior to their entry into the court room on the day set for the trial of petitioner's case, petitioner would naturally have asked Mr. Hovden's advice respecting his pleas in view of the recent statement of the trial judge, and Mr. Hovden would have advised him that he did not interpret these latest remarks of the trial judge "as indicating any change of mind of the trial court." The record shows without conflict that the petitioner at all times had implicit confidence in Mr. Hovden and followed his advice on every occasion, and it is reasonable to suppose that he would have done so on this morning of August 12th had Mr. Hovden informed him of the statement of the trial judge just before opening of court on that morning. Under these circumstances we think it quite evident that petitioner's situation would not have been any different from what it was at the time he entered his pleas of guilty had Mr. Hovden informed him of the latest statement by the court.

[6] Turning now to the legal phase of petitioner's contention that his pleas of guilty should be set aside by reason of his former attorney's failure to inform him of the trial court's statement just prior to his entry of said pleas, we find it fairly "well settled in this state that this procedure to set aside a judgment after plea of guilty may only be resorted to where, on account of duress, fraud, or other force overreaching the free will and judgment of a defendant, he is deprived of his right to a trial on the merits." *People v. Gottlieb*, 25 Cal.App. 2d 411, 415, 77 P.2d 489, 491; *People v. Aseltine*, 139 Cal.App. 768, 780, 34 P.2d 830. In the *Gottlieb* case, 25 Cal.App.2d at page 415, 77 P.2d at page 491, it is stated: "Neither does it avail appellant anything that he entered his plea solely on the advice of his counsel representing him in the case, because this falls far short of being a fraudulently obtained plea."

[7] The early case of *People v. Miller*, 114 Cal. 10, 45 P. 986, is in many respects

like the situation now before us. The defendant was accused of the crime of murder. The court appointed two attorneys to represent him. He entered a plea of not guilty and his case was set down for trial. On the day fixed for the trial of his case he appeared in court with his attorney and asked to withdraw his pleas of not guilty and to plead guilty. His request was granted and he entered a plea of guilty. The time was set for hearing testimony to fix the degree of the crime. After some continuances, evidence for this purpose and in mitigation of punishment was received on a number of different days. A further continuance was asked by defendant and denied by the court. Whereupon the defendant through his counsel asked to be allowed to withdraw his plea of guilty and to plead not guilty on the ground, as shown by affidavits filed by him at the hearing of said motion, that he (114 Cal. at page 14, 45 P. at page 987) "while in jail, feared mob violence, and summary death at the hands of lynchers, and that when he pleaded guilty he did so 'without due deliberation, and without fully realizing his position, and in the hope that by so doing the punishment to which he would be exposed, were he tried before a jury, would thereby be mitigated.'" The court denied his motion and on appeal in affirming the judgment this court stated (114 Cal. at page 16, 45 P. at page 987): "Appellant's contention is that the court abused its discretion in not allowing him to withdraw his plea, interpose a plea of not guilty for the second time, and go before a jury for trial. Before judgment the court may at any time permit this to be done (Pen.Code, § 1018), and the discretion thus vested is one to be liberally exercised. * * * But the mere fact that a defendant, knowing his rights and the consequences of his act, hoped or believed, or was led by his counsel to hope or believe, that he would receive a shorter sentence or a milder punishment by pleading guilty than that which would fall to his lot after trial and conviction by jury, presents no ground for the exercise of this liberal discretion." That case was referred to by this court in the case of *People v. Schwarz*, 201 Cal. 309, 257 P. 71, and the following comment thereon was made on pages 315 and 73, respectively, of the opinion: "The case of *People v. Miller*, 114 Cal. 10, 16, 45 P. 986, 987, it is said, supports the action of the trial court, but it is not in the same category with the case before

us as to the facts thereof. There the defendant was led by the advice of his counsel to believe that he would get less punishment if he changed his plea to guilty than he would receive if he stood trial and was convicted. In this hope, however, he was disappointed. The court rightly held that with full knowledge of the consequences which might follow he should not be permitted to speculate upon the action of the court."

Under these authorities we are of the opinion that the petitioner under the facts here was bound by his pleas of guilty entered in the case then pending against him and may not have his pleas set aside or vacated by reason of any act of his attorney in advising him respecting his defense in said action, or withholding from him the information which his attorney honestly believed would be of no material assistance to his client before entering said pleas.

[8,9] Petitioner also advances the contention that he was weak in body and in such a highly nervous and irrational state of mind as to render himself mentally incompetent to make a proper defense to the action against him, and that a plea of guilty by a defendant in such a mental state is no plea at all and should be set aside when the true facts are shown to the court. It is unnecessary to go into the details of petitioner's condition subsequent to his arrest and during the progress of the action against him up to and during the hearing by the court after his pleas of guilty. After petitioner had pleaded not guilty by reason of insanity at his arraignment on the original indictment, the trial court appointed three alienists to examine petitioner as to his mental condition. Two of these alienists reported that petitioner was sane both at the time he killed his wife and at the time of their examination of him. One of the three was unable to state whether or not petitioner was sane. He did report that in his opinion the defendant "will be legally insane at the time of the hearing set for July 28, 1942" (the date then set for defendant's trial). As noted above, the date of trial was advanced to August 12, 1942. Whether the court should have proceeded with the case against defendant in his then mental state was within the sound discretion of the trial judge. Under the circumstances shown and particularly in view of the report of the two appointed

alienists that petitioner was then sane, we are of the opinion that there was no abuse of discretion on the part of the trial judge in proceeding with petitioner's case in the manner shown by the record.

[10] The final contention of petitioner needs even less discussion than that just considered. Petitioner in this contention claims that the court proceeded to impose upon him the death penalty without taking any evidence to fix the punishment or to determine whether there were any mitigating circumstances sufficient to justify the judgment of life imprisonment rather than death. This contention is answered by what we have previously said in this opinion, that is, that after petitioner's plea of guilty the court then proceeded to take evidence as to the degree of the crime and to fix the punishment, and that the greater part of three days was spent by the court in the hearing of said matter.

Petitioner bases his hope of sustaining this contention upon the statement of the court after petitioner had entered his pleas of guilty. This statement was made immediately after petitioner had entered said pleas and was in the following words: "Now the matter of fixing the degree remains. How do you want to take care of that?" It was in answer to this question and by agreement of all parties in the case that the court spent the greater part of three days in hearing the witnesses, both of the prosecution and the defense, and at its close both parties rested, the petitioner waived time for sentence and the court pronounced its judgment. There is no showing that this hearing was limited to the question of the degree of the crime and did not include evidence for the purpose of fixing the punishment. In fact it would be difficult if not impossible to separate these two purposes for which the evidence was admitted. In endeavoring to show that the crime was not of the first degree, a defendant would introduce every item of evidence which would have the least tendency to prove that he was only guilty of some lesser offense. This would include not only evidence that he was not guilty of the higher offense, but also such evidence if any he had, which would mitigate his offense and thus influence the court in fixing his crime at less than the supreme penalty.

We find nothing in the record before us which would justify the relief sought by

the petitioner. The writ is accordingly discharged and the petitioner is remanded to the custody of the warden of the State Prison of the State of California at San Quentin, California.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.



24 Cal.2d 437

RIBLE v. HUGHES, Superintendent of Schools, et al.

Sac. 5638.

Supreme Court of California.

July 5, 1944.

Rehearing Denied Aug. 3, 1944.

1. Schools and school districts ⇨136

A city or county school board's rules and regulations in effect at date of making or renewal of teacher's employment contract are integral parts of such contract.

2. Schools and school districts ⇨144(4)

A city or county board of education may exercise its discretion in adopting permanent teachers' salary schedules, though such schedules must be adopted before beginning of school year, allowances based on years of training and experience must be uniform and subject to reasonable classification, and schedules must not be arbitrary, discriminatory or unreasonable. School Code, §§ 5.731, 5.734.

3. Schools and school districts ⇨144(4)

A city school board's salary schedules, providing for decreases in salaries of permanent teachers failing to continue their professional training by study in residence at accredited educational institutions within stated periods, were not invalid as indirectly providing for dismissal of such teachers without cause in violation of statute. School Code, §§ 5.401, 5.500, 5.650, 5.731, 5.734.

4. Schools and school districts ⇨144(4)

A city school board's rules, providing for decreases in salaries of permanent teachers failing to complete courses of study at accredited educational institutions

within prescribed periods, were not invalid as imposing on such teachers training requirements in addition to those prescribed by state board of education as conditions precedent to employment. School Code, § 5.731.

5. Officers ⇨103

If reasonable minds may well be divided as to wisdom of administrative board's action, or there appears to be some reasonable basis for classification made by board, such action is conclusive, and court will not substitute its judgment for that of administrative body.

6. Schools and school districts ⇨144(4)

A city school board's salary schedules, providing for decreases in salaries of permanent teachers failing to complete courses of study in accredited educational institutions one summer out of each four, were reasonable and hence conclusive on courts. School Code, § 5.731.

7. Schools and school districts ⇨144(4)

A city school board's salary schedules, providing for decreases in salaries of permanent teachers failing to complete courses of study in accredited educational institutions one summer in four, are not invalid as discriminatory, as uniformity required by statute in salary schedules making allowances for years of training and service is not violated by reasonable classification. School Code, § 5.734.

8. Schools and school districts ⇨144(4)

The fact that city superintendent of schools did not prepare set of written standards for judging teachers' training as required by rules annexed to city school board's salary schedules, but delegated to high school principal power to determine such standards, did not show that administration of board's rules, decreasing salaries of permanent teachers failing to complete courses of study at accredited educational institutions within prescribed periods, was arbitrary as applied to permanent high school teacher who refused to study only because she considered such rules coercive. School Code, § 5.731.

CARTER, SHENK, and CURTIS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Proceeding by Lilly May Rible against Charles C. Hughes, as Superintendent of Schools of the City of Sacramento, and others for a writ of mandate to compel payment to plaintiff of an increased amount of salary due her as a teacher in the senior high school of such city. Judgment for defendants, and plaintiff appeals.

Affirmed.

Prior opinion, 140 P.2d 181.

John Quincy Brown, Dist. Atty., and William A. Green, Asst. Dist. Atty., both of Sacramento, for respondents.

J. H. O'Connor, County Counsel of Los Angeles, and Beach Vasey, Deputy County Counsel, of Los Angeles, amici curiae on behalf of respondents.

EDMONDS, Justice.

The Teacher's Salary Schedules of the Sacramento City Schools, effective in 1935, provide that each year, in establishing the salaries of a permanent teacher for the ensuing twelve months, the amount paid to him for the preceding year shall be decreased if he does not maintain his professional efficiency by graduate study. Lilly May Rible, a teacher subject to the schedule, refused to take any course of instruction and her salary was fixed at the amount specified for those who do not comply with the requirement. Thereafter she sought by writ of mandate to compel the payment of the amount to which she would be entitled had she earned additional educational credits, and her appeal is from a judgment adverse to her contentions.

Miss Rible graduated from Stanford University in 1912 and since that year has been a teacher of English in the Sacramento Senior High School. After nine years of service, she was classified as a permanent teacher and in 1932 she received a life diploma, authorizing her to teach English in the public high schools of California. That diploma is in full force and effect and no proceedings have been taken to suspend, reduce or transfer her. School Code, § 5.650 et seq. In summer recesses commencing in 1929, Miss Rible traveled abroad, doing research work and collecting data pertaining to English literature. By her travels she accumulated, in accordance with the Rules of the Board of Education of the City of Sacramento in effect until 1935, 40 or 50 "rating credits."

During the school year 1933-34 the Board of Education of the City of Sacramento directed its conference bureau, composed of executives of the school department, to study, for the purpose of revision, the existing salary schedules of certificated employees of the Sacramento city schools. After considerable investigation, the conference bureau reached the conclusion that new schedules, based upon certain stated principles, should be adopted. It was agreed that salaries of elementary and high school teachers should be on a basis definitely to encourage additional training. In place of automatic advances in salary it was decided that increased compensation should be uniformly granted upon an evaluation of initial training, teaching experience, and additional professional study obtained by regular attendance at an institution of four-year college rank accredited by the State Department of Education. The conference also declared that teachers reaching the maximum salary should be stimulated to maintain their professional proficiency by continued training, and for the purpose of making this effective, it provided for a salary penalty to be imposed upon those failing to do so within a reasonable length of time.

The principles stated by the conference bureau were approved by the board of education and, in the main, were acceptable to representatives of the various teacher groups with whom they were discussed. Accordingly, a new salary schedule interpreting this "practical philosophy" of the teaching profession was promulgated. A minimum salary of \$1,548 is fixed for a teacher in a senior high school. In the fifth year of service this salary is automatically increased to \$1,836. If the teacher, after having been employed for five years, has completed the study requirement, he is entitled to an annual increment of \$96 in each of the next five years of service. Likewise, after the tenth year, the salary is raised only if the teacher has obtained credit for six additional semester units. One who is eligible for all of the advances authorized by the schedule is entitled to \$2,700 as salary for the fourteenth year of teaching. The maximum of \$2,748 for the fifteenth and subsequent years is attainable only after having concluded further courses of study.

Consistently with the principles stated by the conference bureau, the salary

schedule also provides that if a teacher, during the first five years of her employment as a permanent teacher, has not carried on her professional training by study in residence at an accredited institution, commencing with the sixth year "the salary will be decreased by one annual increment each year until the condition is met; whereupon one annual increment per year shall be restored until the maximum is again reached." A similar condition is imposed at the end of the tenth and fourteenth years of service, and the same requirement is made for the retention of the maximum salary specified after fifteen years of service.

According to the schedules, a conditional increase in salary is allowed when "six semester units shall have been completed in courses open to under-graduates, or four semester units in courses open only to graduates, in an institution or institutions of four-year college rank accredited by the State Department of Education. This work must be done in residence. In conformity with this principle, the Superintendent will prepare a set of written standards against which training taken to meet the conditions for advancement on these schedules will be judged."

On July 1, 1935, the effective date of the new schedules, Miss Rible was receiving an annual salary of \$2,700. Having failed during the succeeding four school years to comply with the additional training requirement, on July 1, 1939, her salary was reduced to \$2,604 and, on July 1, 1940, to \$2,508. By a petition for a writ of mandate, she then demanded that the Board of Education and the Superintendent of Schools of the City of Sacramento authorize the payment of salary to her at the rate of \$2,748 per year commencing July 1, 1939. This is the compensation to which she would be entitled had she met the requirement for additional training upon which the increase to that amount was conditioned. The trial court determined that the schedules are not in conflict with the provisions of the School Code fixing the qualification of a teacher in the high school nor of the rules and regulations of the State Board of Education and denied her any relief. The appeal is from that judgment.

As grounds for reversal of the judgment, the appellant urges that the conditions of the salary schedules are unreasonable, arbitrary

and discriminatory. But, she asserts, conceding that the board of education did not abuse its discretion, it had no power to adopt the rules to which she takes exception for section 5.734 of the School Code requires that salaries must be uniform and based upon years of training and experience. She also contends that the rules are arbitrary and unreasonable in that they delegate to subordinates the discretion to determine the studies a teacher must pursue. And, as the school board cannot discharge her without cause, because of contract and tenure rights (School Code, § 5.650), it is seeking to do indirectly that which it cannot do directly. Moreover, she continues, disciplinary action for a failure to comply with the rules is inconsistent with the legal rights of a permanent teacher.

Other points presented by the appellant are that, conceding for the purposes of argument that the conditions of the 1935 salary schedules were lawfully adopted and reasonable, there are fundamental principles of law which prevent their application to her. Miss Rible contends that her salary is governed by a contract, entered into between herself and the school board in 1921, which requires payment of a salary amounting to \$2,700 a year. Under the provisions of section 5.401 of the School Code, she insists, a teacher's contract of employment is automatically renewed upon the same terms and conditions as existed for the previous year, and a bilateral contract may be modified only by mutual assent. Therefore, the appellant reasons, the automatic reduction in her salary in 1939 was a unilateral act which cannot affect the bilateral agreement by which the board promised to pay her \$2,700 per year. This conclusion, she says, is supported by the statutes relating to tenure and the rules and regulations of a local school board are of no effect where inconsistent with the School Code. Because the School Code delegates to the State Board of Education the power to prescribe and determine the qualifications of teachers, it follows, she contends, that the jurisdiction is an exclusive one and the rules of the Sacramento board are void because they impose training qualifications additional to those required by the School Code or the rules of the state body.

In support of the judgment in their favor, the respondents contend that the challenged rules are not contrary to any

statutory provision. In effect, they say, the rules do no more than provide that teachers shall be compensated according to their training and experience. And the respondents deny that the rules are unreasonable and arbitrary, or beyond the authority of the board to enact.

Notwithstanding Miss Rible's assertions, the controversy does not concern either the validity of her teaching credential or her tenure of position; the narrow issue is whether the board of education may each year fix the salary of all certificated employees upon the basis that those teachers who continue professional training are more qualified persons than the ones who do not do so and entitled to compensation accordingly. More particularly, the question is: may the compensation of those teachers who are unwilling or unable to progress by the completion of a course of study once in four years properly be placed at a lower amount because of their lesser worth in the educational field.

[1] The rules and regulations of a city or county school board, in effect at the date of the making or renewal of a teacher's contract of employment, are integral parts of it. *Kacsur v. Board of Trustees*, 18 Cal.2d 586, 116 P.2d 593; *Fry v. Board of Education*, 17 Cal.2d 753, 112 P.2d 229; *Abraham v. Sims*, 2 Cal.2d 698, 42 P.2d 1029; *Fidler v. Board of Trustees*, 112 Cal.App. 296, 296 P. 912. Miss Rible's last written agreement, executed in 1921, was designated a "Salary Contract" and it provided that she was elected "under section 1609" of the Political Code "in accordance with salary schedule adopted by the Board." Under the provisions of section 1609 of the Political Code, the pertinent provisions of which are now embodied in sections 5.401 and 5.500 of the School Code, the contract of employment of a permanent teacher is automatically renewed from year to year upon the same terms unless, prior to renewal, a school board acts to change such terms. It follows, therefore, that upon the automatic renewal of Miss Rible's contract for the school year 1935-36, it was subject to the new salary schedule and rules adopted July 1, 1935, unless the board had no authority to adopt them or its acts in doing so constituted an abuse of discretion.

[2] Section 5.731 of the School Code provides that city and county boards of

education have the power to fix and order paid the compensation of school teachers. The section has been interpreted accordingly. *Kacsur v. Board of Trustees*, supra; *Fry v. Board of Education*, supra; *Abraham v. Sims*, supra; *Fidler v. Board of Trustees*, supra. In recognizing the power of a board to fix teachers' salaries under the provisions of section 5.731, the court, in the *Kacsur* case [18 Cal.2d 586, 116 P. 2d 596], reiterated "that a permanent teacher has no vested right to a particular salary and that such salary may be changed by the administrative authority," subject to the qualification "that the fixing of salaries must not be discriminatory, arbitrary or unreasonable." In the *Fry* case [17 Cal.2d 753, 112 P.2d 233] it was said that, "within the limits fixed by the School Code, the Board has discretionary control over the salaries of teachers." A restriction upon the authority in that regard, said the court, is the legislative requirement that "within reasonable limits, the principle of uniformity of treatment as to salary for those performing like services with like experience" must be observed but this limitation "does not prevent the Board from making reasonable classifications." In the *Sims* case [2 Cal.2d 698, 42 P.2d 1035], it was said that, although the Legislature intended to give teachers a permanency of tenure, it did not give any "assurance against change in salary. * * * The power of the trustees to raise or reduce the salaries of permanent teachers cannot be doubted, provided it is reasonably exercised and no attempt is made after the beginning of any particular school year to reduce the salaries for that year." According to these decisions, then, a board of education may exercise its discretion in adopting salary schedules fixing the compensation to be paid to permanent teachers although (1) the schedule must be adopted prior to the beginning of the school year; (2) any allowance based upon years of training and experience must be uniform, and subject to reasonable classification; and (3) the schedule must not be arbitrary, discriminatory or unreasonable.

[3,4] In the present case, the salary schedules fix the rate of compensation in accordance with stated conditions. They apply generally to all certificated employees. At his option, a teacher may, by obtaining additional educational credits, from time to time qualify for additional salary. If he does not choose to do so,

the board of education rates his worth to the school district at a lesser amount than one who enlarges his educational experience. In short, the salary schedules merely provide that a teacher is to be compensated in accordance with training and experience.

Certainly this is a desirable procedure. Miss Rible has not been singled out for particular or arbitrary action and the rules do not impose a penalty in the legal sense of that term but set up a standard of salary to be paid each year. There is no basis for the assertion that the board, by adopting the schedules, attempting to do indirectly what section 5.650 of the School Code, providing against dismissal of permanent teachers without cause, prohibited it from doing directly. The fixing of a lower salary for one who has not taken a course of study during four years is not a dismissal without cause, nor do the rules impose training requirements upon permanent teachers, in addition to those prescribed by the State Board of Education, as a condition precedent to employment.

[5, 6] These considerations apply with equal force to the appellant's remaining contention, that the schedules and their conditions are unreasonable, arbitrary and discriminatory. If reasonable minds may well be divided as to the wisdom of an administrative board's action, its action is conclusive. Or, stated another way, if there appears to be some reasonable basis for the classification, a court will not substitute its judgment for that of the administrative body. *Gabrielli v. Knickerbocker*, 12 Cal. 2d 85, 82 P.2d 391; *Monahan v. Department of Water and Power*, 48 Cal.App.2d 746, 120 P.2d 730. The completion of a course of study one summer out of each four has a reasonable relation to a teacher's ability to discharge his professional duties. Although such training may not benefit all teachers equally, the basis of our educational system is that study enlarges one's capacity for accomplishment and leadership in any activity. Very certainly, a permanent teacher of long service, such as Miss Rible, who, so far as the record shows, during more than 30 years of school work has not been in touch with any other phase of education than her own teaching, would benefit from college study not only with respect to the specific subjects for which she received credit but also from contact with modern educational processes. The Sacramento salary schedules are based upon this

self-evident fact, and the determination of the board of education that compensation should be fixed each year in accordance with an estimation of ability is a reasonable one and, therefore, conclusive upon the courts.

[7, 8] Nor is it true that the schedules are discriminatory in their application to the appellant. As emphasized, the difference in salary payments to permanent teachers performing the same duties is based upon a reasonable classification: that of fixing salaries upon the basis of training. Although it would appear that, as Miss Rible asserts, section 5.734 of the School Code requires uniformity in any schedule of salaries making allowance for years of training and service, nevertheless, uniformity is not violated by a reasonable classification. *Fry v. Board of Education*, supra. And the fact that the superintendent did not "prepare a set of written standards against which training * * * will be judged," as required by the rules annexed to the 1935 schedules (Bulletin, p. 10), but, rather, delegated to the principal of the high school the power to so determine; does not support Miss Rible's claim that the administration of the rule was arbitrary. She did not refuse to study because no particular courses had been prescribed by the superintendent but upon the ground that she considered herself "qualified to teach, and those rules were what we might call coercion and rather foolish ones."

The judgment is affirmed.

GIBSON, C. J., and TRAYNOR and SCHAUER, JJ., concurred.

CARTER, Justice (dissenting).

I dissent. I believe that the salary schedule adopted by the Sacramento School Board is discriminatory and unreasonable.

The opinion of the court in stating that appellant's teaching credentials or tenure of position is not here involved, and confining discussion of the controversy strictly to the power to adjust and reduce compensation, is entirely oblivious of the fact that the effect of such salary manipulation as here sought to be practiced can only be to deprive the teachers of this state, of rights protected by their grant of a life diploma by the State Board of Education, and to impair rights heretofore guaranteed

by the provisions of the School Code providing for the permanent tenure of teachers.

Sections 5.260 to 5.281 of the School Code provide for the granting of life diplomas, authorizing the holder to serve for life in the public schools of this state, in the capacity therein specified. Appellant, in 1932, was awarded such a life diploma, the state thereby recognizing her qualifications to teach. Sections 5.270 to 5.281 of the School Code provide for the issuance by county, or city and county boards of education, of a permanent certificate to the holder of a life diploma, upon the successful completion of the number of years of teaching prescribed therein, which entitles the holder to teach in that county or city and county during the life of the holder. The question, then, immediately presents itself, as to the value of such a life diploma, or certificate, if the teacher's salary may intermittently be diminished, by the infliction of penalties, upon failure to meet superimposed study requirements.

As to teachers' tenure, it is the declared policy of this state. School Code, §§ 5.500-5.504. "The Legislature has conferred upon teachers, under specified circumstances, a vested right to be so classified and to teach as permanent instructors, in the particular district where this right has been secured." *Dutart v. Woodward*, 99 Cal. App. 736, 279 P. 493, 494; *Davis v. Gray*, 29 Cal.App.2d 403, 84 P.2d 534. We are not here concerned with the soundness of that policy. *Dutart v. Woodward*, 99 Cal. App. 736, 739, 279 P. 493.

The rule making power of a local school board is limited to those rules and regulations which are reasonable, uniform in treatment, and not in conflict with existing law. *Fry v. Board of Education*, 17 Cal. 2d 753, 112 P.2d 229; *Kacsur v. Board of Trustees*, 18 Cal.2d 586, 116 P.2d 593; *Dutart v. Woodward*, supra. We are justified in saying as a basic premise, that anything which would work to undermine and destroy the declared policy of tenure is unreasonable. The salary schedule here under consideration, does just that.

While the provisions of the School Code, providing for permanent tenure of teachers, guarantees to the public retention of those teachers who have demonstrated their fitness (*Hogsett v. Beverly Hills School Dist.*, 11 Cal.App.2d 328, 53 P.2d 1009), such statutes also have a reciprocal purpose,

looking toward benefit of the teachers, giving a measure of security to those who have served as teachers for the probationary period. *Board of Education of Jersey City v. Wall*, 119 N.J.L. 308, 196 A. 663; *State ex rel. Bass v. Vernon Parish School Board*, La.App., 194 So. 74. And it cannot be doubted, that the latter was the motivating factor in the enactment of our tenure law. Tenure, therefore, not being merely an instrument whereby a teacher may continue the enjoyment of teaching, but the basic element therein being the right to receive a compensation commensurate with the status he or she has attained by virtue of his or her years of study, preparation and past experience, thousands of teachers throughout this state have as a consequence thereof conformed their mode of living to the salary levels which they have been led to believe they were assured as an incident to their tenure status. It is true that a teacher has no vested right to a particular salary, and that such salary may be changed by administrative authority. *Kacsur v. Board of Trustees*, supra, but such changes must be uniform, and must have some regard to the actual classroom worth of the teacher. *Abraham v. Sims*, 2 Cal.2d 698, 42 P.2d 1029; *Fry v. Board of Education*, supra; *Kacsur v. Board of Trustees*, supra. Assuming that the additional educational experience required would have some tendency to increase the ability of an already qualified teacher (it may be here noted that the rule does not prescribe what type of courses shall be taken), by no stretch of the imagination can it be said that failure to take the additional course of study will result in such a substantial diminution in the classroom worth of the teacher, as to justify the salary deductions here contemplated. As applied to appellant, the schedule proposes to reward her, to the extent of \$48 if she takes certain additional training, but if she does not take the training she is to be penalized "one annual increment," amounting to \$96 each year "until the condition is met." If she does not comply with the rule for a period of twelve years, she will be reduced to a beginner's salary of \$1,548. That such lot could befall one who has been given the protective status of tenure is unthinkable. In order to attain tenure, appellant met rigid qualifications, and gave the required number of years of satisfactory service, and in addi-

tion thereto has traveled extensively looking toward her professional improvement; these travels being designed to improve her subject of literature, comprising a large phase of the English courses which she teaches. As to her teaching record, the trial court expressly found that she has rendered many years of efficient, satisfactory, successful service in the Sacramento schools, including the years involved in this salary controversy.

There are many circumstances, or reasons, which may constitute good cause for not taking, or entirely preventing a teacher from taking, the courses and accumulating the credits demanded, such as sickness, need of recuperation from the school year's work, necessity of caring for children, inability to transfer residence to a university center, financial reasons, etc., and thus by virtue of the demerit system employed, they will be penalized, while less efficient and less competent teachers who may take the required units of work, and still remain the least competent, will not be penalized. Even if a teacher is physically able to meet the requirements, the rule compels him or her to forego one out of every four vacation periods, the same constituting a part of that teacher's own leisure time, to fulfilling the conditions imposed.

If the objective of additional schooling be deemed desirable, in order that teachers may keep in touch with modern processes, or for other reasons, the result could be brought about by other methods, that would not affect tenure, for example, opportunities for advancement, the granting of privileges and other like inducements, rather than by giving demerits, such as result from the subtraction process here employed.

This case was originally appealed to the District Court of Appeal of the Third Appellate District and a decision was rendered by that court reversing the judgment of the trial court and directing the issuance of the writ of mandamus as prayed. The opinion in the District Court of Appeal was prepared by Presiding Justice Adams and concurred in by Justices Peek and Thompson. I am convinced that said opinion contains a correct statement of the law applicable to the facts of this case and I adopt as a part of this dissent the following portion of said opinion [140 P. 2d 181]:

"Section 5.530 of the School Code provides that boards of school trustees and

city boards of education shall have power and it shall be their duty to fix and prescribe the duties to be performed by all persons in public school service in the school district. Section 5.420 provides that they shall employ only persons holding proper credentials and certificates; section 5.731 imposes upon them the duty to fix and order paid the compensation of persons in public school service employed by them; sections 5.541-5.547 prescribe the duties of teachers; section 5.650 provides that no permanent employee of a school board shall be dismissed except for the reasons set forth therein, and sections 5.652 et seq. provide the time and method by which charges must be made and heard. There is no provision in the law for disciplinary action against a teacher short of dismissal.

"It is not contended or even suggested by respondent herein that petitioner is subject to dismissal or that it would be within the power of the board to promulgate and enforce a rule requiring that permanent teachers in its employ continue to take college courses. It is said in respondents' brief that 'the question here is not whether the district can require the petitioner to take more training as a teacher in order to hold her position, but whether or not she can be required to take more training or else suffer a reduction in salary.' Obviously, then, the board is attempting to do indirectly what it could not do directly—that is, compel teachers to acquire additional college units by penalizing them by way of a reduction of salary if they do not. This, we believe, is in excess of the powers of the board. Inasmuch as such boards are quasi-municipal corporations of limited power, they have only special powers which may not be exceeded. 23 Cal.Jur. 90; Pasadena School District v. City of Pasadena, 166 Cal. 7, 9, 134 P. 985, 48 L.R.A., N.S., 892, Ann.Cas.1915B, 1039; Grigsby v. King 202 Cal. 299, 304, 260 P. 789. They are powerless to impose penalties—a purely legislative power. Board of Harbor Commissioners v. Excelsior Redwood Co., 88 Cal. 491, 26 P. 375; 22 Am.St.Rep. 321; Gilgert v. Stockton Port District, 7 Cal.2d 384, 390, 391, 60 P.2d 847. And such rules and regulations as they may be authorized to make and enforce must be reasonable and not discriminatory or oppressive, or arbitrary. Dutart v. Woodward, 99 Cal. App. 736, 739, 740, 279 P. 493; Chambers v. Davis, 131 Cal.App. 500, 507, 22 P.2d 27;

Lotts v. Board of Park Commissioners, 13 Cal.App.2d 625, 57 P.2d 215; *McLeod v. State*, 154 Miss. 468, 122 So. 737, 63 A.L.R. 1161; *Hutton v. Gill*, 108 Ind.App. 1, 7 N.E.2d 1011; *Hutton v. Gill*, 212 Ind. 164, 8 N.E.2d 818, 820; *Valentine v. Independent School District*, 187 Iowa 555, 174 N.W. 334, 6 A.L.R. 1525; 24 R.C.L. 575, § 23. They can promulgate no rules in contravention of statutory provisions, nor accomplish by indirection that upon which a statute has placed a ban. *Fairchild v. Board of Education*, 107 Cal. 92, 40 P. 26; *Mitchell v. Winnek*, 117 Cal. 520, 527, 49 P. 579; *Dutart v. Woodward*, *supra*. There can be no arbitrary or unreasonable exercise by the board of its power to reduce salaries or change assignments of permanent teachers. *Abraham v. Sims*, 2 Cal.2d 698, 711, 42 P.2d 1029; *Dutart v. Woodward*, *supra*. And classification of teachers for salary purposes must be reasonable, natural, and based upon a substantial difference germane to the subject, or upon some basis having a reasonable relation to the work assigned. *Hutton v. Gill*, 212 Ind. 164, 8 N.E.2d 818, 820.

"In the case before us the rule enforced against petitioner by the reductions of her salary ignores successful experiences and efficiency as a factor in determining salaries, in contravention of section 5.734 of the School Code; it arbitrarily assumes that a teacher becomes not more, but less efficient with experience; that failure to take additional college work makes a teacher less competent; it also assumes arbitrarily that the taking of any six (or four) units of college work every four years will restore efficiency (though only by degrees); it ignores rating credits acquired under the former salary schedule; it compels a teacher, at her own expense and on her own time, to leave her home and go to a college one semester each four years; it is not a rule governing the conduct of the schools under the jurisdiction of the board, but of the teacher during her vacation from school duties; it ignores every other method by which a teacher might acquire mental stimulus; and in this case it implies inefficiency in conflict with the finding of the trial court of petitioner's efficiency. It is based upon no classification of either teachers or duties, unless it be contended that teachers are to be classified as those that do and those that do not take the prescribed additional college work; and such

a classification would be purely an arbitrary one not based upon qualifications or experience, and could not be justified. *Lotts v. Board of Park Commissioners*, *supra*; *Mansur v. City of Sacramento*, 39 Cal.App. 2d 426, 103 P.2d 221.

"The rule is arbitrary also in that no basis appears for the fixing of the so-called 'annual increment' of \$96 deducted from appellant's salary, no basis for the number of college units teachers are required to complete, and no basis for the requirement that such university courses be taken every four years. If six college units every four years can be required, six units each year can be required; and if a penalty of \$96 per annum can be imposed for non-compliance, any other arbitrary amount could be imposed and the advantages of tenure utterly defeated. It does not prescribe what kind of courses shall be taken by teachers, but merely the number of units that must be completed; so a teacher of English, if she so desired, might present six units of hygiene or home economics, kinesiology or Coptic. Though the rules of the board provide that written standards shall be set up by the superintendent of schools to govern training conditions, it is admitted that none such were set up.

"Petitioner did not fail to perform any duty prescribed by the law or the board. It is not contended that she has not kept up to date in her methods; and except for her failure to acquire the requisite college units her salary would have been the same as previously, \$2,700. There was no change in her rank or grade, working hours or duties. The deductions were not made because of any inefficiency on her part, but as a penalty for failing to go to school. Respondents in their brief contend that there is no penalty involved; but we note that in the Bulletin issued by the board in September, 1936, it is recited: 'It was concluded that teachers reaching the maximum should be stimulated to maintain their professional proficiency by continued training. To make this effective, it was agreed that a salary penalty should be imposed upon those failing to do this within a reasonable length of time.' (*Italics ours.*)

"Also, the rule as applied to petitioner is discriminatory. The evidence shows that high school teachers of English with as little as ten years of experience were receiving \$2,748 per annum, while petitioner, with twenty-nine years of successful experience,

was, after the reductions, the lowest paid among such teachers. There was no general reduction of salaries, the only ones reduced being those of teachers who had not complied with the 'condition.'

"In *Kacsur v. Board of Trustees*, 18 Cal. 2d 586, 592, 116 P.2d 593, the court said:

"However, there are limitations on the powers of boards of trustees to change salaries of permanent teachers. One of the 'legal consequences' referred to in the *Abraham* case, *supra* (*Abraham v. Sims*, 2 Cal.2d 698, 42 P.2d 1029, is that the fixing of salaries must not be *discriminatory, arbitrary or unreasonable*. The above cited cases all so qualify the general power of the administrative agencies to fix the salaries of permanent teachers. Because of this qualification it necessarily follows that there must be a comparison with the salaries of other teachers or salaries of previous years. If this could not be done, the qualification would be meaningless.' (*Italics ours.*)

"The record there showed that the respondent board attempted to reduce appellants' salaries from \$1,600 to \$1,325, practically the minimum allowed by law. No other salaries were reduced; most of them were raised; and the salary of a teacher of approximately the same years of service, experience and qualifications remained the same. The court said:

"These facts standing alone are sufficient to force the conclusion that the attempted action of the board was unreasonable and arbitrary. The fact that the salary of a teacher of like experience and years of service was not reduced is particularly strong in support of appellants' claim of discrimination. That there must be some degree of uniformity was recently recognized by this court in the case of *Fry v. Board of Education*, 17 Cal.2d 753 [at page 757], 112 P.2d 229, 233, wherein it is stated "It must be conceded that, within the limits fixed by the School Code, the Board has discretionary control over the salaries of teachers. (Citing cases.) However, it must also be conceded that the legislature had enjoined on such Boards, within reasonable limits, the principle of uniformity of treatment as to salary for those performing like services with like experience. * * *'" And in that case the Supreme Court reversed the finding of the trial court that the Board had not acted arbitrarily.

"We conclude that the rule of the board requiring petitioner to acquire additional college units or suffer a reduction in salary to which she was otherwise entitled was in excess of the powers of the board. The judgment is reversed and the lower court is directed to issue the writ of mandamus as prayed."

In my opinion the judgment should be reversed.

SHENK and CURTIS, JJ., concur.

Rehearing denied; **SHENK, CURTIS, and CARTER, JJ., dissenting.**



24 Cal.2d 497

HANCOCK OIL CO. OF CALIFORNIA et al. v. INDEPENDENT DISTRIBUTING CO. et al.

L. A. 18087.

Supreme Court of California.

July 13, 1944.

1. Interpleader ⇨6

Essential elements of common-law "interpleader" were that the same thing, debt, or duty must be claimed by both or all parties against whom relief is demanded; all adverse titles or claims must be dependent or derived from common source; the one seeking relief must not have nor claim any interest in the subject matter, and must have incurred no independent liability to either claimant.

See Words and Phrases, Permanent Edition, for all other definitions of "Interpleader".

2. Interpleader ⇨7

The statute providing that interpleader lies although titles or claims are adverse to and independent of one another directly abrogates the common-law requirement that adverse claims be dependent or derived from common source, and hence privity between conflicting claimants need not be shown. Code Civ.Proc. § 386.

3. Interpleader ⇨7

Interpleader is not allowed by amended statute where each claimant asserts the right to a different debt, claim, or duty, or if conflicting claims are mutually exclu-

sive, but fact that identical right is not asserted by each claimant does not preclude the remedy. Code Civ.Proc. § 386.

4. Interpleader ⚡7

If partnership suing lessors as trustees for the partnership, should claim reasonable value of use and occupation, with mesne profits or damages for waste, lessees could not maintain interpleader between lessors and partnership. Code Civ.Proc. § 386.

5. Interpleader ⚡21

Where lessees' complaint in interpleader alleged conflicting claims between lessors and partnership claiming that lessors held in trust for partnership, lessors and partnership were required to answer and, if each agreed that his claim concerned right to rents and royalties, lessees should be discharged from liability upon payment of their obligations under the lease. Code Civ.Proc. § 386.

6. Interpleader ⚡23

A complaint, in interpleader by lessees against lessors and partnership, which claimed that lessees held in trust for partnership, sufficiently showed that lessees stood in position of disinterested stakeholders. Code Civ.Proc. § 386.

7. Interpleader ⚡10

Interpleader will not lie if stakeholder has incurred some personal obligation to either claimant, independent of title or right to possession, which would create a claim against stakeholder that could not be settled in litigation with the other claimant.

8. Interpleader ⚡10

Mere existence of contractual relation between plaintiff in interpleader and one defendant, under which the fund is required to be paid to such claimant, does not of itself defeat interpleader.

9. Interpleader ⚡10

There was no "independent liability" of lessees to lessors, which would bar interpleader by lessees against lessors and partnership which claimed that lessors held in trust for partnership, to determine rights to oil royalties. Code Civ.Proc. § 386.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Liability".

10. Landlord and tenant ⚡61

The rule against tenant's disputing landlord's title, which arose in actions by landlord for rent, is based upon estoppel and public policy. Code Civ.Proc. § 1962, subd. 4.

11. Interpleader ⚡9

A tenant may interplead his landlord and another where opposing claimant derived title from landlord after landlord-tenant relation commenced. Code Civ.Proc. § 386; § 1962, subd. 4.

12. Interpleader ⚡1½

The code provision concerning interpleader must be liberally construed as a remedial statute designed to avoid multiplicity of suits and prevent vexatious litigation. Code Civ.Proc. §§ 4, 386.

13. Statutes ⚡239

In California, an enactment in derogation of common law should be interpreted to effect its objects and promote justice. Code Civ.Proc. § 4.

14. Landlord and tenant ⚡63(2)

The amendment broadening remedy of interpleader implies intention to abrogate any limitation upon tenant as plaintiff in interpleader by reason of statute prohibiting him from denying landlord's title. Code Civ.Proc. § 386; § 1962, subd. 4.

15. Interpleader ⚡9

The statutes abolishing requirement of privity in interpleader cases did away with basis for common-law rule against tenant's maintaining interpleader to dispute landlord's title. Code Civ.Proc. § 386; § 1962, subd. 4.

16. Interpleader ⚡10

A tenant bringing interpleader against landlord and another must not deny landlord's title, since he would no longer be a disinterested stakeholder. Code Civ.Proc. § 386; § 1962, subd. 4.

17. Interpleader ⚡11

Lessees could maintain interpleader against lessors and partnership which claimed that lessors held in trust for it, notwithstanding statute prohibiting tenant from disputing landlord's title. Code Civ. Proc. § 386; § 1962, subd. 4.

18. Interpleader ⚡3(1)

A tenant may not maintain interpleader against lessor and another upon a mere pretext or suspicion of double vexation, but

must allege facts showing reasonable probability of double vexation. Code Civ.Proc. § 386; § 1962, subd. 4.

19. Interpleader ⇐8(1)

The right to interpleader is not founded on possibility of double liability, but on threat of double vexation in respect to one liability.

20. Interpleader ⇐23

A complaint by lessees against lessors and copartnership which claimed that lessors held land in trust for it, seeking interpleader as to rights to oil royalties, was sufficient against general demurrer and precluded denial of leave to amend in sustaining special demurrer. Code Civ.Proc. § 386; § 1962, subd. 4.

21. Appeal and error ⇐1201(4)

Upon reconsideration of special demurrer after reversal of judgment sustaining special demurrer without leave to amend, trial court could require clarification of uncertainties in statement of essential elements of right to interplead.

CARTER, J., dissenting.

In Bank.

Appeal from Superior Court, Santa Barbara County; Ernest D. Wagner, Judge.

Interpleader action by the Hancock Oil Company of California and another against the Independent Distributing Company, a copartnership, and others, and W. L. Hopkins and others, to determine rights to oil royalties. From a judgment sustaining a general and special demurrer without leave to amend, plaintiffs appeal.

Reversed.

Prior opinion 130 P.2d 490.

Pease & Dolley, of Los Angeles, for appellants.

Schauer, Ryon & McMahon and Robert W. McIntyre, all of Santa Barbara, for respondents.

EDMONDS, Justice.

Two corporations, lessees of certain real property, demand that the lessors and certain other persons interplead their rights to the landowner's oil royalties accrued and to accrue under the terms of the lease. A general and also a special demurrer inter-

posed by some of those against whom interpleader is sought, was sustained without leave to amend, and the question for decision concerns the right of a tenant to maintain such a suit against his landlord and a stranger to the lease.

According to the complaint, in 1936 W. L. Hopkins and Gertrude Ann Hopkins, his wife, leased certain real property to Hancock Oil Company of California and R. R. Bush Oil Company. Landowner's royalties of approximately \$1,500. have accrued. It is also alleged that in 1941, Independent Distributing Co., a copartnership composed of Merritt Bloxom, Eugene E. Lowell and Murray M. Lowell, brought an action asserting that W. L. Hopkins, Gertrude Ann Hopkins, and two persons sued by fictitious names, hold the real property described in the lease in trust for them. The relief sought in the suit of Independent Distributing Co. was an accounting of the rents of the land.

The copartnership and the copartners, together with W. L. Hopkins and Gertrude Ann Hopkins, H. James Hopkins and W. L. Hopkins, trustees of Wilbur T. Hopkins Trust, and H. James Hopkins and W. L. Hopkins, trustees of the H. James Hopkins Trust, are named as the defendants in the present suit, the charge of the complaint being that the copartnership and the copartners claim to be the owners of the land described in the lease and entitled to all of the landowner's royalties accrued and to accrue under that agreement. A further assertion of the complaint is that the defendants other than the copartnership and the copartners also claim the same royalties and by reason of these conflicting claims the lessees cannot safely determine to whom the rent should be paid. In conclusion, the plaintiffs declare that the suit was not commenced in collusion with any of the defendants.

To this complaint Merritt Bloxom, Eugene E. Lowell, Murray M. Lowell and Independent Distributing Co. filed an answer alleging that they are the owners of the property and entitled to all of the rents and profits from it. They also assert that the defendants named Hopkins are holding title to the property in trust for them. The defendants other than the copartners and the copartnership interposed a general demurrer and a special demurrer upon the ground of uncertainty. Each demurrer was

sustained without leave to amend and the corporations' appeal is from the judgment which followed that order.

From an opinion of the trial judge, it appears that the demurrers were sustained upon the sole ground that a tenant may not question the title of his landlord at the date of the lease; accordingly, a suit by a tenant to interplead his landlord and one who claims the rent agreed to be paid in accordance with the terms of the lease by which he holds possession of the real property is in violation of this fundamental principle. The appellants assert that a suit in interpleader does not constitute a denial of the landlord's title but is simply a means by which the tenant may discharge his obligation to pay rent under the lease without becoming involved in the conflict between different claimants to the amount due and unpaid. They take the position that section 386 of the Code of Civil Procedure, as amended in 1881, abrogates the common law rule and so liberalizes the remedy as to permit a tenant to interplead his landlord and a stranger to the lease where both claim the rent.

The respondents, in defending the judgment in their favor, argue that the rights of the parties are governed by the common law rule prohibiting a tenant from interpleading his landlord with a stranger to the lease where their titles or claims are not in privity. They point out that a denial of the remedy under such circumstances is based upon the statute declaratory of the common law that "A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation." Code Civ.Proc., § 1962(4). They also insist that the common law rules governing interpleader are still in effect notwithstanding the provisions of section 386 of the Code of Civil Procedure.

[1] The common law bill of interpleader had four essential elements: (1) The same thing, debt, or duty must be claimed by both or all the parties against whom the relief is demanded; (2) all of the adverse titles or claims must be dependent, or be derived from a common source; (3) the one seeking the relief must not have nor claim any interest in the subject matter; and (4) he must have incurred no independent liability to either of the claimants. See 4 Pomeroy's Equity Jurisprudence, 5th Ed. 1941, § 1322, p. 906.

[2] These requirements have been termed historical limitations upon this otherwise expeditious equitable proceeding (see comment, 29 Cal.L.Rev. 35, 36, and 41; 4 Pomeroy's Equity Jurisprudence, 5th Ed. 1941, § 1324, footnote p. 910), and in 1881 section 386 of the Code of Civil Procedure was amended to broaden the remedy. The statute, as modified to remove in part the artificial restrictions which have kept interpleader within technical and narrow bounds, declares, insofar as is here pertinent: "And whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves. The order of substitution may be made and the action of interpleader may be maintained, and the applicant or plaintiff be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another." The provision of this enactment, that interpleader lies "although their titles or claims have not a common origin * * * but are adverse to and independent of one another," directly abrogates the common law requirement that all the adverse titles or claims must be dependent or be derived from a common source, and it is therefore clear that privity between the conflicting claimants need not be shown to invoke the remedy under the code. But the effect of the amendment upon the common law requirement concerning the thing, debt or duty which is the subject of the complaint in interpleader is clearly seen only when the statute is considered in connection with the purpose and policy of the remedy.

[3] Early in the history of interpleader, it was held that one who sought to maintain such a suit must show outstanding claims, identical in every respect and without the slightest degree of variation, to the same thing, debt or duty. In the case of conflicting claims to specific personal property, this rigid formalism did not seriously interfere with the effectiveness of the proceeding. But where, as is generally the situation modernly, the subject matter of the conflicting claims was an obligation, a debt or a duty, the requirement as to the

identity of the defendant's demands very often prevented a stakeholder from using interpleader where he was doubly vexed with respect to one liability. For example, under the narrow rule of the common law, if one person claimed all of the fund held by a bank and another person asserted the right to only a portion of that fund, the bank could not secure a determination of its liability by means of the equitable proceeding. The Legislature has removed this restriction, yet the very rationale of interpleader compels the conclusion that the amendment does not allow the remedy where each of the claimants asserts the right to a different debt, claim or duty. If the conflicting claims are mutually exclusive, interpleader cannot be maintained, but the fact that an identical right is not asserted by each of the claimants does not preclude the use of the remedy. This was recognized in *Sullivan v. Lusk*, 7 Cal. App. 186, 94 P. 91, 92, where, under authority of the statute, a trustee was permitted to interplead two attorneys, one of whom claimed one-half of the amount allowed by the court as counsel fees and the other asserted a right to the entire sum.

[4, 5] In the present case, the plaintiffs have alleged that each of the two groups against whom interpleader is sought claims the right to receive the rents and royalties reserved in the lease. If Independent Distributing Co. and the members of that copartnership should assert that they are entitled to the reasonable value of the use and occupation of the land leased to the plaintiffs, together with the mesne profits or damages for waste, the trial court would be required to deny the plaintiffs the right to interplead those parties with their lessors. Under such circumstances the claims of the parties would not relate to the same obligation. But as the appellants' complaint pleads that there are conflicting claims concerning their obligation to pay the rents and royalties reserved by the lease, the lessors and the third parties must answer and, if each of them agrees that his claim concerns the right to those rents and royalties, the lessees should be discharged from liability upon payment of their obligations under the lease.

[6] As to the remaining common law principles governing a suit of interpleader, the appellants' complaint conforms with the requirement that the plaintiff in such a proceeding must stand in the position of

a disinterested stakeholder. However, much of the present controversy centers about the last element which is specified as essential. Although the complaint discloses no obligation of the appellants other than under the lease, the respondents assert that the obligation to pay rent constitutes an independent liability and bars the remedy of interpleader.

[7, 8] Yet not every obligation may be correctly characterized as an independent liability which will defeat the right to interpleader. The rule concerning independent liability is stated in *Corpus Juris* as follows: "Interpleader will not lie if the stakeholder has incurred some personal obligation to either of the claimants, independent of the title or the right to possession, because such claimant would in that event have a claim against him which could not be settled in a litigation with the other claimant." 33 C.J. 439. The editors of *American Jurisprudence* are in accord with this statement. 30 Am.Jur. 221. The Supreme Court of Maine put the matter most convincingly when it said: "The mere fact that a contractual relation exists between plaintiff and one of the defendants, under which the fund is required to be paid to such claimant, does not of itself defeat the right of interpleader. *Love v. Hartford Life Ins. Co.*, 153 Mo.App. 144, 132 S.W. 335. If such were the law, it would be difficult to conceive of any set of facts which would enable a bank, a trustee, or other custodian of funds, or even a bailee, to maintain interpleader. The obligation referred to in the rule must be independent of the title or right of possession of the fund or property in question. * * * 'The independent obligation covered by the rule must be such that the litigation between the defendants will not determine it, in order to warrant the dismissal of the bill.' *Byers v. Sansom-Thayer Commission Co.*, 111 Ill.App. 575, 580." *First National Bank v. Reynolds*, 127 Me. 340, 143 A. 266, 268, 60 A. L.R. 712. The same reasoning has been followed by this court in holding that an escrow-holder may maintain a suit in interpleader. The determining factor was said to be that "if the relations of the parties are such that the court's decision would determine the responsibility of the escrow holder, he is for the purposes, and within the scope, of the Code section authorizing interpleader a mere stakeholder." *Security Trust, etc., Bank v. Carlsen*,

205 Cal. 309, 271 P. 100, 102, 470, 60 A.L.R. 630.

Although Professor Pomeroy declares that an independent liability "arises from the very nature of the original relation subsisting between" the landlord and tenant, he states that such a suit is proper whenever there is some privity between the claimant and the lessor, as, for example, when the relation of trustee and cestui que trust has been created between them. It seems, therefore, that the reason why the author asserts that the relationship of the landlord and tenant precludes interpleader by the tenant is not that, under the lease, there is an independent liability but because there is no privity between the landlord and the one joined with him as a defendant. The cases cited in the text support this conclusion, for in each of them the court based its decision as to whether interpleader was the proper remedy upon a consideration of the respective claims with regard to their derivation or common origin.

[9] From what has been said, then, it is clear that, in the present case, as according to the facts alleged in the complaint, the relations inter se of the respondents and the copartners are such that the decision will determine the liability of the lessees to each of them, there is no independent liability which will bar the remedy of interpleader; accordingly the appellants' complaint is sufficient with respect to those of the four common law requirements for interpleader not abolished or modified by the amendment in 1881 to section 386 of the Code of Civil Procedure. But notwithstanding this fact, say the respondents, the remedy is not a proper one under the circumstances here shown because of the rule of the common law, now embodied in the Code of Civil Procedure (§ 1962, subd. 4) that a tenant may not dispute the title of his landlord at the time of the commencement of the relation.

[10, 11] The common law doctrine is generally justified upon the ground that to allow the remedy under such circumstances would amount to a violation of the ancient doctrine of attornment. 97 A.L.R. 998; 30 Am.Jur. 216. Historically, the rule arose in actions wherein the landlord sued the tenant for rent. It is based upon estoppel and also the conclusion that to permit a tenant to defend against the person who put him in possession, upon the ground

that the latter had no title or that another had a paramount title, would be against public policy. See 15 Cal.Jur. 645, 646; 32 Am.Jur. 108. But as an exception to it, courts permit a tenant to interplead his landlord and another where the opposing claimant derived his title from the landlord after the commencement of the relation. In such a situation, it is said, since the defendants are in privity, the tenant is not in the position of denying his landlord's title. *Maulsby v. Scarborough*, 179 Md. 67, 16 A.2d 897; 4 Pomeroy's Equity Jurisprudence [5th ed. 1941], § 1327.

In the present case, had the appellants alleged that the copartnership and the copartners derived title from the lessors after the execution of the lease, the complaint would have been sufficient as against a demurrer upon the ground of the common law rule. However, since the complaint is not certain in this respect, and from the briefs it appears that the copartnership and the copartners claim to be the beneficiaries of a constructive trust, it is necessary to determine whether section 1962(4) of the Code of Civil Procedure prevents interpleader where privity is lacking or it arose prior to the commencement of the relation. The point has not been directly adjudicated in California, but this court has considered some aspects of the problem.

In *McDevitt v. Sullivan*, 1857, 8 Cal. 592, 597, an action for rent by a plaintiff standing in the lessor's shoes, the court mentioned by way of dictum, "The moment Sullivan [tenant] discovered that there were adverse claims to the rents, he should have filed his bill of interpleader, making all adverse claimants parties, and offering to pay the rents into Court, to bide the ultimate decision as to the party entitled to them." This case was decided before the important amendment in 1881 to section 386 of the Code of Civil Procedure. *Schluter v. Harvey*, 1884, 65 Cal. 158, 3 P. 659, held that where, after execution of the lease, the original landlord had assigned the rents to Baumgarten and conveyed the land to Harvey, the tenant could interplead both claimants to his obligation for rent, hence there was no issue as to whether an interpleader action violates the rule that a tenant may not deny his landlord's title. The case of *Warnock v. Harlow*, 1892, 96 Cal. 298, 31 P. 166, 31 Am.St.Rep. 209, is not helpful. There a tenant interpleaded his landlord and a stranger to the lease,

but his right to do so was not questioned and the court did not pass upon the propriety of the remedy. In *Spangler v. Spangler*, 1909, 11 Cal.App. 321, 104 P. 995, 996, the court considered a controversy concerning rights under a lease and observed that the lessee, who was then being sued for possession of the property, was the plaintiff in another suit. In commenting upon this situation, it was said: "Conflicting claims have been made on the defendant for the rent, he had a right to require [his lessor and her grantee under a conveyance executed subsequent to the lease] to interplead."

[12,13] Notwithstanding the strict common law limitation on interpleader in landlord-tenant cases which is justified by an ancient rule of real property, the code provision concerning the remedy must be liberally construed. A remedial statute, its purpose is to avoid a multiplicity of suits and prevent vexatious litigation. And contrary to the rule of the common law requiring that statutes in derogation of it are to be strictly construed, in this state such an enactment is to be interpreted "with a view to effect its objects and to promote justice." Code Civ.Proc. § 4. Not inappropriate in this connection is the comment of the District Court of Appeal upon section 386 in its present form. The court said: "In view of such technical rules as prevail in other jurisdictions (30 Am.Jur. 218) the weight of authority is not persuasive, for 'the conditions under which the remedy may be invoked in this state are prescribed by statute and (the) scope of the remedy has been broadened and enlarged.'" *Williams v. Gilmore*, 51 Cal.App. 2d 684, 688, 125 P.2d 539, 541.

[14-16] It should also be noted that section 1962, subdivision 4, of the Code of Civil Procedure was in effect when the Legislature, by the amendment of section 386, broadened the remedy of interpleader. From that action an intention may be implied to do away with any limitation upon a tenant as a plaintiff in such litigation by reason of the statute prohibiting him from denying the title of his landlord. Another reasonable conclusion is that as, notwithstanding the rule codified in section 1962 (4), the common law permitted a tenant to interplead his landlord and a stranger in privity, when the Legislature abolished the requirement of privity in interpleader cases, it did away with the basis for the common

law rule. Moreover, it is questionable whether a tenant, by interpleading his landlord and another, directly and absolutely disputes the former's title. At most, the tenant admits his landlord's title but asserts that another claims his obligation for rent. Clearly, the tenant must not deny his landlord's title for, otherwise, he would not be a disinterested stakeholder.

Interpleader is allowed in favor of a bank against rival claimants to a bank deposit (*Conner v. Bank of Bakersfield*, 1920, 183 Cal. 199, 190 P. 801; *Wells, Fargo & Co. v. Miner*, C.C., 25 F. 533; and see *First Nat. Bank of Portland v. Reynolds*, 127 Me. 340, 143 A. 266, 60 A.L.R. 719), or of an insurer against such claimants to the proceeds of an insurance policy. *Mutual Life Ins. Co. v. Henes*, 1935, 8 Cal. App.2d 306, 47 P.2d 513. Upon principle as, for the reasons which have been stated, the code section forbidding denial of a landowner's title does not apply to a suit of interpleader, there is no basis for any distinction between the position of a bank or an insurance company facing rival claims to a fund and a tenant from whom rent is demanded by two or more persons.

[17] And with general judicial recognition of the right to maintain interpleader against persons in privity, little force is left in the argument grounded upon public policy. From that standpoint, a tenant would be in no better position when meeting the claim of the grantee of a forged deed dated after the commencement of his lease and the demand of one asserting that since a time before the lease was made he has been the owner of the demised property. Without question the rule of privity would allow interpleader against the forged deed claimant. To deny the tenant its benefit in opposing the asserted rights of the person claiming under a title which is described as being derived from one not the lessor, or from the lessor at a date prior to that of the lease, would deprive him of the only effective method of protecting his interests. For in the absence of the right to interplead the landlord and the adverse claimant to the rent, the tenant is faced with the unfortunate alternative of forfeiting his lease or possibly paying twice. *Perkins v. Benguet Consol. Min. Co.*, 55 Cal. App.2d 720, 132 P.2d 70. And there is no action at law adequate to shield him from vexation by multiple litigation over the obligation for rent, against the risk of dou-

ble liability upon the same obligation, and against insecurity of tenancy.

Furthermore, interpleader is not only of importance to the tenant; it is also of advantage to the third party claimant. If the tenant may not interplead his landlord and another under the common law rule, the third party must establish his right to rent in a separate action. During the progress of this litigation the tenant would pay the rents to the landlord. It is entirely conceivable that before judgment was rendered the tenant might become insolvent, leaving the third party without recourse, or because of financial difficulties overtaking the landlord, the tenant would be required to pay his obligation twice.

[18,19] Unquestionably the landlord may suffer some disadvantage in being forced to defend a suit in interpleader. While the litigation continues the rent is withheld from him without interest. But the tenant may not maintain such a suit upon the mere pretext or suspicion of double vexation; he must allege facts showing a reasonable probability of double vexation. Without accurately appraising the rationale of interpleader, by some decisions this court has mentioned as an additional requirement that the plaintiff must allege facts showing a doubt as to which claimant he can safely pay. This statement was made in the case of *Pfister v. Wade*, 56 Cal. 43, 51, and echoed by way of dictum in *Fidelity Sav., etc., Ass'n v. Rodgers*, 180 Cal. 683, 685, 182 P. 426, and *Conner v. Bank of Bakersfield*, supra, 183 Cal. at page 203, 190 P. 801. However, to demand from a plaintiff that he express a doubt as to which adverse claimant he is liable is an admission that the basis upon which the right to interpleader rests is the avoidance of double liability. "The right to the remedy by interpleader is founded, however, not on the consideration that a man may be subjected to double liability, but on the fact that he is threatened with double vexation in respect to one liability." *Pfister v. Wade*, supra, 56 Cal. at page 47; 14 Cal.Jur. 702; see, also, 33 C.J. 438; 30 Am.Jur. 215; 4 *Pomeroy's Equity Jurisprudence* [5th ed. 1941], § 1320.

[20,21] The complaint therefore states a cause of action against a general demurrer and denial of leave to amend was an abuse of discretion even if the special demurrer was well taken. However, upon a reconsideration of the special demurrer the court may require the clarification of any

uncertainties in the statement of the essential elements of the right to interplead. *Washer v. Bank of America*, 21 Cal.2d 822, 136 P.2d 297.

The judgment is reversed.

GIBSON, C. J., and SHENK, CURTIS, and TRAYNOR, JJ., concurred.

SCHAUER, J., did not participate.

CARTER, Justice (dissenting).

I dissent.

I agree with respondents that the case falls within the common law rule, now embodied in Code of Civil Procedure, section 1962(4) and I do not agree that the provisions of section 386 of the Code of Civil Procedure as amended in 1881 have any such abrogative effect upon section 1962 (4) as has just been held by the majority of this court.

I also disagree with the intimation contained in the majority opinion that it can be at all "questionable whether a tenant, by interpleading his landlord and another, directly and absolutely disputes the former's title." As will hereinafter be shown this statement is contrary and stands in opposition to all common law and modern authority. The tenant's very action in filing suit in such a situation, in the absence of any factors showing a derivative title from the lessor to the claimant, subsequent to commencement of the landlord-tenant relationship, is tantamount to an admission that such dispute dated back at least to the commencement of the landlord-tenant relationship.

The principle that a tenant is not permitted to deny the title of his landlord at the time of the commencement of the landlord-tenant relationship stems far back into the common law, and is undisputed therein. The basis for the rule is found in the inequity of allowing a tenant to secure possession of premises through a lease from the person then in possession, and afterwards, and while retaining and enjoying such possession, disputing the right of the lessor to make the lease, and depriving the latter of the benefits of his rent or other obligations incurred when due or owing. As stated in the annotation in L.R.A.1916E at page 699:

"* * * possession of land under a lease imposes upon the lessee and those claiming under him the duty of recognizing

the title of the lessor, in virtue of which he secured such possession; hence, so long as he continues in possession under his lease, he is estopped in any proceeding commenced by him against his lessor, to deny the latter's title as to defects therein or adverse claims outstanding at the time of the execution of the lease. In order to be entitled to question his landlord's title in these regards, he must first surrender possession of the premises. * * *

A correlative provision of the law in this respect is found in Civil Code, section 1948 providing that: "The attornment of a tenant to a stranger is void, unless it is made with the consent of the landlord, or in consequence of a judgment of a court of competent jurisdiction."

The initial question to be considered then, is whether or not a suit in which a tenant interpleads his landlord and one who claims the rent agreed to be paid in accordance with the terms of the lease by which he holds possession of the real property contravenes the foregoing conclusive presumption, that: "A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation."

While the matter is one of first impression in California¹ it has been uniformly held in other jurisdictions where the question has been raised, that a tenant by interpleading his landlord with a third person asserting an adverse title to the leased premises antecedent to the inception of the landlord-tenant relationship, thereby disputes his landlord's title and the action is not maintainable. *Whitaker v. Whitaker*, Tenn. Ch., 62 S.W. 664, affirmed by Supreme Ct. of Tenn. without opinion, see 62 S.W. 673; *Standley v. Roberts*, 8 Cir., 59 F. 836, 8 C.C.A. 305; *Oil Run Petroleum Co. v. Gale*, 6 W.Va. 525; *Camden Safe Deposit & Trust Co. v. Barbour*, 117 N.J. Eq. 401, 176 A. 313, 97 A.L.R. 993; *Lawrence v. Eller*, 169 N.C. 211, 85 S.E. 291, L.R.A.1916E, 699, Ann.Cas.1917D, 546; 30 Am.Jur. 216; 32 Am.Jur. 126; *Pomeroy's Equity Jurisprudence* (5th ed. 1941) vol. 4, §§ 1326, 1327. If, however, the claims of the third person originate from some act of the lessor done or suffered after the commencement of the landlord-tenant

relationship the action is maintainable, not solely because of the presence of privity, as required at common law, but because then the tenant is not disputing his landlord's title as it existed at the commencement of the relation. *Maulsby v. Scarborough*, 179 Md. 67, 16 A.2d 897; *Lawrence v. Eller*, 169 N.C. 211, 85 S.E. 291, L.R.A.1916E, 696, Ann.Cas.1917D, 546; *Coutan v. Williams*, 9 Ves.Jr. 107; *Clark v. Byne*, 13 Ves.Jr. 386; 4 *Pomeroy Equity Jurisprudence*, § 1327. Such is not this case.

Although the matter has not been directly adjudicated in California, yet the fact has been adverted to on occasions that a tenant or subtenant, cannot compel the landlord to litigate the right of some other to that possession for which the tenant has no claim. *Commissioners to Manage the Yosemite Valley, etc., v. Barnard*, 98 Cal. 199, 32 P. 982; *Vatuone v. Cannobio*, 4 Cal.App. 422, 88 P. 374.

Commissioners to Manage the Yosemite Valley, etc., v. Barnard, supra, was an action in unlawful detainer. Plaintiff prevailed. However, the trial court made a finding that there was an outstanding lease in a third person. The defendant upon appeal urged that the plaintiff not being entitled to possession, the judgment should be reversed. This court held that the finding was immaterial and said [98 Cal. 199, 32 P. 983]: "The tenant, having received the possession by the permission of his landlord, cannot compel the landlord to litigate the right of some other to that possession for which the tenant has no claim. As between him and his landlord, his contract as lessee obligates him to surrender the possession at the expiration of his term, and he cannot set up an outstanding title, or show any title in himself which has not been mediately or immediately derived from his landlord."

From what has been said it follows that we may justly disregard the mandate pertaining to the law of landlord and tenant found in section 1962(4) of the Code of Civil Procedure, only if the amendment to section 386 of the Code of Civil Procedure enacted in 1881 be taken to repeal section 1962(4) as far as interpleader actions are concerned.

¹ *McDevitt v. Sullivan*, 8 Cal. 592 (decided before enactment of Code Civ. Proc.) dicta; *Schluter v. Harvey*, 65 Cal. 158, 3 P. 659, and *Spangler v. Spangler*, 11 Cal.App. 321, 104 P. 995, claimants

asserted interest stemmed from the lessor subsequent to the lease. *Warnock v. Harlow*, 96 Cal. 298, 31 P. 166, 31 Am.St. Rep. 209, the issue was not raised.

Section 386 of the Code of Civil Procedure as here relevant provides as follows:

"And whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such persons may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves. The order of substitution may be made and the action of interpleader may be maintained, and the applicant or plaintiff be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical but are adverse to and independent of one another."

The reasons for the provisions in the concluding sentence of the foregoing code section that the claims of the interpleaders need not be of a common origin, nor identical, is easily seen when one refers to the rigid common law elements of a bill of interpleader, to wit: (1) The same thing, debt, or duty must be claimed by both or all the parties against whom the relief is demanded; (2) all of the adverse titles or claims must be dependent, or be derived from a common source; (3) the one seeking the relief must not have nor claim any interest in the subject matter; (4) he must have incurred no independent liability to either of the claimants. 4 Pomeroy's Equity Jurisprudence, 5th Ed. 1941, § 1322.

As a result of the code provision (Code Civ. Proc. § 386), the first two requirements have been expressly abrogated in this state. 14 Cal.Jur. 702. Such being the primary purpose, an intention on the part of the Legislature to go further, without expressly saying so, and thereby repeal such an ancient and universally recognized principle pertaining to the law of landlord and tenant as that expressed in section 1962(4) of the Code of Civil Procedure as a conclusive presumption is not to be readily implied. It is to be noted that the phraseology of section 386 permits interpleader when "conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation * * *." If the Legislature intended the effect for which appellant contends, they would have included real prop-

erty in that phraseology. Such wording is contained in the statutes of Indiana² and it has been held in that state, solely because of this wording that a tenant holding a lease may when an action is brought against him require interpleader of the other claimant. *Hall v. Craig*, 125 Ind. 523, 525, 25 N.E. 538.

As for the conclusion suggested in the majority opinion that "as, notwithstanding the rule codified in section 1962(4), the common law permitted a tenant to interplead his landlord and a stranger in privity, when the Legislature abolished the requirement of privity in interpleader cases, it did away with the basis for the common law rule," the presence of privity was not the basis of the common law rule, but merely one circumstance where a tenant would not be violating the rule. This rule cannot be done away with except by express or implied repeal of the code section itself.

The conclusion herein reached that section 1962(4) of the Code of Civil Procedure was not intended to be and has not been impliedly modified by section 386 of the Code of Civil Procedure as amended in 1881 is further borne out by a consideration of the practical results that would ensue upon the allowance of such litigation at the instance of the tenant.

The landlord upon letting the tenant into possession is entitled to his rent according to the leasehold agreement. In the event of the failure of the tenant to make payment, the landlord can sue for same and the tenant cannot defend on the basis of title in a third person, or that the landlord had no right to make the lease. He must make payment to the lessor. *Reynolds v. Lewis*, 59 Cal. 20. If interpleader is allowed, the rent is paid into court and the landlord is deprived thereof until the termination of the litigation, and of the possible income therefrom entirely. Many of the property owners in this state, as was shown in the late depression are largely dependent upon the rent derived from their property to meet monthly trust deed and mortgage payments. Especially is this true today as to large scale war housing projects recently constructed throughout the state. Also taxes, insurance premiums and expenses for care and maintenance continue to fall due regardless of the legal entanglements that may envelop the income. With

² "A defendant against whom an action is pending upon a contract, or for specific real or personal property, may, at

any time before answer * * *" (Acts 1881 (Spec.Sess.) ch. 38, § 25, p. 240. Burns' Indiana Statutes, § 2-223.

the owner's title so effectively clouded little help can be expected from financing institutions, and it is readily conceivable that this deprivation of income may easily in a short time result in loss of the owner's equity through foreclosure of encumbrances or execution sale upon a judgment suffered.

As stated by Judge Sanborn in the case of *Standley v. Roberts*, 8 Cir., 59 F. 836, 842, 8 C.C.A. 305:

"* * * It would be a monstrous proposition * * * that a tenant of an owner could take a second lease of the same premises from one claiming title to them, and then compel the real owner and the pretended owner to litigate, not only the title to the premises, but the validity of the leases the tenant himself had taken, before either lessor could recover his rent. If such a proposition could be sustained, any tenant might treat his landlord to as many law-suits as he could obtain leases of his premises. * * *"

See, also, *Dungey v. Angove*, 30 Eng. Reprint 644, 645.

Furthermore, such an action started by an unscrupulous tenant could quite conceivably interfere with and delay the owner in obtaining redress by use of the remedy of unlawful detainer,³ when the tenant holds over after the expiration of his term, or has failed to perform conditions and covenants in regard to upkeep of the property. Code Civ. Proc. § 1161(1) (3).

In my opinion it would be more consonant with considerations of justice and principles of equity jurisprudence to require a third person who asserts an adverse interest in real property antecedent to the inception of the landlord-tenant relationship, to obtain a preliminary injunction restraining the tenant from paying the rent to the landlord and requiring that it be impounded pending the litigation, or requiring the appointment of a receiver, in which events the person asserting the adverse interest would be required to put up a bond

to protect the landlord in the event he ultimately prevailed in the action. In other words, the burden should be on the person who asserts an interest adverse to the landlord to convince the trial court on an application for a preliminary injunction that he has at least a *prima facie* case and give the trial court an opportunity to protect the landlord against damage by requiring the person asserting such adverse claim to furnish an undertaking which will protect the landlord against loss or damage in the event he should ultimately prevail. In such event all parties are protected and the landlord is not subjected to the perpetual threat that whenever a tenant becomes suspicious that his landlord's title may be questioned, he may bring an action in interpleader and require his landlord to resort to expensive and prolonged litigation before he may receive the rent which the tenant has by solemn written agreement promised to pay at stated periods. It is not difficult to visualize a situation where a tenant might resort to an action in interpleader without just or any cause in order to prevent the landlord from receiving the rent when due and thus cause the landlord financial embarrassment when no real or actual controversy exists as to the genuineness of the landlord's title. Such a situation should not be permitted to exist in view of the traditional policy of the common law which finds expression in our code section that "A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation." Code Civ. Proc. § 1962(4).

Although, according to the majority opinion, the complaint is uncertain as to just when the copartnership and copartners claimed to have derived title from the lessors, no contention has been made upon this appeal, that it is at all possible for plaintiffs, to amend, so as to take the case out of the rule, and it being indicative to the contrary according to the briefs on file, the sustaining of the general demurrer to plaintiff's complaint should therefore be affirmed.

³ Which action takes precedence on the court's calendar. Nor can a tenant who holds over after expiration of his term

deny his landlord's title without first surrendering the premises. *McKissick v. Ashby*, 98 Cal. 422, 33 P. 729.

65 Cal.App.2d 255

PEOPLE v. DAVIS,**Cr. 3798.**

District Court of Appeal, Second District,
Division 1, California.

July 26, 1944.

1. Gaming $\hookrightarrow$ 98(5)

Evidence that when arrested at card parlor defendant had in his possession a betting marker, which appeared to be in his handwriting, and a key to front door of premises sustained conviction for occupying building with paraphernalia for purpose of registering bets on horse races. Penal Code § 337a, subd. 2.

2. Criminal law $\hookrightarrow$ 491(1)

In determining whether betting marker found in defendant's possession was in defendant's handwriting, trial court, in absence of objection or denial by defendant, had right to determine author of writing by making a comparison. Code Civ.Proc. § 1944.

3. Gaming $\hookrightarrow$ 75(1)

It is not the actual making of bets, but occupancy of room with necessary equipment used for recording bets, which constitutes offense of occupying place with paraphernalia for recording bets on horse races. Penal Code, § 337a, subd. 2.

4. Gaming $\hookrightarrow$ 97(2)

In prosecution for occupying store building with paraphernalia for recording bets on horse races, copy of Daily Turf Reporter found on premises was admissible. Penal Code, § 337a, subd. 2.

5. Criminal law $\hookrightarrow$ 491(1)

In prosecution for occupying store building with paraphernalia for recording bets on horse races, there was no error in admission of application for a loan which was taken from defendant's wallet and which was used to compare writing thereon with that on betting marker found in defendant's possession in order to connect defendant with act of recording bets. Penal Code, § 337a, subd. 2.

Henry Davis was convicted of occupying a store building with paraphernalia for recording or registering bets on horse races, and he appeals from the judgment of conviction and also from an order denying his motion for a new trial.

Judgment and order affirmed.

Donald MacKay, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondents.

YORK, Presiding Justice.

Defendant was charged in an information filed by the district attorney of Los Angeles County with a violation of subdivision 2, section 337a of the Penal Code, in that on September 3, 1943, he did keep and occupy a store building at 3003 Central Avenue, Los Angeles, with books, papers, apparatus, device or paraphernalia for the purpose of recording or registering bets on horse races.

Defendant pleaded not guilty to the charge and waived a jury trial, it being stipulated that the prosecution's case might be submitted on the transcript of the preliminary examination and the exhibits there introduced.

This appeal is prosecuted from the judgment of conviction of the offense charged in the information, as well as from the order denying appellant's motion for a new trial.

The only evidence produced was the testimony of the arresting officer, James Fisk, attached to "Administrative Vice" division of the Los Angeles Police Department, whose qualifications as an expert in matters concerning bookmaking were stipulated to. His testimony was to the effect that he arrested appellant on September 3, 1943, at 11:40 o'clock in the morning at a card parlor situate at 3003 Central Avenue; that as he entered the establishment he saw appellant standing to the left of the entrance with "a piece of paper in his hand which he was attempting to place inside his belt above his right hip"; that the witness took the paper (People's Exhibit A) from appellant's hand; that this paper proved to be a betting marker; that said witness saw another man standing at the back of a cigar counter upon which rested a Daily Turf Reporter, which was identified as a scratch sheet and marked

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

People's Exhibit B. Said witness stated that the papers and paraphernalia commonly used by bookmakers included scratch sheets, betting markers, racing forms, telephones, etc.; that a betting marker is used to record a bet on a horse race, records the identity of the horse indicated by a number or a name, and the identity of the bettor by name, initials or number, as well as the amount of money bet, whether to win, place or show; that a scratch sheet records entries at various tracks throughout the United States using numbers to identify the race horses on the betting marker, as well as recording the names of the jockeys, the probable odds, track and weather conditions, and other racing information. With respect to the betting marker (Exhibit A), said witness examined same and explained in detail the meaning of the various symbols and numbers used thereon; and also examined the scratch sheet (Exhibit B) which disclosed names and numbers having a definite meaning which he also explained. By then comparing the two exhibits, this witness stated he found that all the numbers indicating race horses on Exhibit A were also entered on Exhibit B, and that these were race horses running at various tracks in the United States on the date in question.

An application for a loan, which had theretofore been removed by said officer Fisk from appellant's wallet when he was being booked at Central Jail, was introduced in evidence as People's Exhibit C, and a key found in the possession of appellant at the time of his arrest and which operated the lock of the front door of the establishment at 3003 Central Avenue was introduced in evidence as People's Exhibit D. Appellant made objection to the introduction of Exhibits B and C, on the ground that B was not connected with him in any way, and that C was hearsay, incompetent, irrelevant and immaterial.

It is here urged as grounds for a reversal of the judgment and the order denying motion for a new trial, that (1) the evidence is insufficient to support the judgment; (2) the court committed error in admitting Exhibits B and C in evidence; (3) the court misapprehended the degree of proof required upon a trial as distinguished from a preliminary hearing.

[1] In connection with his first point, appellant claims that the mere possession of the betting marker (Exhibit A) is not a violation of section 337a of the Penal

Code; that the fact that he had a key to the premises in his possession did not establish that he owned, operated or occupied the premises; and that his mere presence in the card room did not prove that he was using the room for any of the acts charged in the information.

While this might be true when each item is considered singly and unsupported by the several other facts and circumstances presented by the evidence herein, nevertheless, when considered together, they constitute sufficient basis for the judgment.

Although no formal proof was presented that either the betting marker (Exhibit A) or the application for the loan (Exhibit C) was in the handwriting of appellant, the trial court apparently was convinced that such was the case, because he made the following comment at the close of the trial: "Well, we have a betting marker in the defendant's own handwriting, at least it compares with the specimen of handwriting of the defendant, and a scratch sheet which anybody could have."

[2] The trial court had a right to determine the author of the writings (Exhibits A and C) by making a comparison (Sec. 1944, Code of Civil Procedure), in the absence of objection or denial by appellant.

[3] In *People v. Kabakoff*, 45 Cal.App. 2d 170, 173, 113 P.2d 760, 762, referring to *People v. Manning*, 37 Cal.App.2d 41, 98 P.2d 748, the court stated: "It was there declared that the offense was complete when it was shown that the accused occupied a room with papers and paraphernalia for the purpose of recording bets on horse races; that it is not the actual making of bets but the occupancy of such a room with the necessary equipment used for recording bets which constitutes the offense denounced by subdivision 2." It was further held (*People v. Kabakoff*, supra): "It is the law that when the corpus delicti of a crime has been established, in order to justify a conviction of the accused, it is necessary only to prove his participation in the crime. * * * It is not our duty to retry the case and to make inferences from the facts proved. That is the function of the trial court. The duty of the appellate court is to decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found to warrant the inference of guilt. *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778. To warrant a reversal of the judgment on

PEOPLE v. NUNN et al.
Cr. 3776.

District Court of Appeal, Second District,
Division 2, California.

July 12, 1944.

the ground of the insufficiency of the evidence, we must be convinced that upon no hypothesis is there sufficient substantial evidence to support the conclusion reached by the trial court. *Ibid.*"

With respect to appellant's possession of the key to the card parlor (Exhibit D), he urges that this "is as consistent with his being the janitor, as the operator or occupant."

[4] Considerable importance must be attached to the fact that the key found in appellant's possession was one which operated the lock and turned the bolt of the front door of the premises at 3003 Central Avenue, which appellant is charged with having kept or occupied. *People v. Roseberry*, 23 Cal.App.2d 13, 14, 71 P.2d 944, citing *People v. Parkinson*, 138 Cal. App. 599, 611, 33 P.2d 18. The key was a substantial link in the chain of established facts, from which the court was warranted in making an inference that appellant was guilty of the offense charged against him, i. e., keeping or occupying premises with papers and paraphernalia for the purpose of recording a bet. Although the *Daily Turf Reporter* (Exhibit B) was found on the counter in front of another man and not in the immediate possession of appellant, it must be conceded that it constituted an item of paraphernalia set up in the premises for the use of patrons, and therefore admissible in evidence as such.

[5] Exhibit C is appellant's application to the Bank of America for a loan and was used by the trial court to compare the writing thereon with that on the betting marker (Exhibit A) in order to connect appellant with the act of recording bets. This paper was taken from appellant's wallet while he was being booked at Central Jail, and as heretofore stated, he made no effort to deny that either the application for the loan or the betting marker was in his own handwriting, and made no attempt whatever to explain his presence on the premises at 3003 Central Avenue.

The record discloses sufficient substantial evidence to support the judgment of conviction and the trial court did not commit prejudicial error in admitting in evidence the documents complained of.

For the reasons stated the judgment and order are, and each of them is, affirmed.

DORAN and WHITE, JJ., concur.

1. Criminal law ⇨93

A conspiracy to hold out a chiropractor as a physician and surgeon was a felony under the Penal Code of which the Superior Court had jurisdiction, though the practice of medicine without a license is only a misdemeanor. Pen.Code, § 182; St.1937, pp. 1258, 1259, 1274, 1279, §§ 2137, 2138, 2141, 2378, 2426.

2. Criminal law ⇨814(17)

Where there was direct evidence of a conspiracy to hold out a chiropractor as a physician and surgeon as well as circumstantial evidence, refusal to instruct on doctrine of circumstantial evidence was not error. Pen.Code, § 1104.

3. Criminal law ⇨814(17)

Where prosecution relies for conviction upon direct evidence and circumstances are shown as corroboration an instruction on the law of circumstantial evidence need not be given.

4. Physicians and surgeons ⇨6(1)

Under the statute, a chiropractor is limited to the use of mechanical, hygienic measures incident to the care of the body which do not invade the field of medicine and surgery. St.1937, pp. 1258, 1259, 1274, 1279, §§ 2137, 2138, 2141, 2378, 2426.

5. Physicians and surgeons ⇨6(1)

The practice of medicine becomes unlawful when done or attempted by one not legally licensed. St.1937, pp. 1258, 1259, 1274, 1279, §§ 2137, 2138, 2141, 2378, 2426.

6. Criminal law ⇨784(4)

In prosecution for conspiracy to hold out a chiropractor as a physician and surgeon, instruction authorizing an acquittal if any facts or circumstances could by reasonable construction be explained consistently with innocence was properly refused. Pen.Code, § 1104.

7. Criminal law ⇨784(4)

In prosecution for a conspiracy to hold out a chiropractor as a physician and surgeon, an instruction directing an

acquittal in a case of circumstantial evidence where the incriminatory circumstances are either denied by the accused or were explained in such a way as to render his guilt doubtful was properly refused. Pen.Code, § 1104.

8. Criminal law ⇨552(1)

The guilt of a defendant may be shown by either direct proof or circumstantial evidence which excludes every hypothesis except that of guilt.

9. Criminal law ⇨552(3)

When reliance is based upon circumstantial evidence only, it is not essential that the inculpatory facts be absolutely incompatible with innocence in order to justify the inference of guilt, but it is sufficient if the jurors are convinced by evidence of guilt to a moral certainty and beyond a reasonable doubt.

10. Criminal law ⇨741(6)

A defendant may be so contradicted by circumstances alone as to render his testimony incredible and as between his denials and the circumstances in proof, it is for the jury to determine which is true. Pen.Code, §§ 1096, 1096a.

11. Criminal law ⇨784(5)

In a prosecution for a conspiracy, an instruction that each circumstance in a chain must be established to a moral certainty and beyond a reasonable doubt was properly refused. Pen.Code, §§ 1096, 1096a.

12. Criminal law ⇨561(1)

A reasonable doubt that would warrant an acquittal must arise from a consideration of all the evidence. Pen.Code, §§ 1096, 1096a.

13. Criminal law ⇨806(1), 807(1)

Repetitious and argumentative instructions were properly refused.

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Leslie Roberts Nunn and Harry Navarre were convicted of a conspiracy to violate the Business and Professions Code, and they appeal.

Affirmed.

Robert W. Kenny, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., and Fred N. Howser, Dist. Atty., and Jere J. Sullivan,

Deputy Dist. Atty., both of Los Angeles, for respondent.

Ward Sullivan, of Los Angeles, for appellant Leslie Robert Nunn.

W. O. Graf, of Los Angeles, for appellant Harry Navarre.

MOORE, Presiding Justice.

Defendants were accused by indictment of three felonies; to wit: by counts (1) and (2), manslaughter, by count (3), a criminal conspiracy to violate Division II, Chapter 5, Article 3 of the Business and Professions Code. A mistrial was declared as to the first two counts following the disagreement of jury. Defendants appeal from their conviction on the third. The grounds of appeal are (1) that the superior court lacked jurisdiction of the offense charged and (2) the refusal of certain proposed instructions constituted prejudicial error. The chapter involved is regulatory of the practice of medicine and its allied arts. The entire chapter comprises some 189 sections, the majority of which are wholly regulatory while others declare violations of the provisions of the chapter to be misdemeanors.

The offense charged is that on or about January 22, 1943, the defendants willfully conspired to cause the defendant Navarre who was a licensed chiropractor to advertise, practice and attempt to practice as a surgeon and to prescribe for diseases and physical conditions of divers and sundry persons and to administer various dangerous drugs specified in the indictment, during which time the said Navarre had no license for such practice. The overt acts alleged are that the two men entered into the conspiracy; that in pursuance thereof defendant Nunn, a licensed osteopathic physician, frequented, and remained during business hours in, the office of Navarre in the city of Los Angeles; that during the period from January 22 to April 9, 1943, together they administered drugs by means of hypodermic devices and performed surgical operations upon divers and sundry persons.

The facts established by the witnesses at the trial and by the statements of the defendants given before the grand jury are that several patients were treated in the office by Navarre in Nunn's presence. Navarre owned the entire office equipment, surgical instruments and a black bag containing drugs, narcotics, ethyl chloride,

labeline and other materia medica. With the knowledge and co-operation of Dr. Nunn, Navarre diagnosed and treated numerous patients who were ignorant of his being an unlicensed physician and surgeon. He introduced Nunn to many as his "assistant" or "my new associate." He made arrangements for a number of throat operations which he advised, administered thyroid treatments and throat medicines. He administered the anaesthetic to Nancy Kenny, Tommy Richmond and Johnny Booker as Nunn performed their tonsillectomies. In the course of the several operations Nancy's lower front teeth were knocked out and both Tommy and Johnny died. He took blood tests, lanced boils and used the hypodermic needle on many persons.

Dr. Nunn's testimony given before the grand jury proved his agreement to work for Navarre for \$75 a week and twenty five per cent of operation fees; that he knew Navarre was a chiropractor only; that he saw Navarre diagnose and treat the patients and make arrangement for their surgery. Nunn had nothing to do with them until the time for operations which were prescribed by Navarre. All diagnoses were Navarre's. Nunn witnessed Navarre's application of ethyl chloride; observed his injections of atropine preliminary to the operations, as in the cases of the Richmond and Booker children, and knew that Navarre had no license to administer the anaesthetic, apply the hypodermic needle or give any drug that comes within materia medica.

Navarre verified to the grand jury his contractual arrangements as stated by Nunn; stated that he continued to diagnose some of his patients after employing Dr. Nunn and that in some instances had recommended surgery; had given treatments of cold vaccines and whooping cough injections; had administered the anaesthetic for operations for which he fixed the price, made arrangements and took the sole responsibility. Dr. Nunn had nothing to do with the examinations, the diagnoses or the price in the cases of the two little boys who died under operation. Navarre administered injections of atropine in both cases.

The Superior Court Had Jurisdiction

The crime charged is that of a conspiracy to violate the provisions of Division II, Chapter 5, Article 3 of the Business and Professions Code. St.1937, p. 1258. The

conspiracy constituted an understanding or an arrangement whereby Navarre was to hold himself out and to practice as a physician and surgeon and to administer drugs. The contention of defendants is that the practice of medicine without a license is nothing more than a misdemeanor under the provisions of Article 3, Section 2141; that since section 2378 provides that a conspiracy to violate any provision of this Chapter constitutes unprofessional conduct and since section 2426 makes it a misdemeanor on the part of any one who violates the latter section, it must follow that there is no basis for accusing defendants of a felony based upon such conspiracy to violate the provisions of Chapter 5. It is also argued that Chapter 5 controls the general provisions of the Penal Code relating to conspiracies to violate the terms of Chapter 5.

[1] Such contentions are based upon a misconception of the breadth and scope of section 182 of the Penal Code. Sections 2137 and 2138, 2141 and 2426 of Chapter 5 all forbid the practice of surgery and medicine by one who is unlicensed by the state, with specific exceptions noted in 2138. While it is true that Chapter 5 does not by its terms make it a felony to enter into a conspiracy to violate any provision of that chapter, yet there is no language to be found there which may be reasonably construed as a repeal of the provisions of the general law on conspiracy. Section 182, Penal Code, declares that those persons who conspire:

"5. To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws.

"They are punishable as follows:

"* * * When they conspire to do any of the other acts described in this section they shall be punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both, and cases of such conspiracy may be prosecuted in the superior court of any county in which any overt act tending to effect such conspiracy shall be done."

The quoted language of section 182 specifically confers jurisdiction upon the superior court. This construction is supported by the case of *People v. Buchchiere*, 57 Cal.App.2d 153, 134 P.2d 505, and by the case of *People v. Vanderpool*, 20 Cal.2d 746, 128 P.2d 513. In the *Vander-*

pool case, 20 Cal.2d at page 748, 128 P.2d at page 514, it was pointed out that by virtue of the designation of the phrase "in this code" the first penal paragraph of section 182 of the Penal Code is referable to conspiracy to commit felonies and acts injurious to the public morals only when the punishment for the commission of such felony or acts is prescribed by some provision of the Penal Code. But under all other circumstances the second penal paragraph of 182 controls. It was reasoned, therefore, that since the lending of money at excessive rates without a license is made a misdemeanor by the Small Loan Act, Gen. Laws Supp.1939, art. 7700, and it is not made punishable by any provision of the Penal Code, then a conspiracy to commit it is punishable under the second penal paragraph of section 182 as either a felony or a misdemeanor and is one within the jurisdiction of the superior court. The conviction of Bucchierre was upheld upon the same reasoning and by the same authority after the defendant had been accused of a conspiracy to violate the Employment Agency Act, St.1937, p. 230 et seq., by operating an agency without procuring a license therefor. Conducting an employment agency without first procuring a license was declared to come within the provisions of section 182. The Vanderpool case was reversed because of the failure of the Small Loan Act to specify the punishment for a violation of its terms. However, in the Bucchierre case it was held that the Employment Agency Act specifically defines a violation of the substantive act to be a misdemeanor and prescribes the punishment (Labor Code, § 1648, St.1937, p. 240) without reference to any section of the Penal Code. The court there declared (57 Cal.App.2d at page 165, 134 P.2d at page 511) that the provision for punishment in the Employment Agency Act differentiates it from the Small Loan Act and the holding in the Vanderpool case and concluded that inasmuch as punishment for a conspiracy to violate the Employment Agency Act was within the second penal paragraph, Section 182, the superior court had jurisdiction of the offense alleged in the indictment. In his concurring opinion in the Bucchierre case Mr. Justice Peters emphasizes that the Vanderpool case holds that if the conspiracy is to commit misdemeanors injurious to public morals that are made punishable by statute other than those contained within the Penal Code, the conspiracy can constitute a felony.

No Error in Refusing the Instructions Proposed by Defendants.

Defendants contend that they were prejudiced by the court's refusal to read certain proposed instructions with reference to the doctrine of circumstantial evidence. They erroneously argue that the judgment was based upon circumstantial evidence. It may be conceded that if all the proof had been circumstantial, instructions embracing the doctrines included in the proposed instructions might without any impropriety have been given. But they are met at the threshold with the proposition that the evidence was not wholly circumstantial but on the contrary was largely direct, as already shown by our abridgement of the testimony.

[2,3] No conspiracy can be established unless some overt act thereof be expressly alleged and proved, although other overt acts not alleged may be given in evidence. Section 1104, Penal Code. The indictment in the instant case alleges three overt acts. Those alleged and many others were proved. The contention made by defendants is that there is no direct evidence to establish the crime charged. But the summary of the testimony shows that Nunn agreed to work for Navarre on a percentage basis knowing that Navarre had no license to practice surgery and medicine; that Nunn knew before he operated on the little boys that Navarre had administered atropine injections and that he had no license to do so or to use a hypodermic needle to administer drugs named in materia medica. Navarre admitted that while he had Nunn associated with him he gave cold vaccines, whooping cough and atropine injections and knew that he was not authorized to do these things as a chiropractor. The presence of the office with its surgical appliances, the black bag filled with medicines, narcotics, hypodermic needles and syringes and the stipulation that they all belonged to Navarre were direct and irrefutable proof. The testimony of Mesdames Richmond, Booker, Tieman, Griep, Blair and of the Longuevans is direct and positive proof that the defendants knowingly worked together in the practice of medicine, with Navarre taking the lead, making the diagnoses, perfecting the arrangements, charging the fees. The case is not one of circumstantial evidence only. The overt acts were established by direct proof. While a conspiracy may be proved by circumstances from which it may be fairly inferred that the parties tacitly came to a mutual understanding. *People v.*

Yeager, 194 Cal. 452, 484, 229 P. 40), yet if the prosecution relies for conviction upon direct evidence and circumstances are shown as corroboration, an instruction on the law of circumstantial evidence need not be given. In fact the jury should not be told that the cause of the people is one of circumstantial evidence. In such cases it would be most mischievous to intimate to the jury that the state relies for conviction upon circumstantial evidence. *People v. Lapara*, 181 Cal. 66, 70, 183 P. 545. If indeed there is direct evidence against one accused of a conspiracy the defendant has no right to demand an instruction on circumstantial evidence. *People v. Clark*, 145 Cal. 727, 728, 79 P. 434. The mere fact that there is some circumstantial evidence in the record in corroboration of the direct testimony renders unnecessary and improper the giving of an instruction on circumstantial evidence. *People v. Lonnen*, 139 Cal. 634, 73 P. 586. In the case of *People v. Williams*, 134 Cal.App. 232, 236, 25 P.2d 259, the court approved of the rejection of an instruction on circumstantial evidence such as proposed by these appellants because there was direct evidence showing that the defendant had committed the offense. From the foregoing authorities it is clear that the court below properly rejected the proposed instructions with reference to circumstantial evidence.

[4, 5] By Chapter 5, Division II of the Business and Professions Code, a chiropractor cannot legally practice surgery. His practice is limited to the arts taught in the school of the chiropractor. He may not invade the field of medicine or surgery or administer drugs or medicines included within *materia medica*. He is limited to the use of mechanical hygienic measures incident to the care of the body which do not invade the field of medicine and surgery. *People v. Fowler*, 32 Cal.App.2d Supp. 737, 84 P.2d 326. The practice of medicine becomes unlawful when done or attempted by one not legally licensed. *Pacific Employers Insurance Company v. Carpenter*, 10 Cal.App.2d 592, 52 P.2d 992; *Painless Parker v. Board of Dental Examiners*, 216 Cal. 285, 14 P.2d 67.

The Proposed Instructions Were Erroneous

[6-9] The first of the proposed instructions rejected by the court authorizes an

acquittal "if any facts or circumstances of this case can by any reasonable construction" be explained consistently with innocence. The second proposed instruction directs an acquittal in a case of circumstantial evidence where the incriminatory circumstances are either denied by the accused or were explained in such a way as to render his guilt doubtful. Neither of the two instructions stated the law. The guilt of a defendant may be shown by either direct proof or circumstantial evidence which excludes every hypothesis except that of guilt. When reliance is placed upon circumstantial evidence only it is not essential that the inculpatory facts be absolutely incompatible with innocence in order to justify the inference of guilt. It is sufficient if the jurors are convinced by the evidence of his guilt to a moral certainty and beyond a reasonable doubt. *People v. Borrego*, 211 Cal. 759, 764, 297 P. 17.

[10] As to the second proposed instruction, the defendant may be so contradicted by circumstances alone as to render his testimony incredible. As between his denials and the circumstances in proof it is for the jury to determine which is true. *People v. Kiser*, 24 Cal.App. 540, 141 P. 1078.

[11, 12] The third proposed instruction required that *each circumstance* in a chain must be established to a moral certainty and beyond a reasonable doubt. Such is not the law. A reasonable doubt that would warrant an acquittal must arise from a "consideration of all the evidence." Sections 1096, 1096a, Penal Code; *People v. Shimonaka*, 16 Cal.App. 117, 125, 116 P. 327; *People v. West*, 34 Cal.App.2d 55, 59, 93 P.2d 153.

[13] All of the other proposed instructions which are the bases of assignments of error are either repetitious or argumentative and were therefore properly rejected.

The purported appeal from the order denying the motion in arrest of judgment is dismissed.

The judgments of conviction of both defendants and the order denying the motion of defendant Nunn for a new trial are affirmed.

W. J. WOOD, and McCOMB, JJ., concur.

KEATING v. BASICH BROS. CONST. CO.*

Civ. 3362.

District Court of Appeal, Fourth District,
California.

Aug. 3, 1944.

Rehearing Granted Aug. 29, 1944.

Subsequent Opinion 151 P.2d 892.

1. Appeal and error ⇨562

Counsel desiring to have exhibits before reviewing court have duty of having exhibits transmitted to court. Rules on Appeal of the Court of Appeal, rule 10.

2. Trespass ⇨46(1)

In action for damages for unauthorized use of real property by defendant corporation while engaged in roadbuilding, testimony of defendant's counsel, who was also a director, that corporation on or about April 2, 1943, took over all the equipment of copartnership, sustained finding that equipment placed on property was in possession of corporation and not partnership between May 5 and September 5, 1943. Code Civ.Proc. § 2055.

3. Evidence ⇨543(3)

In action for damages for placing roadbuilding equipment on property without authority, testimony as to rental value of property by witness who testified that he had been engaged as a roadbuilder for several years, had rented property for plants and machinery in Southern California, and had gone across property in question and knew installations on it, was not inadmissible on ground that witness was incompetent because he had rented no property in that area, since objection went to weight of evidence rather than to admissibility.

4. Landlord and tenant ⇨133(3)

\$1,915 to lessee of half section of unimproved desert land for use thereof for roadbuilding equipment without authority for about four months was not excessive, although land was of little value and rented for \$50 per year.

5. Trespass ⇨45(1)

In action for damages for placing roadbuilding equipment on property without authority, testimony as to rentals subsequently obtained from another construction company was erroneously admitted.

150 P.2d—31

6. Evidence ⇨317(5)

In action for unauthorized use of property by corporation, testimony as to conversation with a watchman to establish that corporation and not a partnership was using the property was hearsay and inadmissible.

7. Appeal and error ⇨1170(7)

In action for placing roadbuilding equipment on property without authority, error in admitting testimony introduced to establish that defendant was using property was not prejudicial where that point was established by other evidence. Const. art. 6, § 4½.

8. Appeal and error ⇨1170(7)

In action for damages for unauthorized use of property, tried by court without a jury, error in admission of evidence as to rent subsequently obtained from another construction company was not prejudicial, where there was other evidence on question of rental value which supported judgment. Const. art. 6, § 4½.

9. Appeal and error ⇨1170(7)

Where there is competent independent evidence in record supporting judgment without recourse to testimony erroneously admitted, generally error is not prejudicial. Const. art. 6, § 4½.

10. Appeal and error ⇨931(5)

Where testimony is erroneously admitted in trial by court, but there is competent independent evidence supporting judgment, it will be presumed on appeal that trial judge relied upon competent evidence in making his findings and rendering judgment.

Appeal from Superior Court, Imperial County; Elmer W. Heald, Judge.

Action by Hugh L. Keating against the Basich Brothers Construction Company to recover damages for the unauthorized use of property which the plaintiff held under lease. From a judgment for the plaintiff, the defendant appeals.

Judgment affirmed.

Stephen Monteleone, of Los Angeles, for appellant.

Whitelaw & Whitelaw, of El Centro, for respondent.

* Subsequent opinion 151 P.2d 892.

MARKS, Justice.

This is an appeal from a judgment awarding plaintiff \$1915 for damages for the unauthorized use of property which plaintiff held under lease.

The property involved was something more than one-half of a section of unimproved desert land (except improvements placed thereon by Basich Brothers, defendant's predecessor) lying along the Mexican border. Plaintiff's lessor held the property under a desert location and had leased it to plaintiff for \$50 a year.

[1] The record is typewritten and contains references to various exhibits which are not included. Counsel have neglected to have any of the exhibits transmitted to this court as required by rule ten, Rules on Appeal. The duty of having exhibits, which counsel desire to have before the reviewing court, transmitted to that court is placed on them. In this case they have neglected to perform that duty so we will assume that they do not consider any of those exhibits necessary for the decision of the case and will rely on the very sketchy description of some of them contained in the briefs. Were this neglect to have the exhibits sent up confined to this case we would not mention it here, but lack of observance of the rule is very general among members of the bar, and has resulted in delays and loss of time in deciding numerous cases. The rule is honored more in its breach than in its observance. Counsel should familiarize themselves with that rule and follow it.

Basich Brothers Construction Company is a corporation organized under the laws of California and was engaged in the contracting business. In about 1932, due to differences among its stockholders, it ceased active business and became inactive. Its physical assets were taken over by Basich Brothers, a partnership, which continued its former operations and took over its physical assets. The corporation became active again early in 1943, and took over the physical assets of the partnership.

In 1942 the partnership entered into a contract for the construction of a Marine Corps base at El Centro, California. In performing this contract, which was completed early in 1943, it went into possession of and used the property involved here without the consent of plaintiff or his lessor.

After the completion of the Marine base the partnership entered into a contract with the Highway Department of the state to improve highways. The use of the land of which plaintiff was the lessee during the performance of this contract gives rise to this action. A road had been constructed across the property and two cement mixing plants, bunkers and bins, what is called in the record a "black top plant", other structures, and heavy road building machinery were on the property during the performance of this contract.

[2] Defendant first argues that there is no evidence that it, as a corporation, was in possession of the property instead of the partnership; that the finding that defendant was in possession of and used the property between May 5th and September 5th, 1943, is without evidentiary support, as is the finding that the reasonable rental value of the property was \$500 per month during that time.

Counsel for defendant was director as well as attorney for the corporation. He was called as a witness by plaintiff under section 2055 of the Code of Civil Procedure. He testified that he was familiar with the business affairs of the corporation. We quote the following from his testimony:

"Q. The corporation then took over all the business of the Basich Brothers, is that right? A. They later took over the business of Basich Brothers. They didn't take over the business, they made arrangements to buy the equipment and carry on the contracts. All contracts now are being performed by Basich Brothers Construction Company, a corporation.

"Q. When was it the corporation, what definite date,—if you have something there you can refer to,—what definite date was it the corporation took over the partnership business? A. It was about April 2nd, 1943. * * *

"Q. Did the corporation take over all the operating equipment of Basich Brothers, a copartnership, on or about, or subsequent to April 2, 1943? A. They agreed to take over the equipment.

"Q. They took it all over, did they? A. Yes, sir."

The foregoing is sufficient to support the finding that the corporation was in possession of and used the property during

the time in question. No contention is made that it had authority to occupy the property.

Defendant argues that there is no evidence in the record supporting the judgment of \$1915 and that a judgment for that amount is excessive. It points to evidence to the effect that plaintiff rented the property for \$50 per year and that it could not have been sold for more than five dollars an acre.

[3] Plaintiff called James A. Pascoe as his witness. For a number of years Pascoe had been engaged as a contractor or subcontractor building "highways, county roads, airport construction and anything else that comes with dirt moving"; that he had rented property as locations for his plants and machinery in various parts of Southern California and knew their rental value; that he had a job in Imperial Valley, went across the property in question every day for a time, and knew the installations on it; that its rental value was between five and six hundred dollars a month.

Defendant argues that as this witness had rented no property in Imperial Valley he was not competent to testify as to the rental value of the property in question here.

[4] This objection goes to the weight of the evidence rather than to its admissibility. While the judgment seems generous, it is supported by this evidence.

Defendant argues that prejudicial error was committed in overruling its objections to the admissibility of evidence and in denying its motions to strike out inadmissible evidence.

[5] Plaintiff was permitted to testify on direct examination, over objections, that after defendant had vacated the property, he leased it to the Macco Construction Company for \$500 a month, and received a conditional offer of the same rental from another prospective tenant.

The objections to this evidence should have been sustained as the price agreed upon between an owner and a stranger to the action does not tend to establish reasonable market value or reasonable rental value. *Ramish v. Kirschbraun & Sons*, 90 Cal. 581, 27 P. 433; *Estate of Ross*, 171 Cal. 64, 151 P. 1138; *Thompson v. Stoakes*, 46 Cal.App.2d 285, 115 P.2d 830. Also, parts of this evidence were hearsay.

[6] Plaintiff was permitted to testify, over objection, to a conversation between himself and a watchman who was on the property on Labor Day of 1943. The purpose of this evidence was to establish that defendant and not the partnership was in possession. There is nothing in the record to indicate that this watchman had any authority to speak for the corporation or to represent it. This evidence was hearsay and was inadmissible. *Ford v. Lou Kum Shu*, 26 Cal.App. 203, 146 P. 199.

There are other similar rulings complained of by defendant which need not be separately considered.

We must next consider the prejudicial effect of these rulings under the provisions of section 4½ of Article VI of the Constitution.

[7] The evidence of Mr. Monteleone, to which we have already referred, rather clearly established that the corporation and not the partnership was in possession of and using this property during the time in question here. The testimony of the caretaker would neither add to nor detract from this other evidence. Therefore, we do not regard its admission as prejudicial. The trial court was probably convinced, as we are after studying the record, that this corporation occupied the property.

[8] In considering the effect of the erroneously admitted evidence as to the rental of the property to the Macco Construction Company after the cause of action in the instant case arose and the conditional offer to rent it, we must bear in mind that the case was tried by the court without a jury and that there is competent evidence in the record on the question of the rental value which supports the findings and judgment.

[9, 10] The general rule prevailing in California on this subject is this: Where there is competent independent evidence in the record which supports the judgment without recourse to the testimony erroneously admitted, generally the error is not prejudicial as it will be presumed on appeal that the trial judge considered and relied upon the competent evidence in making his findings and rendering the judgment. *Evans v. Gibson*, 220 Cal. 476, 31 P.2d 389; *Roy v. Salisbury*, 21 Cal.2d 176, 130 P.2d 706; *Frazure v. Fitzpatrick*, 21 Cal.2d 851, 136 P.2d 566; *Ford v. Lou Kum Shu*, supra; *Watt v. Copeland*, 92 Cal.App.

161, 267 P. 928; *Cordi v. Garcia*, 56 Cal. App.2d 584, 132 P.2d 887.

As the judgment is supported by competent evidence we cannot regard the admission of incompetent evidence as sufficiently prejudicial to result in its reversal.

We have considered the other questions argued by defendant and do not consider them of sufficient importance to require detailed discussion as they are without merit.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



65 Cal.App.2d 213

**GLEED et al. v. LINCOLN NAT. LIFE
INS. CO.**

Civ. 12635.

District Court of Appeal, First District,
Division 2, California.

July 14, 1944.

Rehearing Denied Aug. 12, 1944.

Hearing Denied Sept. 11, 1944.

1. Insurance ☞668(15)

In action on life policy, where plaintiffs sought to establish a past course of conduct over six year period on part of defendant in accepting premiums after grace period, testimony of defendant's cashier, based upon his recollection as to whether remittances of premiums over the six year period all bore postmarks which were prior to expiration of grace period, was for jury. Code Civ.Proc. § 2055.

2. Insurance ☞388(4)

In absence of fraud, where insured makes timely effort to transmit life policy premiums, substantial objections should be required to defeat it as a payment when there are acts and conduct of insurer which would induce insured to omit to follow strict letter of policy.

3. Insurance ☞388(4)

A past course of conduct of acceptance by insurer of payment of premiums after grace period may establish a waiver by insurer of right to declare forfeiture for failure to pay premiums at stipulated time

or insurer may be estopped from asserting forfeiture where insured has been reasonably led to believe that payments made within a reasonable time after grace period will be acceptable.

4. Insurance ☞388(4)

Where for six years insured's assignee had paid premiums to soliciting agent without receiving receipt therefor signed by insurer's president or secretary as required by life policy and all such payments were made while insured was in default, and in only one instance had insurer demanded and received application for reinstatement, insurer was estopped from insisting upon a strict compliance with policy until it had given reasonable notice of its change in policy.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Bernice Taylor Gleed and another against the Lincoln National Life Insurance Company on a life policy. From a judgment for plaintiffs, the defendant appeals.

Affirmed.

Prior opinion, 149 P.2d 75.

Keesling & Keil, of San Francisco, for appellant.

Nathan G. Gray, of Berkeley, for respondents.

NOURSE, Presiding Justice.

In a trial by jury the plaintiffs had a verdict for the sum of \$3,000 based upon a policy of insurance on the life of F. C. Gleed, deceased. The plaintiff Gleed was the widow and the plaintiff Boggs was an assignee of deceased.

The appeal from the judgment is based upon the ground that the policy lapsed prior to the death of the insured because of nonpayment of the premium then due. The respondents defend the judgment on the ground that the time and manner of payment under the strict terms of the policy was waived, and that defendant is estopped from contesting the policy on that ground.

The contested policy was issued on May 12, 1936, through one Hansen, a duly authorized soliciting agent, and by him delivered to the insured. Thereafter, until the death of the insured, Mrs. Boggs paid all the premiums to Hansen—sometimes in cash and sometimes by her personal

check. For each payment Mrs. Boggs received a receipt signed "Edward F. Hansen, Agent" and containing the policy number and the amount received. On June 12, 1942, in accordance with her usual custom, Mrs. Boggs gave to Hansen her check drawn in his name to cover the premium due on May 12, 1942. Hansen deposited the check in his own bank and drew his check in favor of appellant which was deposited for collection by appellant and returned unpaid because of insufficient funds in the Hansen account. On June 18th the appellant notified Hansen that his check had been dishonored, and that the company would hold it until it received a new remittance. On the same day appellant mailed a letter to the insured advising him that the policy had lapsed and requesting an application for reinstatement. The insured died early the following morning and this letter was found unopened in his home.

Appellant now contends that Hansen was not its agent, but that he was acting in the capacity of broker only for Mrs. Boggs, that the express terms of the policy permitted payments of premiums to be made "to an authorized agent of the Company only in exchange for the Company's receipt therefor signed by the President or the Secretary," that the check of Hansen was received for collection only, and did not constitute a payment of the premium. In the opening brief the appellant states: "From the facts in the instant case it is clear that no payment was made to the insurance company by the insured or his assignee in the manner specifically set forth in the policy for the payment of premiums, and that in the absence of a specific waiver of this provision of the policy, the policy lapsed on May 12, 1942, for non-payment of premium." Respondents concede the statement as to the manner in which payments of premiums were made, but defend the judgment upon the ground that the appellant waived these terms of the policy and is estopped to deny that Hansen was its authorized agent to collect and receipt for the premiums as paid.

On the issue of waiver and estoppel the evidence is that for a period of six years all premiums had been paid by Mrs. Boggs to Hansen, either in cash or by her personal check, and that no one of these payments was exchanged for the company's receipt

signed by the president or secretary as required in the policy. It is also in evidence that each and all of these payments were made in this manner while the insured was in default, and in many cases after the period of grace had expired. During this period of six years eighteen separate premiums became due. Fourteen of these were accepted by appellant after the period of grace had expired. In only one instance—September, 1940—the appellant demanded and received an application for reinstatement.

[1] The appellant directs attention to the testimony of its cashier relative to the date of mailing of these remittances from Hansen. Called under section 2055 of the Code of Civil Procedure this witness testified from records of the office covering the dates when "premium was paid" or "premium was received" over the six year period. On cross-examination by the appellant this witness testified that he personally inspected each one of the envelopes containing these remittances and knew that they all bore postmarks which were prior to the expiration of the grace period. The jury was at liberty to accept or reject this testimony based upon the witness' recollection of events occurring during a period of six years. And it was at liberty to accept or reject the positive testimony of the same witness, based upon the books of the company, showing when "payment" was made. The appellant vigorously contends that, since it is the common practice of insurance companies generally to treat premiums which are placed in the mail "as being paid within the grace period" provided the envelope of enclosure is stamped within such period, we should hold as matter of law that no one of these payments was in default. But if such is the common practice the record here casts doubt as to whether it was followed in this instance. The appellant's books show that the premiums were "paid" after the expiration of the grace period. These books are the only documentary evidence showing the date of payment. The envelopes bearing the postmarks have all been destroyed. If the custom had been followed and "payment" was acknowledged as of the date of mailing, the inquiry rises why the insured was not credited as having "paid" the premiums within time rather than having been charged on the books as being in default. However, the conflict in the evidence is ap-

parent, and the jury's verdict cannot be disturbed on that ground.

Respondents also argue that the appellant is estopped to deny the authority of Hansen as its agent to accept payments of premiums within the grace period. At the special request of appellant, Hansen was licensed by the State Insurance Commissioner to "act as its agent", and for the full period he collected from the insured every premium that accrued. All these premiums were paid by Mrs. Boggs, as assignee of the insured. Some were paid in cash and some by check. All were made on the last day of grace, or the day before. In some instances Hansen mailed his check to appellant on the last day of grace. It was a fair inference for the jury to draw that during the entire period the appellant held out to the respondents that Hansen was its agent for all purposes and that payment of premium made to him within the grace period would be treated as payment within the terms of the policy.

[2] In *Huber v. New York Life Ins. Co.*, 18 Cal.App.2d 269, 274, 63 P.2d 318, 320, which is a case similar to this in many respects, the District Court of Appeal said: "In the absence of fraud, where a party makes an effort to transmit his premium in time, it seems to us that substantial objection should be required to defeat it as a payment when there are acts or conduct on the part of the Insurance Company which would induce the insured to omit to follow the strict letter of the policy * * *."

[3] In *Page v. Washington Mut. Life Ass'n*, 20 Cal.2d 234, 239, 125 P.2d 20, 23, the Supreme Court said: "It is clear that a past course of conduct of acceptance by the insurer of payments of premiums after the grace period may establish a waiver by the insurer of the right to declare a forfeiture for failure to pay premiums exactly at the stipulated time, or the insurer may be said to be estopped to assert the forfeiture where the insured may be said to have been reasonably led to believe that payments made within a reasonable time after the grace period would be acceptable. *Nelson v. National Guaranty Life Co.*, 131 Cal.App. 669, 21 P.2d 1022; *Vinther v. Sunset Mut. Life Ins. Co.*, 11 Cal.App.2d 118, 53 P.2d 182; *Turner v. Redwood Mutual Life Ass'n*, 13 Cal.App.2d 573, 57 P.2d 222." To the same effect is *Bryson v. National Travelers Cas. Co.*, 206 Cal. 475, 479, 274 P. 957.

[4] Upon these authorities we conclude that the course of conduct in relation to the payments of premiums running over a period of six years was such that the respondents were entitled to assume that the terms of the policy need not be adhered to strictly, and that the appellant was estopped from insisting upon a strict compliance with those terms until it had given the respondents reasonable notice of its change in policy.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concur.



65 Cal.App.2d 196

LIBERAL CATHOLIC CHURCH v.

ROGERS.

Civ. 14289.

District Court of Appeal, Second District,
Division 3, California.

July 12, 1944.

1. Venue ☞7, 21

A mandamus proceeding to compel former officer of nonprofit corporation to turn over property withheld by her from corporation was not based on any "obligation" or "contract" to be performed in county in which officer was appointed and in which duties of office had been performed, and hence officer was entitled to trial in county of her residence. Code Civ. Proc. §§ 395, 1085.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract" and "Obligation".

2. Venue ☞21

The fact that petition in mandamus proceeding seeking to compel return of property also sought damages for property which had lost its value while being withheld did not change nature of proceeding so as to deprive defendant of right to trial in county of her residence. Code Civ. Proc. §§ 395, 1085.

3. Venue ☞7

The reference to performance of obligation in codal provision that when a de-

fendant has contracted to perform an obligation in a particular county, trial may be had either in that county or county of his residence, is to contract obligations and not to duties imposed by law. Code Civ. Proc. § 395.

4. Venue 36

A mandamus proceeding was subject to same right to change of place of trial to county of defendant's residence, as would have been the case in any other civil action. Code Civ. Proc. § 395.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Mandamus proceeding by the Liberal Catholic Church against Sarah Peacock Rogers, to compel the defendant to return certain books, records, property and moneys of the petitioner. From an order granting the defendant's motion for change of venue, the plaintiff appeals.

Order affirmed.

Charles A. Thomasset, of Los Angeles, for appellant.

Henderson & Churchill, of Ventura, for respondent.

SHINN, Justice.

This proceeding in mandamus was instituted in Los Angeles County and, upon demand and motion of Sarah Peacock Rogers, defendant in said proceeding, was transferred to Ventura County as the county in which said defendant resided at the time the proceeding was instituted. Plaintiff, Liberal Catholic Church, appeals.

The plaintiff, a corporation, in its petition for a writ of mandamus alleged in substance as follows: that petitioner is a non-profit corporation with its principal place of business in the City of Los Angeles, County of Los Angeles, whose corporate powers have been exercised by its board of directors, denominated trustees in its articles of incorporation. Prior to November 29, 1941, respondent Sarah Peacock Rogers was elected by said trustees as secretary, treasurer, and registrar of petitioner, and manager of St. Alban Press, under which name petitioner publishes books, literature and disposes of and distributes the same, and that on approximately the 29th day of November, 1941, the said trustees dis-

charged said respondent from all of said offices, declared the same vacant, and elected others to said offices in her place, and respondent has had neither power nor authority to act as such since said date, and that respondent was again discharged from said office in the same manner on approximately June 1, 1943, and the same persons were re-elected thereto. That while holding said offices on or about the 29th day of November, 1941, respondent came into possession of certain books, records, property and monies of petitioner appertaining to the holding of said offices, and has withheld the same from petitioner's principal place of business since said date against the consent and without the wish of petitioner. Demand has been made by order of petitioner's board of trustees through its chairman for the return to said principal place of business of all of said personal property on November 29, 1941, and again on June 7, 1943; and on the 7th day of March, 1943, respondent was ordered to return the same by a special convocation of the petitioner. Respondent has at all times failed and refused to turn over said property to her successors in office, and she has no right, title or interest in and to the same. Among the books and papers so held by respondent were certain missals of the reasonable market value of \$2277, which while being so withheld by respondent lost their entire value by reason of being superseded by a later edition, to petitioner's damage in the sum of \$2277.

It was alleged that petitioner did not know and was unable to state the exact amount and nature of said property withheld by the respondent, although much of it was described in detail, and the petition prayed for judgment against respondent for the return of all of said property, for an accounting as to the same, and for the recovery of the sum of \$2277 with interest thereon from November 29, 1941, and for general relief.

Defendant's demand for change of place of trial was supported by her affidavit that she was a resident of the County of Ventura at the time of the institution of the action and her application was in due form. This showing as to her residence was not controverted. Plaintiff filed a counter affidavit of the president and chairman of the board of trustees of plaintiff, in which it was stated that defendant was appointed secretary, treasurer, and registrar of plaintiff and manager of St. Alban Press "in

the City of Los Angeles, County of Los Angeles, State of California, and accepted and took over said offices in the said city, county and state; that at the time of accepting and taking said offices of secretary, treasurer, registrar and manager of St. Alban Press respondent agreed and promised to abide by the orders and directions of the said board of trustees of petitioner and the members thereof gathered in provincial convocation; that said agreement was made and entered into by respondent in the said City of Los Angeles, County of Los Angeles, State of California," and the affidavit repeated allegations of the petition with reference to demands made upon defendant to return all of the property of plaintiff to it at its headquarters and principal office for the transaction of business in the City of Los Angeles.

[1-4] Under section 395 of the Code of Civil Procedure defendant was entitled to a transfer of the action to the county of her residence unless the instant proceeding was founded on an obligation which she contracted to perform in Los Angeles County, or upon a contract entered into in Los Angeles County. It is the contention of plaintiff that the counter affidavit of its president proved that defendant entered into a contract to abide by orders duly made and given to her by plaintiff's governing board and officers and that she thereby incurred an obligation to return the property to plaintiff at its office in Los Angeles County. Defendant's answer to this contention is that the proceeding is not founded upon a contract or an obligation arising out of contract but that it is to compel the performance of a duty enjoined by law. We think the trial court did not err in making the order of transfer. It is provided by section 1085 of the Code of Civil Procedure that a writ of mandate may be issued "* * * to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station * * *." The action is founded upon defendant's legal duty as a former officer of plaintiff corporation. The claim for damages alleged to have been sustained by reason of defendant's retention of the missals until they had been rendered valueless was purely incidental to the principal remedy sought through the extraordinary writ of mandate. The incorporation of this demand could not change the essential nature of the proceeding. Neither could it be changed by

the averments of the counter affidavit by which it was attempted to substitute as the foundation of plaintiff's cause of action a contract which was in effect no more than a voluntary recognition and affirmance of defendant's legal duties as a former officer of plaintiff. If it should be granted that in some circumstances proof made by affidavit might be controlling in determining the nature of the foundation of the action, where it was not definitely established by the complaint, this could not be true in the instant case where plaintiff has invoked the remedy of mandamus in preference to an action based on the alleged contract. When section 395 of the Code of Civil Procedure speaks of the performance of obligations, it has reference to contract obligations and not to duties imposed by law. This apparently was conceded by plaintiff when it filed the counter affidavit setting up the contract. And it is not contended here that the proceeding was improperly transferred to Ventura County if it is founded upon a duty imposed by law and not upon an obligation arising out of contract. It was said in *Work v. Associated Almond Growers*, 1926, 76 Cal. App. 708, 710, 245 P. 790, 791: "In determining the nature of an action, resort must be had to the averments of the complaint, and the character of the judgment which might be rendered upon a default. *McFarland v. Martin*, 144 Cal. 771, 78 P. 239." It cannot be questioned that if the proceeding had not been defended and the facts alleged had been proved, a peremptory writ of mandate would have issued commanding defendant to restore to plaintiff the corporate books and records and other property with which she had been entrusted as the secretary and treasurer of plaintiff. This would have compelled the performance of a legal duty, and the question of contract would not have entered into the case as the basis of the recovery or as an element of the proof. The court therefore properly construed the petition as the statement of a cause of action founded upon a legal duty and not upon a contract obligation. The proceeding in mandamus was subject to the same right to a change of place of trial as any other civil action. *Bloom v. Oroville-Wyandotte Irr. Dist.*, 1939, 34 Cal.App.2d 102, 93 P.2d 164.

The order is affirmed.

DESMOND, P. J., and PARKER
WOOD, J., concur.

65 Cal.App.2d 170

MURDOCK v. GERTH.
Civ. 14336.

District Court of Appeal, Second District,
Division 1, California.

July 12, 1944.

Hearing Denied Aug. 30, 1944.

1. Malicious prosecution ⇨34

Before action for malicious prosecution can be maintained proceeding complained of must have been finally terminated in favor of plaintiff.

2. Malicious prosecution ⇨35(1)

In determining whether a proceeding allegedly maliciously prosecuted has been terminated in favor of the party injured thereby, the judgment should be considered as a whole.

3. Malicious prosecution ⇨35(1)

An action for malicious prosecution could not be maintained where defendant had obtained a judgment for \$200 against plaintiff in the proceeding complained of, though such sum was only a small part of the amount sued for.

4. Malicious prosecution ⇨25(1)

"Probable cause" for institution of action does not mean legal cause, but is reasonable cause; an honest suspicion or belief, founded upon facts sufficiently strong to warrant the average person in believing the charge to be true.

See Words and Phrases, Permanent Edition, for all other definitions of "Probable Cause".

5. Malicious prosecution ⇨71(2)

The existence of probable cause is a question of law.

6. Malicious prosecution ⇨64(2)

Evidence did not support inference of lack of probable cause for instituting civil proceeding, as basis for malicious prosecution action.

7. Malicious prosecution ⇨30

The motives for instituting prior action become unimportant as regards liability for malicious prosecution, if probable cause existed for commencement thereof.

8. Malicious prosecution ⇨25(1)

An attorney who, after honest, industrious search of authorities, upon facts stated to him by client, advises client that

he has a good cause of action, is not liable for malicious prosecution although courts upon trial of such action decide that attorney's judgment was erroneous.

9. Malicious prosecution ⇨25(1)

Where court held attorney's theory of law erroneous, but client obtained judgment upon another theory framed by the pleadings and sustained by evidence, the attorney would not be liable to adversary for malicious prosecution.

Appeal from Superior Court, Los Angeles County; Raymond McIntosh, Judge.

Action by Dr. D. S. Murdock against Otto A. Gerth for malicious prosecution. From a judgment for plaintiff, defendant appeals.

Reversed.

Otto A. Gerth and Stephen Monteleone, both of Los Angeles, for appellant.

Moidel, Moidel, Moidel & Goldsmith, by Isadore Moidel, all of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal by defendant from an adverse judgment rendered in an action for malicious prosecution. The case was tried before the court without a jury, resulting in a judgment for plaintiff in the sum of \$100 general damages and for the further amount of \$775 special damages. The special damages were awarded for "required legal services caused by the action * * * of the defendant herein, Otto A. Gerth."

Defendant Gerth has practiced law since 1912, and since 1922 has been and now is an active member of the State Bar of California. Since the last named date he has been engaged in the practice of his profession in the City of Los Angeles.

In connection with the factual background which gave rise to this litigation, the record discloses that for some time prior to 1937 plaintiff herein and one Dr. H. H. Wolf, both veterinarians, were associated in the maintenance and operation of a dog and cat hospital in the city of Los Angeles, upon premises for the occupancy of which Dr. Wolf had a lease. The business was apparently a profitable one, for the record discloses that the net pro-

ceeds therefrom, after paying operating and other expenses, totaled \$16,000 per year and that Drs. Wolf and Murdock each received in profits approximately \$8,000 per annum.

On June 14, 1937, plaintiff herein, Dr. Murdock, commenced an action in the Superior Court of Los Angeles County against Dr. Wolf for dissolution of partnership and to quiet title. Attorney Gerth, defendant in the instant action, was attorney of record for Dr. Wolf in that proceeding. However, on June 21, Drs. Wolf and Murdock apparently got together themselves and without the aid of counsel prepared and executed the following agreement:

"June 21, 1937

"This agreement entered into between Dr. H. H. Wolf, party of the first part, and Dr. D. S. Murdock, party of the second part, wherein Dr. Murdock agrees to pay Dr. Wolf \$7250 for his interest in the dog and cat hospital located at 1713 W. Slauson Avenue, at the rate of \$200.00 per month for the first year, beginning June 17, 1937, and \$175.00 per month for the second year, and \$100.00 per month thereafter until the \$7250.00 has been paid. This is to be a definite bona fide sale of Dr. H. H. Wolf's interests without any provisos whatsoever.

"Signed

"Dr. D. S. Murdock

"Dr. H. H. Wolf

"Witness John M. Smith"

We think from a reading of the record that it is a fair statement to say that upon execution of the foregoing agreement Dr. Wolf turned over to Dr. Murdock the aforesaid dog and cat hospital business. On June 22, 1937, attorney Gerth, the defendant herein, at the suggestion of his client and apparently with the consent of Dr. Murdock, prepared another agreement which was in the nature of a conditional sales contract. By the terms of this agreement Dr. Wolf agreed to sell and Dr. Murdock agreed to buy the aforesaid business for the sum of \$7,250, payable in monthly instalments, and Dr. Murdock was to take over and have possession of the business from and after said date of June 22, 1937. Both Drs. Wolf and Murdock signed this contract and there was appended thereto an agreement wherein, by his signature, the owner of the leased premises approved the aforesaid agreement and consented to the transfer of responsibility un-

der the lease from Dr. Wolf to Dr. Murdock as lessee.

On the morning of June 23, 1937, Dr. Wolf again consulted his attorney, defendant herein, informed the latter that Dr. Murdock, plaintiff herein, was dissatisfied with the agreement of June 22nd. Thereupon, Dr. Wolf wrote a letter to Dr. Murdock advising that, the latter having stated to Dr. Wolf that he was "on the advise of your attorney, rescinding the agreement" of June 22, that "we will consider the contract mutually cancelled and terminated".

Following negotiations and correspondence between defendant herein, as counsel for Dr. Wolf, and the attorney representing Dr. Murdock, a final agreement was entered into under date of July 6, 1937, duly executed by Drs. Wolf and Murdock, under the terms of which it was agreed between them that the former sold to the latter all right, title and interest in and to the dog and cat hospital hereinbefore referred to. The agreed purchase price was \$7,000, payable at the rate of \$200 per month for the first year; \$175 per month for the second year; and \$100 per month for the third and final year. The purchaser was to take over immediate control and operation of the business. By its further terms, the agreement provided that, at the expiration of one year, this last mentioned agreement might be "terminated and abrogated should the party of the second part (Dr. Murdock) so elect." Such termination could be effected by Dr. Murdock giving notice in writing to Dr. Wolf 60 days prior to the expiration of one year from the date of execution, of his "desires that this agreement be terminated." In the event Dr. Murdock exercised his option to terminate the contract, it was provided that all future payments thereunder should cease and the business be returned to Dr. Wolf; that "as of such date (date of termination on election) each of the parties will be restored to their respective rights in and to the subject matter of the sale herein that each has on the date hereof."

On May 5, 1938, after the lapse of 10 months from the date of execution of the last named agreement, Dr. Murdock elected to and did by due notice to Dr. Wolf rescind and terminate the sales contract of July 6, 1937. After receipt of such notice of termination and rescission, the defendant in the instant action, as attorney for

Dr. Wolf, on May 31, 1938, directed a letter to Dr. Murdock which, after acknowledging receipt of such notice, reads in part as follows:

"Your notice confirms information which was recently given us that you had no intention of fulfilling the agreement of July 6, 1937, when you entered into it and that you did so simply for the purpose of relieving yourself from a purchase which you made from Dr. Wolf and from a sale which Dr. Wolf made to you on June 21, 1937. No doubt you and your advisers felt you were clever in resorting to this ruse, yet you have not accomplished any such result.

"In the first place, your action in connection with the contract of July 6, 1937, is fraudulent and you induced Dr. Wolf to enter into that agreement through fraud and that agreement is hereby rescinded on the ground that it was a fraudulent transaction practiced by you upon Dr. Wolf.

"Even though the agreement of July 6, 1937, should be held to be a valid one, your termination of that agreement simply places both you and Dr. Wolf back in the position which you occupied prior to July 6, 1937, and reinstates your then status and such rights as each of you have * * *.

"The contract of July 6, 1937, was and is conditional, giving you the right to terminate it, but not in any way affecting any other agreement entered into between you and Dr. Wolf or changing any status which either one of you had prior to July 6, 1937. * * * I am now definitely informing you that Dr. Wolf stands upon his agreement with you under date of June 21, 1937, whereby he sold you his place of business, lease, equipment and good will for the sum of \$7,250.00 payable according to its terms and he hereby demands fulfillment of that agreement."

The letter also informed Dr. Murdock that the payments made by him under the terminated agreement of July 6, 1937, amounting to \$2200, would be credited on the original agreement of June 21, 1937.

On July 6, 1939, defendant herein, as attorney for Dr. H. H. Wolf, caused to be filed in the Superior Court of Los Angeles County a civil action against plaintiff in the instant action, Dr. D. S. Murdock, predicated upon the original agreement of June 21, 1937, by which action it was sought to enforce the terms and conditions of the last mentioned contract.

By his answer in the action just referred to, Dr. Murdock admitted execution of the contract of June 21, 1937, but denied any liability thereunder for the reason "that said document was never acted upon by the parties herein and was mutually cancelled by them within 24 hours of its execution." As affirmative defenses in the same action, the defendant therein, Dr. Murdock, alleged cancellation of the contract of June 21, 1937, by and through the hereinbefore mentioned agreement of June 22, 1937, known as the "conditional sales agreement"; that on June 23, 1937, "the plaintiff and defendant did mutually cancel and terminate and end any and all obligations arising out of the written agreement and documents dated June 21, 1937 * * * and June 22, 1937." Defendant Dr. Murdock in said action also filed a cross-complaint for declaratory relief.

Following trial of the action instituted by Dr. Wolf through defendant herein, attorney Gerth, against Dr. Murdock, the court filed the following conclusions of law:

"I. That the plaintiff, H. H. Wolf, is entitled to judgment against the defendant, D. S. Murdock, in the sum of Two Hundred (\$200.00) Dollars, together with interest at the rate of 7% per annum from June 17, 1938.

"II. That the plaintiff, H. H. Wolf, is not entitled to judgment against the defendant, D. S. Murdock, for costs.

"Let judgment be entered accordingly."

Based thereon judgment was rendered as follows:

"It is ordered, adjudged and decreed that the contract of June 21, 1937, between the parties hereto and set out in plaintiff's complaint was cancelled and rescinded by said parties on or about June 23, 1937; that no obligation or liability ever accrued under said contract from the defendant to the plaintiff, or otherwise, and that the plaintiff herein, H. H. Wolf, take nothing by his complaint against the defendant, D. S. Murdock, upon that certain agreement dated June 21, 1937, and set forth in plaintiff's complaint herein;

"It is further ordered, adjudged and decreed that the plaintiff, H. H. Wolf, do have and recover against the defendant, D. S. Murdock, the sum of \$200.00, together with interest thereon at the rate of 7% per annum from June 17, 1938, on that certain agreement set forth in the amendments to the answer of D. S. Murdock and dated

July 6, 1937, but without costs." (Emphasis added.)

On December 20, 1940, Dr. Murdock as plaintiff commenced the action with which we are here concerned in the Superior Court of Los Angeles County against defendant Otto A. Gerth, who acted as counsel for plaintiff Dr. Wolf in the last above mentioned action. The instant proceeding was for malicious prosecution of the above named action by which it was sought to enforce the provisions and terms of the agreement of June 21, 1937. By his complaint in the case at bar plaintiff alleged that the defendant, Otto A. Gerth, acting as attorney for Dr. Wolf, prepared and caused the above mentioned action to be filed in the Superior Court and alleged in the complaint therein that Dr. Murdock was indebted to Dr. Wolf in the sum of \$5,050 pursuant to the terms and conditions of the contract of June 21, 1937; that in preparing, filing and prosecuting said action against Dr. Murdock defendant herein, as attorney for Dr. Wolf, "acted maliciously and without probable cause * * * and the plaintiff is informed and believes and upon such information and belief alleges that the defendant herein Otto A. Gerth knew that the allegations in the complaint were false"; and further that defendant attorney was aware of the fact that his client who verified said complaint knew that the allegations thereof were false; that in preparing, filing and prosecuting said action defendant attorney Gerth "intended to harm, harass, vex, annoy and injure plaintiff herein"; that said complaint was prepared, filed and prosecuted by defendant attorney "with malice, and premeditation, and without any cause whatsoever, against the plaintiff herein, Dr. D. S. Murdock".

Following trial of the malicious prosecution action, the court rendered judgment as aforesaid in favor of plaintiff and against defendant attorney. From such judgment the latter prosecutes this appeal.

[1-3] Before an action for malicious prosecution can be maintained, it is essential that the proceeding complained of should have been finally terminated, and terminated in favor of the plaintiff. Respondent urges that the judgment in favor of appellant was not predicated upon the contract of June 21, 1937, upon which appellant relied but was based upon another agreement set forth in amendments to the

answer filed by plaintiff in the instant action, viz., the agreement of July 6, 1937. While it is true that the judgment was not based upon the allegations of the complaint prepared by appellant, nevertheless, we are persuaded that, in determining whether a proceeding alleged to have been maliciously prosecuted has been terminated in favor of the party injured by such proceeding, consideration should be given to the judgment as a whole. To hold otherwise would defeat the purpose of the rule which seeks to prevent collateral attack upon judgments of duly constituted courts. Hence, the decree or judgment itself in the former action is the criterion by which to determine who was the successful party in such proceeding. In the instant case, it is at once apparent that the plaintiff in the action complained of actually obtained a judgment against Dr. Murdock, plaintiff in the instant malicious prosecution case for \$200. True, such sum was only a small part of the amount sued for. Nevertheless, it is conclusive proof that there was an obligation on the part of Dr. Murdock to Dr. Wolf that was due and unpaid. The situation is not altered by the fact that the theory of plaintiff in the prior action was not adopted by the trial court. The fact remains that the judgment, framed upon the pleadings filed and the issues raised thereby, was not in favor of the defendant therein. By said judgment the defendant was required to pay plaintiff the sum of \$200, and such judgment in favor of plaintiff was satisfied of record. Plaintiff in the prior action having obtained a judgment therein against the defendant, it must be held that there was probable cause for instituting the action. Therefore the plaintiff in the instant action has not sustained the indispensable burden cast upon him in a malicious prosecution action to prove that defendant herein when he prepared and filed the prior suit acted without probable cause.

Furthermore, on the issue of probable cause, the record herein reveals that defendant Gerth, as attorney for Dr. Wolf in the prior action, took the position that in none of the subsequent agreements was there any declaration that such agreements were made with the intent to extinguish the contract of June 21, 1937, upon which the law suit was based. In that connection it is noteworthy that in the agreement of June 23rd it is expressly provided that said agreement would cancel the contract of

the preceding day, while the agreement of July 6, 1937, was specifically rescinded by Dr. Murdock.

Prior to filing the action complained of, appellant herein prepared a lengthy brief in which he reviewed the legal aspects of the contemplated action based upon the validity of the original contract of June 21, 1937. This brief was introduced into evidence at the trial of the malicious prosecution action with which we are here concerned. The authorities therein contained lend strength to appellant's claim that he honestly believed that the validity of the agreement of June 21, 1937, presented at least a debatable legal question in view of the contents thereof and of the disposition that was made of subsequent agreements. Defendant attorney in the instant action also contended that the contract of July 6, 1937, abridged the provisions of sections 1709 and 1710 of the Civil Code, in that Dr. Murdock negotiated and entered into said contract without any intention of complying with the terms and conditions thereof.

[4-7] "Probable cause" for the institution of an action does not mean "legal cause" therefor, because, if it did, every plaintiff who failed to recover in his law suit would be liable to an action for malicious prosecution. "Probable cause" has sometimes been defined as "reasonable cause"; and in the case of both civil and criminal prosecutions has been further defined to be an honest suspicion or belief on the part of the instigator thereof, founded upon facts sufficiently strong to warrant the average person in believing the charge to be true. The existence of probable cause is a question of law for the court, and in the case at bar, aside from the fact that plaintiff therein did not, as we have held, obtain a judgment in the original action, which fact is of itself conclusive evidence of probable cause for instituting the action, we are not impressed that there was otherwise, sufficient evidence to support an inference of lack of probable cause. The motives for instituting the prior action become unimportant if probable cause existed for the commencement of the suit in question.

[8] It would be inimical to the administration of justice if an attorney were to be held liable to a malicious prosecution action where, after an honest, industrious search of the authorities, upon facts stated

to him by his client, he advises the latter that he has a good cause of action, although the courts upon a trial of such action decide that the attorney's judgment was erroneous. If the issue which the attorney is called upon to decide is fairly debatable, then under his oath of office, he is not only authorized but obligated to present and urge his client's claim upon the court. And if it subsequently is determined that the position honestly taken by the attorney was erroneous he should be relieved from responsibility.

[9] In the instant case we find no substantial evidence that the defendant attorney did more than in good faith urge upon the court the claims of his client, and the view of the law favorable to the interests of his client. Indeed, at the trial of the malicious prosecution action, the plaintiff therein did not take the witness stand and the only oral evidence with reference to motive and intent was given by the defendant attorney himself. Because, by the decision of the court, defendant attorney's theory of the law was held to be erroneous, but his client obtained a judgment upon another theory framed by the pleadings and sustained by the evidence the attorney may not be held answerable for malicious prosecution of the action in question. It is undoubtedly for this reason that, in determining whether the plaintiff or prosecutor in a given action acted with requisite belief, knowledge and prudence in the institution thereof so as to absolve him from the charge of want of probable cause, the law prescribes as one of two main facts, the existence of either of which, if proven, is held to be sufficient to establish probable cause, the following: That such plaintiff acted in the institution of the complained of action upon the opinion and advice of counsel to the effect that he had a good cause of action after laying all of the facts of the case, in good faith, before said counsel. If a plaintiff acting upon such advice commences his action, it has been held that probable cause therefor is established. *Johnson v. Southern Pac. Co.*, 157 Cal. 333, 107 P. 611. However erroneous, from a legal standpoint, such advice might subsequently prove to be, its solicitation, based upon an honest statement of the facts, would be a complete defense for the attorney's client in a malicious prosecution action. When the advice to the client is honestly, though mistakenly given by an at-

torney, the same immunity from liability for malicious prosecution should attach to him.

For the foregoing reasons the judgment is reversed.

YORK, P. J., and DORAN, J., concur.



65 Cal.App.2d 272

ROLAND et al. v. SOUTHERN TITLE & TRUST CO.
Civ. 3346.

District Court of Appeal, Fourth District,
California.

July 27, 1944.

Hearing Denied Sept. 21, 1944.

1. Municipal corporations ⚭405

The word "assessment" usually refers to a charge levied on property to pay for a local improvement.

See Words and Phrases, Permanent Edition, for all other definitions of "Assessment".

2. Taxation ⚭658(3)

Omission of the word "assessment" from notice of sale of property for nonpayment of taxes was not material in absence of proof that there were delinquent assessments that were a lien on property at time of sale. Pol.Code § 3764(1, 2).

3. Taxation ⚭658(3)

Notice of sale of land for delinquent taxes containing a statement that the real estate upon which such taxes were a lien would be sold was in sufficient compliance with statute requiring that notice of sale contain a statement that the property would be sold for the nonpayment of "taxes, assessments, penalties and costs due and which are a lien thereon." Pol.Code § 3764(1).

4. Taxation ⚭658(3)

Notice of sale for delinquent taxes was not defective because in the delinquent list, instead of segregating items of taxes, penalties and costs, a total of the three was given. Pol.Code § 3764(1, 2).

5. Statutes ⚭231

Various code sections relating to sale of property for delinquent taxes must be construed together and harmonized if possible. Pol.Code §§ 3764, 3817a.

6. Taxation ⚭658(3)

Notice of sale for delinquent taxes containing an addenda to delinquent tax list including property delinquent for prior years, made necessary because of moratorium law making it impossible because of postponements therein for tax collector to state in a single notice a single year in which various parcels had been sold to state for taxes was a substantial compliance with law requiring that notice should contain provision that property would be sold upon which five years have elapsed from date of sale of property to state. Pol.Code, §§ 3764, 3817a.

7. Taxation ⚭762

Deed from state conveying tax title was not void because it set forth the property was sold for \$250 when \$258.29 was the actual price paid for property.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action to quiet title by Graham Roland and another against the Southern Title & Trust Company, formerly Southern Title Guaranty Company. Judgment for plaintiffs and defendant appeals.

Affirmed.

Solon S. Kipp, W. E. Starke, and C. C. Pease, of San Diego, for appellant.

Dwight E. Stanford, of San Diego, for respondent.

MARKS, Justice.

This is an appeal from a judgment quieting plaintiffs' title to a lot in Cuyamaca Resort Unit No. 2 in San Diego County. Plaintiffs' title depends on the validity of a tax title under a deed to the State dated September 1, 1933, and another from the State to them dated August 12, 1941. Plaintiffs argue the question of the insufficiency of the answer to raise certain necessary issues but owing to the conclusion we have reached on the merits it will be unnecessary to decide this question. We will assume that the answer put all necessary questions in issue.

Defendant urges that the notice of sale for delinquent taxes for the fiscal year 1926-1927 is defective in form and affords no legal basis for the deed to the State. Subdivision 1 of section 3764 of the Political Code in effect when the sale to the State was made (Stats.1921, p. 107) provided that the notice of sale contain the statement that the property would be sold for the nonpayment of "taxes, assessments, penalties, and costs due, and which are a lien thereon." (Emphasis ours.) The published notice omitted the word "assessments" and the phrase "and which are a lien thereon", but did contain the statement that the "real estate upon which said taxes are a lien * * * will be sold." It is argued that this departure from the language of the code section is fatal to the proceedings and rendered the resulting sale void.

[1,2] There is nothing in the record indicating there were any "assessments" on the property. The word "assessments" has a well-defined meaning in the law of this State and usually refers to a charge levied on property to pay for a local improvement. If there were no delinquent assessments, no good purpose could be served by requiring that word to be included in the published notice. If used under such circumstances it would imply a mistake of fact and would only serve to confuse the taxpayer. In the absence of proof that there were delinquent assessments that were a lien on the property we cannot regard the omission of the word "assessments" from the notice as material here.

[3] We regard the words "and which are a lien thereon" as a direction to the tax collector to correctly compute and state the amount of the delinquencies and not as a requirement that those words be made a part of the notice which did contain the statement that the property upon which the taxes were a lien would be sold which we believe should be held to be a sufficient compliance with the statute as there is no claim that the amount of the taxes, penalties and costs was not correctly given in the notice.

Further, the quoted words appearing in subdivision 1 of the section do not appear in the form of the notice set forth in subdivision 2.

[4] If we understand them correctly, counsel for defendant argue that the

notice is defective because, in the delinquent list, instead of segregating the items of taxes, penalties and costs, the total of the three was given in the notice. He relies on the case of *Gottstein v. Kelly*, 206 Cal. 742, 276 P. 347, and other cases of similar import as supporting this argument.

In 1929 the legislature amended sections of the Political Code which were construed as follows in *Clayton v. Schultz*, 4 Cal.2d 425, 50 P.2d 446, 448:

"There is no merit in respondents' claim that the notice of sale was fatally defective in failing to separately state the items of 'taxes, penalties and costs,' as required prior to 1929—this on the theory that the applicable law is the law as it stood in 1926 which controls the period of redemption. *Risso v. Crooks*, 217 Cal. 219, 220, 17 P.2d 1001; *Teralta Land, etc., Co. v. Shaffer*, 116 Cal. 518, 48 P. 613, 58 Am.St.Rep. 194. It is true that prior to 1929, following decision in the case of *Gottstein v. Kelly*, 206 Cal. 742, 276 P. 347, the possible construction to be placed upon the provisions of sections 3747 and 3764 of the Political Code was that taxes, penalties, and costs should be separately shown on the publication of delinquent lists and notices of sale under sections 3771 and 3771a. In that year, however, the Legislature amended these provisions by requiring that the delinquent list show only 'an amount equal to the total amount of all taxes, assessments, penalties, and costs due' (section 3764), and in passing the amendatory act (St.1929, p. 742), specifically declared that the amendments were 'not a change in, but a statement and declaratory of the law as the legislature intended it to be by the terms of those sections prior to' the amendment (section 4). Section 4 further provided: 'All publications of delinquent lists or notices of sale under sections 3771 and 3771a of the Political Code failing to enter taxes, penalties and costs as separate entries but entering the foregoing amounts in one total sum and all sales * * * tax deeds * * * based upon such entries * * * are hereby confirmed, validated and legalized.' * * *

"Respondents contend that so much of the 1929 amendment as is declaratory of the meaning of the said statutes, with intent to give them a retrospective operation, is unconstitutional. In view of the nature and purpose of the amendment, so far as here applicable, we see no reason to declare it unconstitutional."

Defendant argues that the tax collector lacked the necessary authority to issue the tax deed to the State because of jurisdictional defects in the publication of the notice and the addenda thereto.

Section 3764 of the Political Code, in effect in 1933, provided that the notice should contain the provision that the property would be sold upon which "five years will have elapsed from the date of the sale of said property to the state." The published notice provided that the property would be sold "upon which five years or more will have elapsed * * *." The code section also contained the provision that the notice should contain the statement that the property was sold to the State "in the year 19— for the taxes of the year 19—."

The notice which was published on August 8, 1933, contained the usual notice of sale for delinquencies for the year 1932-1933, to which was added: "Addenda to Delinquent Tax List—Notice of Sale of Property at Public Auction for Delinquent Taxes of 1927. Also Property Delinquent for Taxes of 1925 and 1926 for which sale was postponed under Section 3817a of the Political Code", after which appeared the notice of the time and place of the sale.

Then appeared the following in the addenda: "Delinquent Taxes of 1927", followed by descriptions of the various parcels and the other appropriate information. Next then appeared: "Delinquent Taxes of 1925. For which sale was postponed in 1931 and again in 1932 in accordance with Section 3817a of the Political Code." This was followed by numbers, the names of those to whom the parcels were assessed, with descriptions and the amount of the least acceptable bid, an index and also "Delinquent Taxes of 1926—For which sale was postponed in 1932 in accordance with Section 3817a of the Political Code", followed by the same information.

Defendant maintains that this variance in the notice from the provisions of the statute is fatal to the proceedings. It should be noted that section 3764 of the Political Code in 1933 provided that the notices "shall be in substance, and may be in form, as follows:", after which appeared the form to be used.

The variance in the published notice from the prescribed form was made necessary by the tax moratorium statute under which delinquent tax sales were postponed beyond the five year period. With the moratorium in force, and the sales postponed,

it was impossible for the tax collector to give a notice of the date of a sale when only five years had elapsed from the first date of the sale to the State. Because of these postponements it was also impossible for him to state, in a single notice, a single year in which various parcels had been sold to the State for taxes of a single year.

[5,6] We must construe the various code sections together and harmonize them if possible. While it might have been proper for the legislature to have amended section 3764 of the Political Code at the time of the passage of the moratorium act to make the form of the notice conform to the new conditions made necessary by that act, this was not done, and the assessor had to modify the form to conform to those new conditions. No taxpayer who studied the notice which was published could have been misled by it. He could have gained all the information to which he was entitled under the law. In view of these facts, and of the further fact that the Political Code provided that the notice "shall be in substance, and may be in form", set forth, there was a substantial compliance with the law and defendant may not complain.

[7] The final objection raised by defendant is that the deed from the State to plaintiffs was void because it set forth that the property was sold for \$250 when \$258.29 was the actual price paid for it.

The same contention was made in *Smart v. Peek*, 213 Cal. 452, 2 P.2d 380, 382, and was held unsound for the following reasons: "And, further appellant contends that even if the sale was for the proper amount, a deed which misrecites a sale for a smaller amount is void. The deed in the instant case recited a sale for \$2,219.87. When a tax deed founded upon a valid sale is defective in form or misrecites the true facts, the sale is not rendered void, but the purchaser may compel the issuance to him of a conveyance in due form. *Morton v. Sloan*, 96 Cal.App. 747, 275 P. 223, and cases cited. In *Morton v. Sloan*, supra, in which a hearing was denied by this court, the District Court of Appeal considered the validity of a tax deed issued under section 3785b, Political Code, which recited that all taxes levied and assessed prior to 1919 had been paid, instead of reciting that all taxes prior to sale had been paid. Although a corrected deed had been filed in the Appellate Court under section 956a, Code of Civil Procedure, the court

held that the original deed was not void, but sufficient to pass title, and merely irregular. A similar decision was made in Schainman v. All Persons, 96 Cal.App. 753, 275 P. 225, 276 P. 113, decided the same day. We regard the rule of said decisions as equally applicable to a deed issued under section 3898, Political Code, and to an error in stating the amount bid for the property. The misrecital does not destroy the effect of the deed as prima facie evidence of the other facts recited therein."

For the reasons given the judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



VINER et al. v. UNTRECHT.*
Civ. 14400.

District Court of Appeal, Second District,
Division 2, California.

July 14, 1944.

Hearing Granted Sept. 11, 1944.

1. Appeal and error ⚡1010(1)

Where a judgment is attacked on ground that it is not supported by evidence, power of appellate court ends when it once determines that there is substantial evidence which will support conclusions of trial court.

2. Money lent ⚡
Trusts ⚡1

Transaction by which one advances money to enable another to purchase a house is a "loan", not a "trust".

See Words and Phrases, Permanent Edition, for all other definitions of "Loan" and "Trust".

3. Trusts ⚡95

Where lender advances money to enable borrower to purchase a house and takes title as security for loan, subsequent repudiation by lender of relation of borrower and lender operates as a legal fraud upon borrower and gives rise to a "resulting trust" in property in favor of borrower.

150 P.2d—32

See Words and Phrases, Permanent Edition, for all other definitions of "Resulting Trust".

4. Trusts ⚡102(1)

Equity will not permit a trustee to take advantage of an existing confidential relation out of which trust arose and by repudiating such trust obtain an unconscionable advantage of confiding beneficiary.

5. Trusts ⚡95

Where lender advanced money to enable borrower to purchase a house and took title as security for loan and thereafter repudiated relationship of borrower and lender, it was unnecessary to the establishment of a resulting trust that borrower have expressly promised to repay lender since loan created implied promise to repay which was only promise necessary to constitute trust relation.

6. Trusts ⚡95

Where lender advanced money to enable borrower to make down payment on purchase of a house and took title as security for loan, the fact that lender subsequently advanced additional money to pay on purchase price and on improvements did not prevent establishment of resulting trust when lender repudiated borrower-lender relationship and claimed title.

7. Trusts ⚡361

Where lender advanced money to enable borrower to purchase a house and took title to secure loan and upon repudiation of borrower-lender relationship declined to render a statement of amount advanced, the establishment of a resulting trust was not defeated by failure of borrower to tender borrowed money since under circumstances tender would have been an idle act.

8. Trusts ⚡110

Substantial evidence supported finding of fact that defendant advanced money to plaintiff to enable plaintiff to purchase a house and took title to secure loan and thereafter repudiated borrower-lender relationship and claimed ownership and supported conclusion that a resulting trust in plaintiff's favor existed.

9. Damages ⚡91(1)

Substantial evidence sustained finding that defendant took title to house only as security for a loan and that her claims of innkeeper's liens against chattels in house

* Subsequent opinion 158 P.2d 3.

proven to belong to other persons were unfounded and authorized an award of punitive damages and counsel fees. Civ. Code, §§ 1861, 3294.

10. Appeal and error ⇐1010(1)

Where substantial evidence supported finding as to amount allowable to defendant as a credit and adoption of defendant's contention would have resulted in a judgment for an inconsequential amount in her favor, appellate court would not go behind finding.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Betty Ruth L. Viner, a married woman, Business Women's Association, and Western States University against Mary Untrecht, also known as Mary Holdstein, to enforce a resulting trust and for other relief, wherein defendant cross-complained. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Arthur E. Briggs and J. B. Mandel, both of Los Angeles, for appellant.

S. L. Kurland and W. L. Pollard, both of Los Angeles, for respondent.

MOORE, Presiding Justice.

This action was brought to enforce a resulting trust. All of the material allegations of the complaint were found to be true and those of the cross-complaint substantially contrary to the complaint were found to be untrue. Also, the court found that defendant's maintenance of her claims of ownership of the realty and of her claims of lien upon certain movables of plaintiffs was in bad faith by reason of which plaintiffs were awarded punitive damages in the sum of \$500 and attorney's fees in the sum of \$1,000. From the ensuing judgment defendant has brought this appeal upon seven grounds which may be summed up in one phrase: Insufficiency of the evidence to support the findings and the judgment.

Prior to November 15, 1940, plaintiff, Betty Ruth L. Viner, herein at times referred to as Ruth, was president of the Business Women's Association, a non-profit California corporation. She and her corporation were associated with the Western States University, also a non-profit California corporation. The two corporations having interests in the several prop-

erties involved in this action joined with Mrs. Viner as plaintiffs to establish their respective claims against a common adversary. Inasmuch as the right of each of the plaintiffs as against one another is immaterial to a decision, no effort will be made to keep distinct their respective interests in so far as they relate to defendant.

Prior to November 1, 1940, Ruth had become associated with Mary Untrecht. About that date, having investigated and negotiated for the acquisition of a house on behalf of the association, Ruth decided to undertake the purchase of a 14-room residence, herein referred to as "La Brea house," for the sum of \$6,300, on terms, 10 per cent payable in cash, the balance in deferred payments. In order to effect such purchase, Ruth, on behalf of the association, agreed with Mary that if the latter would lend the association as much as \$1,500 in order to consummate the transaction, to make certain improvements, to buy certain furnishings and to pay the accrued taxes and assessments, she should be repaid her advances with interest at 7 per cent per annum compounded; receive instructions in comptometry and bookkeeping; and have the use of a residential room free of charge. As security for the repayment of her loan, it was agreed that the title to the property should be vested in appellant. Arrangements for the purchase were concluded on January 3, 1941, when Mary deposited in the escrow the sum of \$715, and she was named grantee in the conveyance of La Brea house. The association installed its furniture and furnishings, leased to Mrs. Viner certain residential rooms, which lease was ratified by appellant, and, pursuant to the loan agreement had Mary occupy the room she had selected for herself. Ruth moved her furniture into the house, and both women continued to reside there until the repudiation of the loan contract by Mary. In the following month appellant advanced an additional \$200 to the association and thereafter made other payments on account of the property.

Simultaneously with the foregoing events the association leased certain space in the building to the University for the storage of its 165 law books, comptometer and other equipment, and this tenant agreed to carry out the association's contract with appellant by giving her the promised technical training. For 15 months Mary con-

tinued to reside in the house and to receive instructions from the University which tuition was of the reasonable value of \$300. After the occupancy of the house by the two women Ruth made practically all of the installment payments on the purchase price, paid the taxes and assessments, the utilities and expense of operation. This continued until January 3, 1942, when the association extended Ruth's lease for another year in consideration of her continuing the same payments. This she did until July 15, 1942.

On July 4, 1942, appellant informed the association that she was the owner, demanded possession of the property; declared the association had no interest therein, and repudiated all agreements theretofore made with Ruth. The association requested a statement of its indebtedness on account of moneys advanced by Mary but that lady denied the existence of any such indebtedness. Following her oral and written demands for possession of the realty, Mary asserted a lodging-house lien upon the furniture and furnishings of Ruth and of the association and on September 10 she posted notice of sale of such effects pursuant to section 1861, Civil Code, for the purpose of satisfying her demand for moneys advanced in the sum of \$3,142. The total of all moneys advanced by Mary in connection with the purchase and improvement of the property was \$1,679.62. Besides her own occupancy, after her repudiation, Mary received net rentals as income from the house \$623.55. The University owns the movables it had placed in the house under its lease from the association. Although Mary had no interest in them she took them away and held them without any claim of right. Their value is \$3,000. That corporation and Ruth were both required to employ counsel to effect a recovery and the reasonable value of such service to each of them is the sum of \$500.

The foregoing facts having been found to be true the court's conclusions logically followed:

(1) At all times the association was the equitable owner of La Brea house. (2) Appellant held title for the association, subject to her lien for advances; but (3) she had no right to the possession of the property to the exclusion of respondents. (4) By virtue of their leases, Ruth and the University were entitled to occupy certain rooms which they entered as tenants of the association and occupied February 1, 1941;

(5) neither was Mary a boarding-house keeper, nor was Ruth her guest, but on the contrary, (6) she was herself a mere lodger in the house. (7) She had no lien upon, claim to, or legal interest in, the law books and bookkeeping machines taken by her from the University or to any of the chattels claimed by Ruth, therefore Mary should pay to Ruth and the University the \$1,000 counsel fees and (8) Mrs. Viner is entitled to punitive damages in the sum of \$500 for the arbitrary, wrongful and oppressive taking and holding of her belongings and for appellant's wilful maintenance of her unjust contentions. (9) The association is entitled to all moneys heretofore collected as rentals on the La Brea house and to an accounting of all moneys paid her as rentals therefor after July 4, 1942, besides the \$623.55 she accounted for prior to judgment.

[1] It is fundamental that where a judgment is attacked on the ground that it is not supported, the power of the appellate court ends when it shall once have determined that there is substantial evidence which will support the conclusions of the trial court. *Drabkin v. Bigelow*, 59 Cal. App.2d 68, 74, 138 P.2d 750; *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 45 P.2d 183.

The proof found to support the findings and judgment consists of two classes, to-wit: (1) the declarations and affidavits of appellant and (2) the testimony of respondents and their witnesses. Appellant testified that she purchased the La Brea home for herself and that the association was never mentioned in reference to the property. However, on October 29, 1940, she executed an affidavit to be filed in her divorce action in the superior court in which she averred that her sole possession was a \$200 interest in a life insurance policy. On June 19, 1941, six months after taking title to the La Brea property she filed her verified complaint in the same action alleging that she was indigent. In the same case she testified that she was holding title to the La Brea house and its furnishings as trustee for the association and that she had no interest therein. In the verified divorce pleading she alleged that she was so ill from October 1940 to June 1941 that she was unable to do any work. In the present action she alleged under oath (1) that during the same period she acted as secretary, office attendant, and instructor for the association in its downtown office and that

such services were worth \$1,540; and (2) that during the same period she was acting as house keeper for respondent and did all of the work for the roomers and for respondents in the upkeep of the 14-room house with its six bedrooms, and that such services were reasonably worth \$1,690.

The testimony of Mrs. Viner established that she located the La Brea house as a desirable property and that Mary accompanied her to visit the premises. They had many meetings at which the house was shown to certain members of the association and Mary finally agreed to lend to the association funds not to exceed \$1,500 in order to complete the purchase and repairs. Ruth conducted all negotiations; dictated all letters for Mary's signature and told the agent of the grantor that the title would be taken in the name of appellant in order to comply with the requirements of the bank which declined to convey to an eleemosynary corporation. Mary was present at all of the conferences had with the seller or its agent; was present at the time the escrow was opened; advanced \$715 for the down payment and other outlays and later gave Ruth \$200 as a part of the sums she had promised to advance. At the time the escrow was opened Mary stated to her that she hesitated to take title to the property in her own name by reason of the pendency of her divorce action.

The witness Ware, licensed real estate broker, testified that, in his presence at about the time the escrow was opened, appellant stated that they could not buy the property under the name of the association on account of its credit standing and that it was taken by her in trust for the association to be conveyed to it at the proper time. The witness Kohan, sister of Ruth, established that in the summer of 1942 Mary told her that the property belonged to the association; that she desired to collect the moneys she had loaned to make the purchase; that it could be sold at a profit if she and Ruth could share in it; that if it were not sold "she would use any means possible to make her sell it so she could get her loan therefrom." One Shoup made a contract for the painting of the house with Mrs. Viner and Mrs. Snyder, president and secretary of the association. He testified that he never discussed the painting with appellant during the several weeks he was there employed. No proof has been designated to show that appellant at any time prior to July 4, 1942, ever made claim

to ownership of La Brea house and we find none. When she gave notice of her repudiation her language was that "all agreements between you and Mrs. Utrecht are hereby terminated and cancelled." From such language of her counsel, in the light of other proof, it is a reasonable inference that appellant acknowledged that she had made a contract with Mrs. Viner on terms advantageous to the latter.

[2-7] Contrary to the contention of appellant there is no express trust alleged. Neither was one proved. The only agreement expressed was one for the loan of moneys by appellant to the association to enable it to effect the purchase of the house and lots. There is no more trust involved in the transaction with the association than it would have been had the money been borrowed from Mrs. Snyder or any other member of the association. After an agreement to lend the money to the association the legal effect of the actual payment to the bank was the transfer of the money from Mary to the association. *Brown v. Spencer*, 163 Cal. 589, 126 P. 493. A transaction such as that in the case at bar is denominated as a loan by the grantee to the beneficiary. The vesting of title in the lender as security for her loan and the subsequent repudiation by the grantee of the relation of borrower and lender operates as a legal fraud upon the beneficiary and gives rise to a resulting trust in the property in favor of those to whom the loan was made. *Webb v. Vercoe*, 201 Cal. 754, 759, 258 P. 1099, 54 A.L.R. 1200. Equity will not permit a trustee, such as appellant is shown here to have been, to take advantage of an existing confidential relation out of which the trust arose and by repudiating such trust obtain an unconscionable advantage of the confiding beneficiary. *Bradley Co. v. Bradley*, 165 Cal. 237, 240, 131 P. 750; *Lauricella v. Lauricella*, 161 Cal. 61, 118 P. 430. The contention that there was no promise made to repay appellant is immaterial. The loan of the money created an implied promise to repay it. No other promise was necessary to constitute or accentuate the trust relation between the parties. *Brown v. Spencer*, 163 Cal. 589, 126 P. 493, *supra*. Neither does the fact of the advancement of moneys to pay on the purchase price and improvements prevent the establishment of the resulting trust. *Watson v. Poore*, 18 Cal.2d 302, 115 P.2d 478. Nor is it defeated by the failure of the asso-

ciation to tender the borrowed moneys. Mary's declination to render a statement and her repudiation of the loan agreement and the trust rendered further tenders idle and unnecessary. *Penziner v. West American Finance Co.*, 133 Cal.App. 578, 586, 24 P.2d 501.

No other equitable ground is alleged or proved that would justify a judicial defeat of the trust relationship. Appellant was free to make the loan. She received a valuable consideration for it. She continued to enjoy the relationship for 18 months at the expiration of which she was free to enforce her lien for the moneys she had advanced.

[8] It is thus demonstrated that the findings with reference to the La Brea property find abundant and substantial support in the record leaving this court without power to alter the conclusions derived by the court below.

We have examined the authorities cited by appellant in support of her numerous points. *Wittenbrock v. Cass*, 110 Cal. 1, 42 P. 300; *Donohoe v. Mariposa Land & Mining Co.*, 66 Cal. 317, 5 P. 495; *Holtze v. Holtze*, 2 Cal.2d 566, 42 P.2d 323; *Fee-ney v. Howard*, 79 Cal. 525, 21 P. 984, 4 L.R.A. 826, 12 Am.St.Rep. 162; *Barr v. O'Donnell*, 76 Cal. 469, 18 P. 429, 9 Am. St.Rep. 242; *Lincoln v. Chamberlain*, 61 Cal.App. 399, 214 P. 1013; *Dimity v. Dixon*, 74 Cal.App. 714, 241 P. 905; 65 C. J., p. 423, §§ 184, 185; *Kirk White & Co. v. Bieg-Hoffine & Co.*, 6 Cal.App.2d 188, 44 P.2d 439. These authorities merely restate old rules and familiar principles. Nothing in them is contrary to the decision we have derived. For a case to be of guiding value its facts must parallel or assimilate those under review.

[9] The evidence is equally abundant to support the findings that the University owns the personal property which it claimed, that Ruth was not a guest of Mary; that appellant is not the owner of the chattels used by the association in the La Brea house and that the only moneys

advanced by Mary to the association were those used for the purchase and for taxes and improvement of the property. Appellant witnessed the conversation whereby Ruth was employed to operate the house. The latter engaged a number of employees to do the menial tasks from February 1941 till May 1942. By her own testimony and that of Mrs. Munson, Mrs. Schneider and Miss Yaryan, Ruth established that Mary neither brought any furniture into the house nor made a payment on that which was purchased, and that she did no work either as a domestic or as an instructor for the respondents. Because of such proof and its acceptance by the court, appellant's asserted claims of a lien as an innkeeper upon the personal property in the La Brea house are utterly without right (*Fox v. Windemere Hotel Apartment Co.*, 30 Cal. App. 162, 157 P. 820), and the award of punitive damages and counsel fees is justified. Sec. 3294, Civil Code.

[10] Finally, appellant complains that the amount of her award should have been \$2,489.31 instead of \$1,679.62, allowed by the judgment. In support of this she cites her own testimony with reference to a payment she made to the painter, the "constant tendency of Mrs. Viner to exaggerate," and the misstatement of Exhibit 39. For reasons heretofore recited we cannot retry the comparative veracity or accuracy of the witnesses. On the contrary, the findings and decision determined that Mary is entitled to a total of \$1,679.62, the full amount of her loans, but that she is indebted to respondents for net rentals collected, \$623.55; punitive damages, \$500; counsel fees, \$1,000, aggregating \$2,123.55, besides costs in the sum of \$208.35. It is thus shown that if her contentions as to the computations of the court should be adopted, she would have but an inconsequential amount in her favor. Of course we cannot go behind the findings under the circumstances.

The judgment is affirmed.

McCOMB, J., concurs.

65 Cal.App.2d 362

AMBROSE et al. v. ALIOTO.
Civ. 3339.District Court of Appeal, Fourth District,
California.

Aug. 1, 1944.

As Modified on Denial of Rehearing
Aug. 29, 1944.

Hearing Denied Sept. 28, 1944.

I. Joint adventures ☞1
Usury ☞39

Where fish canner advanced \$17,000 to convert fishing boat subject to \$31,200 mortgage into a tuna boat and agreed to take second mortgage without interest in consideration of sale of all fish to him for five years and option to receive new note for \$17,000 plus half of principal amount paid on first mortgage after payment thereof or an undivided half-interest in boat, contract was not usurious, but provided for a joint venture.

2. Usury ☞37

Where the whole sum advanced is put in hazard, the amount to be paid may be considered a price set for the surrender of an investment rather than a usurious loan.

3. Shipping ☞27

Where third person had exercised option to take interest in boat in satisfaction of owner's indebtedness, there remained no debt in respect of such person, notwithstanding owner's refusal to convey, as regards owner's liability to convey an interest to another after payment of debts against boat.

4. Specific performance ☞94

An incomplete performance is not necessarily a defense to an action for specific performance, particularly where there has been a substantial performance and full performance is prevented by the action of the other party.

5. Action ☞65**Specific performance ☞94**

Where wrongful discharge of plaintiff by defendant prevented earnings which would have paid all indebtedness against boat and entitled plaintiff to one-fifth interest in boat, decree of specific performance compelling conveyance of such interest was proper, particularly where proof showed earnings after beginning of action had been sufficient to pay all indebtedness.

6. Specific performance ☞32(2), 94

Plaintiff was entitled to specific performance of contract which he had fully

performed, except where defendant had wrongfully prevented full performance, although contract originally was not mutual and plaintiff could not have been compelled to perform it. Civ.Code, § 3386.

7. Appeal and error ☞832(4)

Where injunction was asked only in respect of fish that should be taken on voyage which was completed before trial, and there was neither pleading nor proof justifying an injunction in respect of future voyages, an injunction covering future voyages would be corrected even though it was called to court's attention for first time on petition for rehearing.

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Action by Annie L. Ambrose and Joe Alioto against Mary Alioto to compel the defendant to convey to plaintiffs certain interests in a boat. From an adverse judgment, the defendant appeals.

Judgment modified and as modified, affirmed.

Sloane & Steiner, of San Diego, for appellant.

Gray, Cary, Ames & Driscoll and John M. Cranston, all of San Diego, for respondents.

BARNARD, Presiding Justice.

The plaintiffs brought this action to compel the defendant to convey to them, respectively, certain interests in a boat. The defendant owned a fishing boat which had been losing money and which was mortgaged to the Bank of America for \$31,200. She desired to convert it into a tuna boat at an estimated cost of \$23,500. With this end in view she entered into a written contract on April 30, 1938, with Wiley V. Ambrose, who was a fish canner and president of Westgate Sea Products Company. This corporation will be referred to as "Westgate".

So far as material to this discussion, this contract provided that \$6500 of the cost of conversion should be paid by the defendant and \$17,000 by Ambrose; that if the cost of conversion was less than the estimate the defendant could use the balance for maintenance and operation; that any excess cost over the estimate should be paid equally by the parties; that as security the defendant should give to Ambrose a note for \$17,000, payable on or before three years, without interest, with a second mortgage on the vessel; that all fish caught with the boat for five years should be delivered to Westgate; and that, after paying certain operating expenses,

Westgate should apply the balance of the proceeds in payment of the bank's first mortgage.

Paragraph 8 of the contract then provided that the defendant should manage the boat so long as its earnings were sufficient to pay all amounts coming due on the mortgage to the bank; that otherwise Ambrose might assume control and appoint his own master and crew; that if the earnings of the boat after a reasonable time were still insufficient to cure any default under the bank's mortgage the vessel should be sold; that the net proceeds of the sale should be divided equally between the parties and any indebtedness of the defendant to Ambrose should be deemed satisfied and discharged; and that if his operation of the boat proved successful Ambrose should continue to manage the boat until the bank's mortgage was paid.

Paragraph 9 provided that when the bank's mortgage was paid Ambrose should have the option either (a) to receive a new note for \$17,000 plus one-half of the principal amount paid to the bank during the life of the agreement (payable on or before two years with interest at 6% secured by a first mortgage on the boat), or (b) to receive a bill of sale to an undivided one-half interest in the vessel. In either event, the original \$17,000 note and second mortgage was to be cancelled and satisfied.

Paragraph 12 provided that at any time after two years from the time Ambrose received such a bill of sale, the defendant should have the option of repurchasing his half interest by paying him the amounts mentioned in subdivision (a) of paragraph 9, with interest at 6% from the date of the bill of sale.

The work on the boat was completed at a cost of about \$5000 in excess of the estimate, which amount was advanced by Westgate. Mr. Ambrose died and his interest in this contract, and in Westgate, passed to his wife Annie L. Ambrose, so far as material here. The boat was operated for some two years at a loss and on June 15, 1940, the debts against the boat amounted to over \$65,000, exclusive of the \$17,000 Ambrose had advanced on the project. The bank was threatening to foreclose its first mortgage and on June 27, 1940, Mrs. Ambrose's son, acting as her agent, gave the defendant written notice that pursuant to paragraph 8 of the contract he had taken over the management of the boat and appointed a new captain and crew, that he had appointed Joe Alioto as captain and, in order to secure his full cooperation, had agreed to give him a one-fifth interest in the boat when all of the

existing liabilities had been paid. The notice then informed the defendant that under this agreement with Joe Alioto "when and if said liabilities are paid off completely, it will then be in order for both of us to deed to Joe Alioto enough of our interest in said vessel to give him an undivided one-fifth interest", and asked the defendant for her approval. The defendant signed this notice as "Accepted: 7-2-40" before two witnesses.

The operation of the boat with Joe Alioto as master proved successful and by May, 1943, the \$65,000 indebtedness above referred to had been reduced to about \$9000, the bank's first mortgage having been fully paid. Mrs. Ambrose then notified the defendant in writing that she elected to receive an undivided one-half interest in the vessel and offered to deliver up and discharge the note and mortgage for \$17,000 given under the original agreement. The defendant refused to convey any interest in the vessel but offered to pay to Mrs. Ambrose the amounts mentioned in subdivision (a) of paragraph 9 of the agreement.

In this action which followed, Mrs. Ambrose recognized the right of Joe Alioto to a one-fifth interest in this boat and a judgment was asked for requiring the defendant to specifically perform the agreements above mentioned and directing her to execute a bill of sale to Mrs. Ambrose for an undivided two-fifths interest in this boat and another to Joe Alioto for an undivided one-fifth interest therein. The court found in all respects in favor of the plaintiffs and entered a judgment directing the defendant to convey an undivided two-fifths interest to Mrs. Ambrose and an undivided one-fifth interest to Joe Alioto. From this judgment the defendant has appealed.

With respect to the judgment as affecting Mrs. Ambrose, appellant's sole contention is that the transaction covered by the contract of April 30, 1938, constituted a loan of \$17,000 by Ambrose to the appellant; that subdivision (a) of paragraph 8 of the contract provides for a bonus of \$15,600 for making this loan; that subdivision (b) of paragraph 8 carries the same bonus provision which must be eventually paid before the appellant may redeem the property and clear the boat; that these bonus provisions are usurious and unenforceable; that Mrs. Ambrose is, therefore, legally entitled only to a return of the \$17,000 originally advanced, without interest; and that it follows that the judgment giving her an interest in the boat should be reversed. Cases are cited in which it has been held that where the

transaction is purely a loan the lender may not contract for more than legal interest through any device or scheme intended to evade the usury law or to obtain more interest under another name.

[1] We think it rather clearly appears from its terms that this contract was something more than, and quite different from, a mere loan of money and that the provision for the giving of a note and mortgage as security was but an incidental part of the transaction. Mr. Ambrose was engaged in the fish canning business and was undoubtedly interested in getting fish for his cannery. The inference would seem reasonable that his main purpose was to get this boat in operation and secure the fish it produced for his cannery. In any event, he was willing to advance \$17,000 and to risk that amount, as well as any return thereon, on the success of the venture. It makes no difference by what name the relationship created by this contract is called. Whatever else it does, the contract provides for a form of joint enterprise in which he was to participate and through which he might well lose all or a part of the amount he agreed to advance. The appellant did not agree to repay the \$17,000 in any event. It was clearly provided in paragraph 8 that if the operation of the vessel proved unsuccessful Ambrose's recovery should be limited to half of the net proceeds of the sale of the boat, and that he should cancel any obligation on the part of the appellant.

Ambrose was to receive nothing unless and until the bank's mortgage was paid in full. In the meantime, he was not only interested in having the boat produce that result but he was authorized to take over its full management to that end, which he later did. When the bank's mortgage was paid he was to surrender and cancel the \$17,000 note and second mortgage, which had never called for any interest. He then had the option to ask for and receive a note and mortgage for his \$17,000 plus what amounted to one-half of the profits up to that time, or to receive a conveyance of a half interest in the boat, subject to appellant's right to take over the entire boat two years later at a price which included his share of the profits up to the time the mortgage was paid.

In a very real sense Ambrose was hazarding his investment on the success of the enterprise and was to receive a share in the earnings of the boat, and finally and possibly in the boat itself, rather than any interest on his investment or any flat obligation to repay the same. Even the appellant concedes that at the time of the transaction "Actually the \$17,000 loan was a poor risk."

[2] The general rule here applicable is thus stated in 11 Cal.Jur. 10-yr. Supp., page 112:

"When the whole sum advanced is put in hazard—as where one advances money under a contract that may be satisfied by delivery of property of uncertain or speculative value or the payment of an increased amount by a specified date—the amount to be repaid may be considered a price set for the surrender of an investment, rather than a usurious loan."

The principles pointed out in *Jameson v. Warren*, 91 Cal.App. 590, 267 P. 372; *Lamb v. Herndon*, 97 Cal.App. 193, 275 P. 503; *Miley Petroleum Corporation v. Amerada Pet. Corp.*, 18 Cal.App.2d 182, 63 P.2d 1210; *Westman v. Dye*, 214 Cal. 28, 4 P.2d 134, and *Van Noy v. Goldberg*, 98 Cal.App. 604, 277 P. 538, are applicable and controlling here insofar as this respondent is concerned.

The claims and rights of the respondent Joe Alioto rest upon his agreement for taking charge of this boat and upon its confirmation through the written notice of June 27, 1940, and the acceptance thereof signed by the appellant. It was thereby agreed that he was to be given a one-fifth interest in the boat when and if certain liabilities were paid. A list of these liabilities against the boat and which were to be "paid off" was furnished. This list totaled \$80,512.26 and included a balance of \$27,706.24 on the bank's mortgage and an item "due W. V. Ambrose Estate on note \$17,000."

Joe Alioto acted as master of the boat for something over two years, during which time the debts against the boat were largely reduced but not entirely paid off. The appellant then discharged Joe Alioto and put another master in charge of the boat. The trial court found that Joe Alioto was wrongfully discharged by her and this finding is not questioned.

This action was filed after the bank's mortgage had been paid in full. At the trial, following an opening statement by counsel for the plaintiffs, the defendant moved for judgment, as to this part of the action, on the pleadings and on that statement, which was denied. This motion was apparently based on the contention that all of the debts against the boat had not been paid. During the trial evidence was admitted showing that after the action was filed the boat in question had made two trips and that the profits therefrom had been sufficient to pay all outstanding debts against the boat (disregarding the alleged debt of \$17,000 to Mrs. Ambrose), and to leave a surplus of a little over \$6000.

The appellant contends that Joe Alioto was not entitled to specific performance since the contemplated debts were not fully paid at the time the action was brought, and that the bringing of this part of the action was premature. It is contended that the \$17,000 originally advanced by Ambrose is a debt which has not yet been paid since she must pay that amount and more before she can clear her title to the boat, and that other debts of about \$9000, although subsequently paid, had not been paid at the time the action was brought.

[3] With respect to the \$17,000 item, Mrs. Ambrose was entitled to a conveyance of an interest in the boat, and was then under obligation to cancel the note and second mortgage which had been given. That amount then represented an interest in the ownership of the boat and not a debt against the boat. Any possible obligation in this respect, as a debt against the boat, had then been discharged. The appellant could not alter the legal situation then existing by refusing to convey. This particular "debt" had been sufficiently paid and discharged within the meaning and effect of the second agreement in which Joe Alioto was interested.

[4,5] There remains for consideration the other debts against the boat in the approximate amount of \$9000, which were subsequently paid through the operation of the boat pending the trial, but which had not been paid when the action was filed. Joe Alioto's performance of this part of the agreement was prevented by his wrongful discharge by the appellant. An incomplete performance is not necessarily a defense to an action for specific performance. This is true where there has been a substantial performance and a full performance is prevented by the action of the other party. *Lucy v. Davis*, 163 Cal. 611, 126 P. 490. This principle is peculiarly applicable here since the operation of the boat pending the trial demonstrates that all these debts would have been paid by the profits from the boat and that Joe Alioto would have been entitled to a one-fifth interest in the boat had he not been wrongfully discharged by the appellant. A supplemental and amended complaint was filed with the permission of the court to cover the subsequent happenings and to conform to the proof. The action was one in equity, there had been not only a very substantial performance but a full performance had been prevented by the action of the appellant, and it was within the equitable powers of the court to dispose of the entire matter in this one action without compelling the parties to bring and defend another action which would necessarily lead to the same result.

150 P.2d—32½

Moreover, the exact conveyance that should be made to Mrs. Ambrose could not be determined without considering the rights of Joe Alioto. For this reason, as well as those above indicated, it cannot be held that this part of the action was premature.

[6] The appellant further contends that Joe Alioto's contract was not specifically enforceable since it was not mutual in that he could not have been compelled to render personal services as master of this boat. It may be conceded that this contract could not have been specifically enforced in the beginning, but when it was fully performed it would be specifically enforceable. Civ.Code, Sec. 3386. His further performance having been prevented by the appellant, this principle is applicable and it must be considered to have been sufficiently performed, within the meaning of section 3386, to enable him to maintain this action and to enable a court of equity to grant the relief which was appropriate under the circumstances.

The judgment appealed from contained a paragraph reading as follows: "Now, therefore, it is ordered, adjudged and decreed that the defendant, Mary Alioto, and all persons under her control, at her direction or on her behalf be, and said defendant and all such persons are hereby, enjoined and restrained from delivering to Sun Harbor Packing Company or to anyone other than Westgate Sea Products Co., any fish caught on any fishing voyage made by the vessel 'Dependable.'"

[7] There is nothing to support that part of the judgment, since the period had expired during which it was agreed that all fish caught from this boat should be delivered to Westgate. Moreover, the complaint asked for such an injunction only with respect to "the present voyage" of this boat. That voyage was completed before the trial. There was neither pleading nor proof justifying a continuing injunction, under the new ownership of the boat, much less one covering all future time.

The respondents argue that the appellant has no right to raise such a point for the first time on petition for rehearing. Assuming that this is true, where such an obvious error comes to the attention of the court, it may be corrected on the court's own motion.

The judgment is modified by striking therefrom the paragraph above quoted, and as so modified the judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

LOCKE v. RED RIVER LUMBER CO. et al.

Civ. 7035.

District Court of Appeal, Third District,
California.

July 31, 1944.

Rehearing Denied Aug. 29, 1944.

Hearing Denied Sept. 28, 1944.

1. Negligence ⚖️32(2)

Customer who entered store for purpose of purchasing a dress and who remained until closing time for purpose of procuring dress after it had been altered and who was injured while leaving building when she stepped into a hole in an isle was not a "licensee" but was an "invitee" toward whom proprietor was bound to exercise ordinary care to keep aisles in reasonably safe condition and to warn her of existing dangers.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee" and "Licensee".

2. Negligence ⚖️32(2)

The relationship of an "invitee" as distinguished from a mere "licensee" exists when injured person enters premises for a purpose which is of mutual interest to himself and to owner or occupant of premises.

3. Appeal and error ⚖️1008(1)

Whether customer was guilty of contributory negligence for failure to see hole in surface of concrete floor of aisle of store, which defect was plainly visible but of which customer had no previous knowledge, was a question of fact for trial court sitting without a jury.

4. Appeal and error ⚖️1008(1)

Negligence ⚖️66(1)

A failure to observe an object or defect which might have been seen by close scrutiny does not necessarily constitute contributory negligence on part of one who, without previous knowledge of its existence, is injured thereby, and existence of contributory negligence is to be determined as question of fact from all facts and conditions surrounding accident complained of with which solution a reviewing court may not interfere unless it appears as a matter of law that the plaintiff was guilty of a lack of ordinary care.

5. Appeal and error ⚖️996

Where circumstances of particular case are such that reasonable minds might

differ with respect to question of exercise of due care by plaintiff, conclusion of jury or trial court in that regard will not be disturbed on appeal.

Appeal from Superior Court, Lassen County; A. K. Wylie, Judge.

Action by Lillian M. Locke against the Red River Lumber Company and Bennett's, Inc., for injuries sustained when plaintiff stepped into an open crack in the concrete floor of a store operated by defendant Bennett's, Inc., as lessee of the premises. From a judgment for plaintiff, Bennett's, Inc., appeals.

Affirmed.

R. A. Harris and L. R. Hollingshead, both of Sacramento, for appellant.

Hardin Barry, of Susanville, and Duncan Oneal, of San Jose, for respondent.

THOMPSON, Justice.

The defendant Bennett's, Inc., a corporation, has appealed from a judgment which was rendered against it in a suit for damages for personal injuries sustained by the plaintiff as a result of stepping into an open crack in the concrete floor of a store at Westwood, California, operated by the appellant as lessee of the premises. The cause was tried by the court sitting without a jury. Findings were adopted favorable to the plaintiff to the effect that the appellant was guilty of negligence in knowingly permitting the dangerous crack to remain in the floor for a period of more than two years, and that plaintiff was free from contributory negligence. A judgment for the sum of \$3,045 was accordingly rendered in favor of the plaintiff. It is not contended that the judgment is excessive.

The appellant contends that the plaintiff, as a customer in the store, was a mere licensee toward whom it was merely liable for wilful and wanton neglect, and that the plaintiff was guilty of contributory negligence in failing to observe the hole which was plainly visible to one who exercised ordinary care. In other words, it is asserted the proprietor is not liable for injuries sustained to a customer on account of obvious defects in the store.

The defendant Red River Lumber Company owned a store building at Westwood, which was leased October 15, 1935, to the

appellant, Bennett's, Inc., a corporation, and operated as a mercantile establishment. The store contained various departments on the ground floor. In the men's furnishing department of that portion of the store where the accident occurred, goods were displayed on tables adjacent to a main aisle leading to the front entrance. The aisle was about eight feet in width. The floor was constructed of concrete which was marked in squares and painted a gray color, although the concrete was mixed with pigment of a pink color. For more than two years prior to the accident a crack was permitted to exist in the concrete floor, along the middle of that aisle. During that period of time the crack increased in size until it became three or four feet in length, four inches wide at the center of the defect, and three-fourths of an inch in depth. Along one side of the crack the wall of the depression was nearly perpendicular. On the other side the concrete was broken and crumbled and receded gradually. The janitor who was employed by the appellant testified that the hole "got quite good-sized" and that he had "spoken" to his boss, Mr. Piedmont, about it several times.

The plaintiff, a woman sixty years of age, was required to use glasses only for the purpose of reading. She had occasionally traded at that store for about two months before the accident occurred. She had no previous knowledge of the existence of that hole in the surface of the concrete floor. She had never observed it until after the accident occurred. In the forenoon of November 6, 1939, she went to the store to make several purchases. She bought some meat and selected a dress which she left for alterations with Mrs. Phyllis Taylor, an employee of the appellant in the ladies' ready-to-wear department, with a promise of delivery of the dress about four o'clock that afternoon, but it was not then completed. She filled an engagement at the beauty parlor in that store, and ate her lunch at the fountain counter. At six o'clock at night, when the whistle blew as a warning for customers to depart, in company with her friend, Mrs. Taylor, she hastened along the main aisle toward the front entrance on her way out of the building. While doing so she stepped into the hole in the surface of the concrete floor, at a point near the cash register, and was thrown violently to the floor. As a result of the fall, she sustained serious in-

juries to her knee, her hip and the lower extremity of her spine. She suffered intense pain, and was confined to a hospital for several months. The amount of the judgment which was rendered is not challenged as excessive.

After the accident occurred the plaintiff was placed in a chair about eight feet from the point where she fell. She testified at the trial that she could plainly see the hole in the concrete floor from the point where she sat, but that she had never seen it before the accident and did not previously know that it existed, although she had formerly traversed the various aisles in the store on several occasions.

At the time of the accident the lights were burning. The plaintiff was a healthy, vigorous woman and her eyesight was good. She then wore shoes with moderate height Cuban heels.

The cause was tried by the court sitting without a jury. Findings against the appellant were adopted to the effect that plaintiff, as an invitee in the appellant's store, was injured as alleged in her complaint on account of its negligence in knowingly permitting a defective and dangerous crack to remain in the concrete floor of the aisle for a period of more than two years without repairing it and without notifying plaintiff of that danger; that the floor in the aisle in question was not in a reasonably safe condition, but on the contrary was defective and dangerous to customers, and that the plaintiff, as an invitee and customer of the appellant, "while walking along said aisle suddenly, without fault on her part, without warning, or knowledge, previous or present, of the existence of said crack," stepped into the hole and fell to the floor seriously injuring herself as previously related. Judgment was accordingly rendered in plaintiff's favor for the sum of \$3,045, together with her costs. From that judgment this appeal was perfected.

The appellant's contention that the plaintiff was a mere licensee to ward whom it was merely liable for wilful and wanton neglect is without substantial merit. The plaintiff went to the store for the purpose of purchasing goods from that mercantile establishment. She remained in the store until the closing time at six o'clock in the evening for the purpose of procuring the dress after it had been altered. While hastening down the main aisle to the

entrance door, she unwittingly stepped into the hole she did not know existed and was injured.

[1,2] Under such circumstances plaintiff was clearly an invitee toward whom the merchant was bound to exercise ordinary care to keep the aisles in reasonably safe condition and to warn her of existing dangers. *Hodge v. Weinstock-Lubin & Co.*, 109 Cal.App. 393, 293 P. 80; *Brinkworth v. Sam Seelig Co.*, 51 Cal.App. 668, 197 P. 427; *Thompson v. B. F. Goodrich Co.*, 48 Cal.App.2d 723, 120 P.2d 693; *Sanders v. City of Long Beach*, 54 Cal. App.2d 651, 129 P.2d 511; *Buckingham v. San Joaquin Cotton Oil Co.*, 128 Cal. App. 94, 98, 16 P.2d 807; 19 Cal.Jur. 621, sec. 55. The relationship of an invitee as distinguished from a mere licensee has been held to exist when it appears that the injured person enters the building or premises of another for a purpose which is of mutual interest to himself and the owner or occupant of the property. *Aguilar v. Riverdale Cooperative Creamery Assoc.*, 104 Cal.App. 263, 266, 285 P. 889; *Young v. Bates Valve Bag Corp.*, 52 Cal. App.2d 86, 92, 125 P.2d 840. Clearly the mission of the plaintiff in this action in visiting the mercantile establishment of the appellant at the time of the accident was that of a customer with the purpose of purchasing goods, which rendered her an invitee and not a mere licensee.

[3] The chief contention of the appellant is that the plaintiff may not recover damages for injuries received as a result of stepping into the hole in the surface of the concrete floor of the aisle because the defect was plainly visible and that she was therefore guilty of contributory negligence in failing to exercise reasonable care. It is asserted that the finding of the court that plaintiff was injured, "without fault on her part," is not supported by the evidence. We are of the opinion this court is bound, under the circumstances of this case, by the finding of the trial court in that respect.

[4] In several California decisions it has been held, under circumstances somewhat similar to those of the present case, that a failure to observe an object or defect, which might have been seen by close scrutiny, does not necessarily constitute contributory negligence on the part of one who, without previous knowledge of its existence, is injured thereby. Those authorities hold that the question of con-

tributory negligence should be determined from all of the facts and conditions surrounding the accident complained of; that the issue of contributory negligence is usually one of fact to be determined by the jury or the trial judge, with which solution a reviewing court may not interfere unless it appears as a matter of law that the plaintiff was guilty of a lack of ordinary care. *Neel v. Mannings, Inc.*, 19 Cal.2d 647, 655, 122 P.2d 576; *Hodge v. Weinstock, Lubin & Co.*, supra; *Walsh v. Maurice Mercantile Co.*, 20 Cal.App.2d 45, 66 P.2d 181; *Brinkworth v. Sam Seelig Co.*, supra; *Thompson v. B. F. Goodrich Co.*, supra; *Sanders v. City of Long Beach*, supra; 19 Cal.Jur. 735, sec. 141. In the *Sanders* case the court appropriately said [54 Cal.App.2d 651, 129 P.2d 515]: "In each of those cases it was held that the question of contributory negligence was for the jury where the plaintiff invitee tripped and fell over an unexpected but plainly visible obstruction on the floor of fully lighted premises to which the invitation extended, but which obstruction the plaintiff had failed to see."

The principle expressed in the foregoing language is applicable to the present case.

[5] The cited authorities further hold in that regard that if the facts and circumstances of the particular case are of such a nature that reasonable minds might differ with respect to the question of the exercise of due care on the part of the plaintiff the conclusion of the jury or the trial court in that regard will not be disturbed on appeal. In 38 American Jurisprudence, at page 870, § 191, it is said that while one is ordinarily required, in the exercise of reasonable prudence, to use his senses of sight and hearing with due diligence, the mere failure to observe a visible defect which causes injuries does not necessarily constitute contributory negligence. The failure to see an obvious defect may be otherwise reasonably accounted for by the circumstances of the case. The text last cited declares that "It is not contributory negligence to fail to look out for danger where there is no reason to apprehend danger."

In the *Neel* case, supra, an order of the trial court rendering judgment for the defendant, notwithstanding the verdict for damages in favor of the plaintiff, as a result of striking her head against a board negligently fastened across the top of a stairway, was reversed by the Supreme Court. In that case, unlike the present one,

the plaintiff had previous knowledge of the dangerous condition of the stairway by reason of the existence of that board. The court said she was "familiar with the existing condition [19 Cal.2d 647, 122 P.2d 581]." With respect to the principle previously announced regarding the province of a jury or the trial court to ordinarily determine the question of the existence of contributory negligence, even when a dangerous object is visible, the Supreme Court said in that case:

"Even though the evidence did establish that the alleged defect in the construction of defendant's premises was patent and observable to any one using the stairway, and that in addition plaintiff by reason of her past visits to the restaurant was familiar with the existing condition, there would still be the question for the determination of the jury as to whether or not it was a want of ordinary care on the part of plaintiff not to have kept in mind such element of danger. * * *

"Where different conclusions may be reasonably drawn by different minds from the same evidence, the decision must be left to the jury."

We may not hold as a matter of law that the plaintiff in this case was guilty of contributory negligence in failing to see the hole in the concrete floor of the aisle. We cannot say she did not use that degree of care which should have been exercised by a reasonably prudent person under such circumstances. That being true, we may not interfere with the finding of the court in that regard. The plaintiff had no previous knowledge of the defect in the floor. She had no reason to anticipate that the main aisle to the front entrance in that general mercantile establishment would be in a dangerous condition for customers to use. She had a right to assume the proprietor of the store would provide his invited customers with safe aisles in which to walk. The circumstances in that regard are similar to those in the Hodge case, supra, and other previously cited authorities in which the courts held that the plaintiffs were not guilty of contributory negligence for failure to see obvious defects. The plaintiff in this case testified that she did not know of the defect in the floor; that, in response to the whistle warning customers of the closing of the store, she was hastening down the aisle toward the front entrance for the purpose of departing; that the lights were on, "the store was full of customers," and tables were

placed on either side of the aisle upon which goods were displayed. Under such circumstances we are bound by the finding of the trial court that the plaintiff was not guilty of contributory negligence.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.



65 Cal.App.2d 432

THOMPSON et al. v. SCHURMAN.

Civ. 7058.

District Court of Appeal, Third District,
California.

Aug. 2, 1944.

1. New trial ⇨23

In suit to recover money paid upon oral contract to purchase dairy ranch because of vendor's alleged fraud and misrepresentations, where vendor was willing to fulfill his portion of contract and issues of fraud were determined against plaintiffs, but judgment was rendered in favor of plaintiffs, trial court did not abuse its discretion in granting a new trial.

2. Appeal and error ⇨979(2)

New trial ⇨6

Trial court is invested with broad discretion to grant or deny motion for new trial, and when evidence is conflicting order may not be disturbed on appeal where there is substantial evidence which would support judgment in favor of moving party.

3. Frauds, statute of ⇨132

Vendee of realty under oral contract within statute of frauds may not recover partial payment of purchase price paid pursuant to agreement, in absence of fraud, while vendor is ready, able and willing to perform.

4. Vendor and purchaser ⇨21

Where vendor and purchasers of dairy ranch orally agreed upon terms of sale and purchasers made a deposit, but thereafter when written agreement of sale was submitted purchasers refused to accept it on ground of fraud, and brought suit to

recover deposit in which court found there was no fraud, but rendered judgment for purchasers, court's subsequent order granting new trial was not erroneous on ground that contract of sale never became effective because not reduced to writing and signed.

5. Contracts ⇨32

Where parties orally agree upon terms of contract with mutual intention that it shall become binding, fact that formal written agreement is to be thereafter prepared and signed does not alter binding validity of original contract.

6. Contracts ⇨32

Whether oral agreement, including all essential terms and conditions thereof, which parties intend to reduce to writing shall take effect forthwith as a completed contract depends upon intention of parties to be determined by surrounding facts and circumstances.

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Action by Harvey J. Thompson and another against Carl Schurman to recover \$1000 paid upon an oral contract to purchase a dairy ranch on ground that the contract was void because of fraud and misrepresentations. From an order granting a new trial because of lack of evidence to support judgment for the plaintiffs, the plaintiffs appeal.

Order affirmed.

Douglas A. Nye, of San Francisco, for appellants.

L. R. Lambert, of Santa Rosa, for respondent.

THOMPSON, Justice.

The plaintiffs have appealed from an order granting a new trial in a suit to recover \$1,000 paid upon an oral contract to purchase a dairy ranch, together with live stock and equipment. The action was commenced without a tender of further performance on the part of plaintiffs on the theory that the contract was void on account of alleged fraud and misrepresentations of the grantor. The statute of frauds was not pleaded. The court adopted findings adverse to the plaintiffs on the issue of fraud. A new trial was granted for lack of evidence to support the judgment. It is contended the court

abused its discretion in granting the new trial.

The defendant owned a 260 acre dairy ranch near Santa Rosa in Sonoma County, together with 70 milk cows, 40 calves, farming machinery and equipment. In July, 1941, the plaintiffs, after a personal inspection of the property, orally agreed to purchase it for the sum of \$52,000 to be paid in specified installments. The contract was subsequently orally modified by mutual consent. All of the terms and conditions of the sale of properties were stipulated. August 6, 1941, pursuant to that contract, the plaintiffs paid defendant \$1,000 "to apply on conditional contract of sale of ranch", for which payment the defendant signed his receipt. The contract provided for the further payments of \$9,000 on September 1, 1941, and \$750 every three months thereafter, at 6% interest per annum, until \$42,000 had been paid on the purchase price, at which time the defendant agreed to execute and deliver a good and sufficient deed of conveyance and bill of sale, free and clear of encumbrance, upon delivery of a first deed of trust on the real property to secure the balance of \$22,000, with 6% interest per annum, also payable in installments of \$750 every three months until the balance of the purchase price was fully paid. On September 1, 1941, the defendant executed and delivered to plaintiffs a written agreement of sale drawn in accordance with the previous terms and conditions orally stipulated. The plaintiffs refused to accept or execute the written agreement claiming that they had been defrauded by defendant's alleged misrepresentations to the effect that the dairy buildings were not constructed in accordance with sanitary dairy rules and regulations and that some of the milk cows were diseased. Plaintiffs thereupon repudiated their contract and demanded repayment of their deposit of \$1,000, which was refused. This suit was commenced August 29, 1942. No tender of further performance of the contract was made by the plaintiffs. The asserted invalidity of the oral contract on account of the statute of frauds was not pleaded.

The amended complaint is couched in two counts. The first cause alleges that plaintiffs paid the defendant the sum of \$1,000 on the purchase price of the property, relying upon false representations which were made by the defendant to the

effect that the "milking barn and buildings" were constructed in accordance with the California statutes regulating dairy industries, and that the milk cows were free from disease, while, upon the contrary, the "barn used for containing cars and barn used for feeding and containing cattle were attached to and contiguous with barn used for milking cows, and that said dairy herd was diseased." The second cause in *assumpsit* merely alleges the payment of said sum of \$1,000 with a promise on the part of defendant to repay it on demand; that demand for repayment of the money was duly made and refused. The prayer of the amended complaint merely demands judgment for the sum of \$1,000, together with interest and costs of suit.

Neither count of the complaint alleges a tender on the part of plaintiffs to perform the terms and conditions of the contract. Nor is the statute of frauds specifically pleaded.

The material allegations of the amended complaint were denied by the answer which the defendant filed. He affirmatively alleged the terms and conditions of the oral contract under which said sum of \$1,000 was paid on the purchase price of the dairy ranch and personal property; that he had fully complied with all the terms of that contract, and that he was "ready and willing to complete said deal in accordance with the terms and conditions agreed upon by plaintiffs and the defendant."

The cause was tried by the court sitting without a jury. Findings were adopted adverse to the plaintiffs on their alleged charges of fraud and misrepresentations. Judgment for money had and received by the defendant in the sum of \$1,000, together with interest and costs, was rendered on the second count in favor of the plaintiffs. On motion of the defendant a new trial was granted on insufficiency of the evidence to sustain the findings and decision. In that order the court said: "At this time [when the sum of \$1000 was paid] the parties had entered into an oral contract for the sale and purchase of defendant's dairy farm and herd; their directions to Lambert [the attorney] as to the terms and conditions were definite and certain, there was a complete meeting of their minds and—as stated—plaintiffs had paid \$1000 to bind the bargain thus made. Thereafter the vendor, defendant herein, executed the formal contract as thus agreed upon."

The order granting the new trial concludes by saying that "since defendant was at all times ready and willing to fulfill his portion of the contract, plaintiffs cannot recover the money paid thereon. * * * For the reasons stated defendant's motion for new trial must be and the same is hereby granted."

[1] The record adequately supports the conclusions of the trial court. Having determined the issues of alleged fraud against the plaintiffs, and it satisfactorily appearing that the \$1000 was paid to defendant on the purchase price of the dairy ranch and personal property in accordance with the terms and conditions of the oral contract of purchase, which the defendant was ready and willing to fulfill, we are unable to perceive how the court could have decided the motion for new trial otherwise, since plaintiffs were in default and failed to tender fulfillment of their contract. Even though it be conceded there is a conflict of evidence regarding the terms and conditions upon which the properties were agreed to be purchased, there is substantial evidence which would support a judgment in favor of the defendant. The court therefore did not abuse its discretion in granting the motion for new trial.

[2] The authorities are uniform to the effect that a trial court is invested with a broad discretion to grant or deny a motion for new trial, and that when the evidence is conflicting the order may not be disturbed on appeal where there is substantial evidence which would support a judgment in favor of the moving party. *Tweedale v. Barnett*, 172 Cal. 271, 156 P. 483; *Charles Lomori & Son v. Globe Laboratories*, 35 Cal.App.2d 248, 95 P.2d 173; 20 Cal.Jur. 31, sec. 13. In the *Tweedale* case it is said [172 Cal. 271, 156 P. 485]: "It is a rule so well understood that discussion of it seems almost superfluous, that the discretion of the court granting such a motion [for a new trial] is very broad, and the order will be upheld by the court to which an appeal is taken if it may be supported upon any of the assigned grounds. (Citing authorities) We may not disturb such an order where there was at the trial a conflict of evidence upon material issues, unless we can say that a verdict in favor of the moving party would not have found sufficient legal support in such evidence. *Empire Inv. Co. v. Mort*, 169 Cal. 732, 147 P. 960."

We may assume that if the defendant had procured plaintiffs to pay \$1,000 on the purchase price of the dairy ranch and personal property by means of fraud and misrepresentations, the transaction would be voidable and plaintiffs would be entitled to disaffirm the contract and recover judgment for that amount, on the theory that the law implies a promise to repay the money thus obtained. *Fitzhugh v. University Realty Co.*, 46 Cal.App. 198, 188 P. 1023; *McCall v. Superior Court*, 1 Cal. 2d 527, 36 P.2d 642, 95 A.L.R. 1019; 12 Cal.Jur. 785, sec. 51; 24 Am.Jur. 25, sec. 202. But in the present case the court adopted findings against the plaintiffs on the issues of fraud. The record contains evidence to support those findings. For the purpose of determining whether the court abused its discretion in granting a new trial, we may not hold as a matter of law that the defendant was guilty of the alleged fraud and misrepresentations.

[3] According to the great weight of authorities, including those found in the California jurisdiction, the vendee of real property under an oral contract which is within the statute of frauds may not recover partial payment of the purchase price which he has paid pursuant to the agreement, in the absence of fraud, while the vendor is ready, able and willing to fulfill the terms and conditions of the contract. *Laffey v. Kaufman*, 134 Cal. 391, 66 P. 471, 86 Am.St.Rep. 283; *Walbridge v. Richards*, 212 Cal. 408, 413, 298 P. 971; *Kroger v. Baur*, 46 Cal.App.2d 801, 117 P.2d 50; 12 Cal.Jur. 922, sec. 92; 2 Williston on Contracts, Rev.Ed., 1562, sec. 538; 2 Restatement of the Law of Contracts, 618, sec. 355[e]; 132 A.L.R. 1489, note; 27 Cal. Law Rev. 475. In the authority last cited it is said: "The more reasonable view seems to be that the unenforceable oral contract is a good defense to an action for the value of the services *until the contract is broken*. * * * Although the California Statute of Frauds [Sec. 1624, subdivision 4, Civil Code, and Sec. 1973, subdivision 4, Code of Civil Proc.] declares such an oral contract 'invalid,' *it is not void, but only voidable*, and is 'effective as to all the purposes for which it has been made * * * until its enforcement is voided upon the ground that it is not in writing.'" *Producers' Fruit Co. v. Goddard*, 75 Cal. App. 737, 755, 243 P. 686; *Long v. Rumsey*, 12 Cal.2d 334, 344, 84 P.2d 146; 12 Cal.Jur. 921, sec. 91. (Italics added.)

It is further said at page 475: "Where the vendee [of land] has paid part of the purchase price, the great weight of authority is that as long as the vendor is able and willing to perform, the oral contract is a good defense to an action by the vendee to recover the money paid; whether or not the vendee is in possession."

The text of 2 Williston on Contracts, supra, at page 1562, reads: "Where money has been paid by the plaintiff as the whole or part of the price under an oral contract to buy land and he then fails or refuses to perform further, recovery of the money paid is almost universally disallowed if the seller is ready and willing to convey as he orally agreed."

To the same effect it is said in 2 Restatement of the Law of Contracts, Section 355[e], at page 618: "Contracts within the Statute of Frauds are neither illegal nor void, even though the requirements for direct enforcement are not complied with. A party who is not in default and who is willing to perform is not in any sense a wrongdoer; no legal remedy is available against him, except to the extent that is indicated in section 357."

The California cases last above cited support that doctrine.

The cases of *Jackson v. Ratterree Land Co., Inc.*, 123 Cal.App. 165, 11 P.2d 8, *Ellis v. Clear Lake Beach Co.*, 124 Cal.App. 175, 12 P.2d 26, and *Carter v. Fox*, 11 Cal.App. 67, 103 P. 910, upon which the appellant relies, are not in conflict with the principle heretofore announced. In the *Jackson* case the court said [123 Cal.App. 165, 11 P.2d 9]: "The failure or refusal of the vendor to perform his part of the contract entitles the purchaser, *if not in default*, to treat the contract as at an end and to recover any money which he has paid thereon."

In that case the vendor breached his contract. He was not able and willing to convey the land according to his agreement. He failed to grade adjacent streets or install sidewalks as he promised to do. In that rescission suit the court determined that the grantor, having defaulted in the covenants of his agreement to sell the land, could not retain the purchase price since the consideration failed.

In the *Ellis* case the plaintiffs were employed by the owner of land in Lake County to sell subdivided lots therefrom in consideration of commissions consisting of "all

sums collected by them as first payments upon sales of the lots." [124 Cal.App. 175, 12 P.2d 27] Plaintiffs sold certain lots and took notes from the purchasers thereof which they credited on their earned commissions. The defendant who owned the land, however, "without the consent or concurrence of plaintiffs, carried on separate negotiations with the makers of the notes," as a result of which, as the trial court found, "The defendants retained the sum of \$856 for which the consideration had failed." The District Court of Appeal therefore affirmed the judgment for said sum of money which was rendered in favor of plaintiffs. In other words, the plaintiffs were entitled to recover commissions pursuant to the terms of their contract because the defendant retained those payments in violation of its contract.

In the Carter case, similar to the two cases last mentioned, judgment for recovery of a portion of the purchase price of land was affirmed in favor of the vendee on the following ground [11 Cal.App. 67, 103 P. 911]: "Defendant having failed and refused to convey the property within the time specified and in accordance with his covenant, and as to which covenant time was expressly made the chief factor of importance, and plaintiff not being in default, the latter had a legal right to disaffirm and insist upon the repayment of the money."

It thus appears that the vendor in the Carter case was in default and unwilling to convey the property according to the terms of his agreement, and for that reason the vendee was entitled to recover the purchase money which he had paid pursuant to the contract.

In the present case the vendor was at all times ready and willing to convey the property in strict accordance with the terms of his agreement. He was not guilty of failure to perform any covenant of the agreement. The preceding cases relied upon by the appellant therefore have no application to the facts of this case.

[4] Finally, the appellant asserts that the court erred in granting the new trial because the contract to purchase the property would not become effective until the terms and conditions were subsequently reduced to writing and signed by the parties. It is true that a written contract was subsequently prepared and executed by the

vendor in accordance with the terms and conditions orally agreed to by the parties on August 5th, which the purchaser refused to accept or sign on account of the alleged fraud. In support of the foregoing contention the appellants rely on the cases of Stoddard v. Goldenberg, 48 Cal.App.2d 319, 119 P.2d 800, and Mercantile Trust Co. v. Sunset Road Oil Co., 176 Cal. 461, 168 P. 1037. Those cases, however, may be readily distinguished from this case.

[5, 6] The rule is well established and uniformly followed that when the respective parties orally agree upon all the terms and conditions of a contract with the mutual intention that it shall thereupon become binding, the mere fact that a formal written agreement to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract. Nolte v. Southern Cal. Home Bldg. Co., 28 Cal.App.2d 532, 82 P.2d 946; Fly v. Cline, 49 Cal.App. 414, 426, 193 P. 615; 17 C.J.S., Contracts, p. 390, § 49; 122 A.L.R. 1217, note; 6 Cal.Jur. 226, sec. 149. The question as to whether an oral agreement, including all the essential terms and conditions thereof, which according to the mutual understanding of the parties is to be subsequently reduced to writing, shall take effect forthwith as a completed contract *depends on the intention of the parties*, to be determined by the surrounding facts and circumstances of a particular case. 17 C.J.S., Contracts, p. 391, § 49; 122 A.L.R. 1233, note. In the present case there is substantial evidence to support the determination of the trial judge that the terms and conditions of the oral contract agreed upon by the respective parties on August 5th, "were definite and certain; there was a complete meeting of their minds." In support of that conclusion the appellant thereafter paid respondent the sum of \$1,000 "to apply on conditional contract of sale of ranch," for which the vendor gave his written receipt, and the purchaser immediately took possession of the property.

Certainly, for the purpose of determining whether the court abused its discretion in granting a new trial we may not say as a matter of law that the oral agreement is not binding upon the parties in this suit to recover a voluntary payment of a portion of the purchase price, merely because it was agreed that a formal written contract, including the same terms and condi-

tions, would be subsequently prepared and executed.

The order granting a new trial is affirmed.

PEEK, J., and ADAMS, P. J., concur.



65 Cal.App.2d 260

COOKE v. COOKE.

Civ. 3320.

District Court of Appeal, Fourth District,
California.

July 26, 1944.

Hearing Denied Sept. 21, 1944.

1. Husband and wife ⇨49½(9)

Evidence presented question for jury as to whether defendant's decedent had made a gift of insurance policy on his life to plaintiff prior to securing divorce from her and as to whether plaintiff was thereafter owner of the policy.

2. Appeal and error ⇨994(3), 1012(1)

The weight to be given evidence and credibility of a witness are generally for trial court.

3. Husband and wife ⇨49½(3)

Generally, a husband may make a valid gift of an insurance policy on his life to his wife, and when the gift is consummated the wife becomes owner of the policy.

4. Husband and wife ⇨249

Where policy on husband's life was given to wife while couple was living in California and a portion of premiums were paid out of community property while both parties were residents of California, wife had a vested interest in the policy, independent of any gift, of which she could not be divested either by Arkansas divorce decree or by operation of Arkansas statute or by a change of the beneficiary. Civ. Code, § 161a; Crawford & Moses' Dig. Ark. §§ 3508, 3511.

5. Constitutional law ⇨278(1)

Divorce ⇨4

Where husband made valid gift of life policy to wife prior to securing divorce from her in Arkansas, and Arkansas di-

vorice decree made no mention of policy, application of Arkansas statute providing for restoration of all property not disposed of at commencement of divorce action which either party obtained from the other during the marriage would have effect of depriving wife of her property without due process of law. Crawford & Moses' Dig. Ark. §§ 3508, 3511; Const. Cal. art. 1, §§ 1, 13; U.S.C.A. Const. Amend. 14.

6. Constitutional law ⇨278(1)

The Legislature has no constitutional power to deprive a person of property by means of a legislative enactment.

7. Appeal and error ⇨117

An order refusing to terminate proceedings for preparation of the record on appeal was not appealable.

Appeals from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Marguerite K. Cooke against Dorothea Dyer Cooke, as executrix of the estate of Stephen B. Cooke, deceased, to recover proceeds of two insurance policies on the life of Stephen B. Cooke. From a judgment in favor of the plaintiff, the defendant appeals, and the plaintiff appeals from an order denying her motion to terminate the proceedings for preparation of the record on appeal.

Appeal from order dismissed, and judgment affirmed.

See also 60 Cal.App.2d 451, 140 P.2d 989.

Bertrand L. Comparet, of San Diego, and John A. Rowe, Jr., of Los Angeles, for appellant.

R. M. Switzler, of San Diego, for respondent.

MARKS, Justice.

This is an appeal from a judgment awarding plaintiff \$8517.06, and interest, and defendant \$665.77, and interest, out of money due from The Travelers Insurance Company in the principal sum of \$10,000 on the life of Stephen B. Cooke, deceased, and authorizing the company to retain the amount borrowed from it on the policy. The action also involved another policy issued by the Atlas Life Insurance Company, but no question is raised by counsel on the disposition of the proceeds from that policy made by the judgment so we will give it no further notice.

Plaintiff has also attempted to appeal from an order denying her motion to terminate the proceedings for preparation of the record on appeal. She now admits that the order is not appealable though seeking to have it reviewed as a part of the case in chief.

Plaintiff and Stephen B. Cooke were married in Honolulu on February 18, 1926. There were three children the issue of this marriage. They came to California in October, 1927, and lived in East San Diego for a time. Stephen was an officer in the United States Navy and was killed in an airplane accident on January 4, 1941.

The couple lived together as husband and wife, with various separations caused by his service in the Navy, until some time in 1937, when they separated. In 1939, Stephen returned to his native state of Arkansas and instituted an action for divorce. Marguerite appeared and contested the action which resulted in a divorce being granted to Stephen. While the decree divided certain property of the parties no disposition was made of the policies of life insurance involved in this action.

On July 29, 1939, Stephen married Dorothea Dyer and they remained husband and wife up to the time of his death, at which time they were residing in the city of Coronado. Stephen's will was admitted to probate in San Diego County and Dorothea was appointed executrix.

The Travelers Insurance Company policy was issued on October 1, 1930, naming Marguerite K. Cooke as beneficiary. The premiums were paid, but after the separation, Stephen borrowed money from the insurance company on the security of the policy.

The policy reserved to Stephen the right to change the named beneficiary. On December 11, 1937, he exercised this right and made the policy payable to his executors, administrators and assigns. The company consented to this change on December 13, 1937.

Marguerite K. Cooke testified, and the trial court found, that shortly after the issuance of the policy, Stephen made a gift of and delivered it to her with the promise between them that Marguerite should be and remain the sole beneficiary thereof; that after such absolute gift and delivery of the policy to her, and probably in 1935, Stephen obtained possession of

the policy from her upon his statement and representation that he wished to place it in a safety deposit box for safe keeping for her use and benefit. Plaintiff did not regain possession of the policy.

In this action plaintiff sought judgment for the money due under the policy and also attacked the divorce decree rendered by the Arkansas court on the ground that it had no jurisdiction because neither party was then a resident of that state. The trial court found that the Arkansas court had jurisdiction to enter the divorce decree; that plaintiff was the divorced wife of Stephen B. Cooke, and that on and after July 29, 1939, and up to the time of his death, Dorothea Dyer Cooke had been his lawful wife and was thereafter his widow. The money derived from the insurance policy was divided as already indicated. The award to defendant was based on the fact that after their marriage the premiums on the policy had been paid out of the community funds of Stephen and Dorothea Dyer Cooke.

On June 11, 1940, Stephen B. Cooke brought an action in the Superior Court of San Diego County against Marguerite K. Cooke to establish the judgment of the Arkansas court as a foreign judgment, enforceable in the courts of this state. Marguerite was personally served with summons and complaint and appeared by demurrer which was overruled. She failed to answer and her default was entered. A decree establishing the judgment of the Arkansas court as a foreign judgment of a sister state, in full force and effect, was rendered on July 19, 1940, and entered the following day. This judgment has long since become final. After the entry of this judgment, proceedings were had which resulted in changing the custody of one of the sons of Stephen and Marguerite to the father and reducing the monthly payments to be made for the support of the children. After that order was made by the Superior Court of San Diego County the Arkansas decree was modified accordingly.

The question of the jurisdiction of the Arkansas court to render the divorce decree, because of the non-residence of Stephen, was not raised in the California case brought to establish the foreign judgment, nor in any of the supplemental proceedings which resulted in a modification of that decree by both courts.

Although plaintiff has not appealed from any portion of the judgment before us for

review, her counsel has spent much time and effort in attacking that portion of it which upholds the divorce decree of the Arkansas court. He urges again that the decree is void because Stephen was not then a resident of the State of Arkansas. It should be sufficient to remark that the trial court, for obvious legal reasons, found against plaintiff on this issue and that such finding is conclusive here. We find no need to further extend this opinion with a detailed consideration of that question.

[1, 2] Defendant argues that the finding to the effect that Stephen made a gift of the policy to plaintiff, and that she thereafter was the owner of it, lacks evidentiary support. Plaintiff testified to facts supporting this finding and there were bits of evidence corroborating her. The attack on the sufficiency of this evidence is directed at her credibility as a witness chiefly as disclosed by her conduct after the purported gift was consummated. Defendant points out that she made no effort to regain possession of the policy after she had delivered it to Stephen for safe keeping, even though their relations had so deteriorated that a divorce action was pending, and that plaintiff made no public claim to ownership of the policy until after Stephen's death. This is an argument on the weight to be given plaintiff's evidence which was properly addressed to the trier of fact. He considered the argument, weighed the evidence, believed plaintiff was telling the truth and found accordingly. The weight to be given evidence and the credibility of a witness are generally questions for decision in the trial court and not on appeal.

Defendant relies on the case of *Herbert v. Lankershim*, 9 Cal.2d 409, 71 P.2d 220, as supporting her argument of the insufficiency of the evidence to support the finding. A study of the two cases discloses a marked dissimilarity in the factual situations so that the *Herbert* case cannot be controlling here but rather the more general rule that the credibility of a witness and the weight to be given her testimony are questions to be decided in the trial court and not on appeal.

Defendant next argues that, assuming a valid gift of the policy by Stephen to plaintiff, it was restored to Stephen under the divorce decree and statutes of the State of Arkansas, which statute we quote from an able opinion of the trial judge, as follows:

"In that connection my attention has been directed to an Arkansas Statute (Crawford & Moses, Code of 1921, Section 3511) which in part provides that:

"In every final judgment for divorce from the bonds of matrimony granted to the husband, an order shall be made that each party be restored to all property not disposed of at the commencement of the action, which either party obtained from or through the other during the marriage and in consideration or by reason thereof
* * *."

"An earlier section (3508) is to the effect that:

"When a decree shall be entered, the court shall make such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable."

[3] It is admitted by both parties that, generally speaking, a husband may make a valid gift of an insurance policy on his life to his wife, and that when the gift is consummated the wife becomes the owner of the policy.

[4] The factual situation other than that already outlined seems to be this: The policy was obtained in 1930 after the effective date of section 161a of the Civil Code, and a considerable part of the premiums were paid from the community income so the wife had a vested community interest in a portion of the policy which could not be taken from her without her consent. *Union Mutual Life Ins. Co. v. Broderick*, 196 Cal. 497, 238 P. 1034; *McEwen v. New York Life Ins. Co.*, 42 Cal.App. 133, 183 P. 373; *Lo Presti v. Manning*, 125 Cal.App. 442, 13 P.2d 1002. It should follow that plaintiff had a vested interest in that portion of the insurance purchased by community funds and that this interest was not "obtained from or through the other during the marriage and in consideration or by reason thereof" but by purchase from community funds. Thus at least, as to the portion of the policy purchased with the earnings of the husband while the couple were residing in California, if not elsewhere, the Arkansas statute could not be effective as that interest vested under the California statute and not through any gift from Stephen.

The complaint filed by Stephen in the Arkansas court contained no allegation as to property except the allegation that

Stephen's sole income was his Navy pay and the allegation "that he also keeps in force a substantial amount of insurance for the protection of the defendant and said minor children". The answer filed by Marguerite merely alleged that she had no income other than that given her by Stephen and that she had no finances with which to defend the case. Thus no issue was presented by the pleadings as to the insurance involved here. The findings and judgment are silent on the question of insurance although the court did divide certain property and provide for the custody and support of the children as well as for the support of Marguerite.

In considering the effect of the Arkansas statute on the insurance policy involved here, we must bear in mind that in the instant case the trial court found that there was a valid and binding gift of the policy by Stephen to Marguerite, which finding we have concluded is supported by the evidence. This, coupled with the further fact that the Arkansas court did not award the policy or any interest in it to Stephen, compels defendant to rely on the Arkansas statute as the sole support of her claim that on the rendition of the divorce plaintiff was divested of her vested property interest in the insurance and that it was ipso facto restored to Stephen as his property.

The Arkansas statute was taken from the statutes of Kentucky (Taylor v. Taylor, 153 Ark. 206, 240 S.W. 6), and the Arkansas courts have held that the interpretation placed on it by the Kentucky courts should be followed in Arkansas. Morgan Utilities, Inc., v. Perry County, 183 Ark. 542, 37 S.W.2d 74. Thus we should examine the Kentucky statute and its interpretation by the courts of that state which are much more numerous than those of Arkansas.

Kentucky has two statutes bearing on this subject. Sec. 425, Civil Code of Practice; Section 2121, Ky.Stats. While not identical in language they have been held to be identical in meaning (Sea v. Conrad, 155 Ky. 51, 159 S.W. 622, 47 L.R.A., N.S., 1074, Ann.Cas.1915C, 318) so it will be sufficient to quote section 425 of the Civil Code of Practice of Kentucky which provides as follows:

"Every judgment for a divorce from the bond of matrimony shall contain an order restoring any property not disposed of at the commencement of the action, which either party may have obtained, directly or

indirectly, from or through the other, during marriage, in consideration or by reason thereof; and any property so obtained, without valuable consideration, shall be deemed to have been obtained by reason of marriage. The proceedings to enforce this order may be by petition of either party, specifying the property which the other has failed to restore; and the court may hear and determine the same in a summary manner, after ten days' notice to the party so failing."

While the statutes of Arkansas and Kentucky are not identical, the important difference in them as affecting this case is found in the final sentence of the Kentucky statute which permits the summary restoration of property either in or independent of the divorce action. No such provision appears in the Arkansas statutes which have been cited to us.

Defendant maintains that the Arkansas statute is not only mandatory but self-executing. No Arkansas case is cited which supports this argument, but this seems to be the established law in Kentucky, with two exceptions. See, Sea v. Conrad, supra; Hanks v. Hanks, 282 Ky. 236, 138 S.W.2d 362; Schauburger v. Morel's Adm'r, 168 Ky. 368, 182 S.W. 198, Ann.Cas.1917C, 265; Eversole v. Eversole's Adm'r, 169 Ky. 234, 183 S.W. 494; Hawkins v. Northern C. & C. Co., 145 Ky. 118, 140 S.W. 48; Asher v. Asher, 252 Ky. 664, 68 S.W.2d 32; Meyer v. Meyer, 226 Ky. 278, 10 S.W.2d 844; Walden v. Walden, 250 Ky. 379, 63 S.W.2d 290.

The first exception to the foregoing rule is that when the wife has during coverture contributed anything towards the purchase of the property she is entitled to the return of her contribution. Schauburger v. Morel's Adm'r, supra; Eversole v. Eversole's Adm'r, supra.

The second exception is set forth in the case of Guthrie's Ex'r v. Guthrie, 155 Ky. 146, 159 S.W. 710, 711. This case arose over a controversy between the executor of the estate of James M. Guthrie, deceased, and Mary B. Guthrie, his divorced wife, as to which one was entitled to payment of \$1000 insurance under a policy taken on the life of James M. Guthrie while he and Mary B. Guthrie were husband and wife and were residents of Kentucky. Mary B. Guthrie was named as beneficiary in the policy. After the issuance of the policy the couple moved to Illinois where Mary B. Guthrie secured a divorce from James

M. Guthrie. The parties returned to Kentucky after the divorce and became residents of that state, James dying there. The Kentucky courts awarded the money to Mary, the divorced wife, the Court of Appeals of Kentucky summarizing its reasons for its decision as follows:

"The appellants, however, insist that the divorce granted by the circuit court of Cook county, Ill., and which admittedly had jurisdiction of the parties, like a Kentucky divorce decree, of itself operates to bar the right of the divorced wife, and is one of the conditions that divest her of any interest in the policy of insurance; that is, the Illinois decree should have the same effect as a divorce granted in Kentucky. The difficulty is that appellant makes no allegation that there are, or were in force at the time of the divorce in Illinois, any laws of similar import to the Kentucky Statute and Code above referred to.

"Since the Illinois court had jurisdiction of the parties and the subject-matter, and the record not disclosing that it was the duty of that court under the laws of Illinois to restore any property obtained through the other during marriage, or in consideration, or by reason thereof, and in view of the further fact that James M. Guthrie never attempted to change the beneficiary named in the policy, we are constrained to hold that Mary B. Guthrie named as beneficiary is entitled to the proceeds."

The policy of insurance in the instant case was taken out while the parties were residents either of Hawaii or California. The policy was given to plaintiff while the couple was living in California and a portion of the premiums were paid out of community property while both parties were residents of California. Thus plaintiff had a vested interest in the policy, independent of any gift, of which she could not be divested either by the divorce decree or by operation of the statute under the Kentucky cases already cited as well as under established California law. It would also appear that under these circumstances she could not be divested of her community interest in the policy by a change of the beneficiary (*Travelers' Ins. Co. v. Fancher*, 219 Cal. 351, 26 P.2d 482) and should be entitled to at least a proportionate amount of the proceeds of the policy paid for with community funds. *Modern Woodmen of America v. Gray*, 113 Cal.App. 729, 299 P. 754.

[5, 6] Further, the application of the Arkansas statute to the facts of this case would have the effect of depriving plaintiff, without due process of law, of property vested in her by a prior valid gift (Fourteenth Amendment U.S.Const.; Section 13, Art. I, Cal.Const.) and would deprive her of property without her consent and without compensation. Sec. 1, Art. I, Cal.Const. It has been repeatedly and consistently held by the California courts that the legislature has no constitutional power to deprive a person of property by means of a legislative enactment. This principle is so firmly established that we need consider but few of those cases.

In *George v. Ransom*, 15 Cal. 322, 76 Am.Dec. 490, the court had before it a statute which provided in effect that the rents and profits of the separate property of either spouse should be deemed common property. This was held unconstitutional, the court saying: "We think the Legislature has not the Constitutional power to say that the fruits of the property of the wife shall be taken from her, and given to the husband or his creditors."

The same principle was involved in the case of *Spreckels v. Spreckels*, 116 Cal. 339, 48 P. 228, 36 L.R.A. 497, 58 Am.St.Rep. 170. Prior to the amendment of section 172 of the Civil Code (Stats.1891, p. 425) a husband had the management and control of community property with absolute power of disposition, other than testamentary, as he had of his own estate. The amendment prohibited him from giving away community property or conveying it without consideration without the written consent of his wife.

After the effective date of the amendment, Claus Spreckels, voluntarily and without consideration and without the consent of his wife, gave Rudolph Spreckels corporate stock which, it was assumed, had been acquired prior to the effective date of the amendment. The court held that the amended statute could not deprive the husband of the right to give away community property acquired prior to its effective date because it would deprive the husband of a vested right in the property which the legislature could not take away by statute.

The legislature amended the first paragraph of section 164 of the Civil Code (Stats.1923, p. 746) to read as follows:

"All other property acquired after marriage by either husband or wife, or both,

including real property situated in this state, and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state, is community property."

The constitutionality of the amendment was before the court in *Re Estate of Thornton*, 1 Cal.2d 1, 33 P.2d 1, 3, 92 A.L.R. 1343. The property had been acquired by William M. Thornton and his wife while they were residents of Montana and under the laws of that state was the separate property of the husband subject to the wife's right of dower. The couple moved to and became residents of California bringing their earnings with them. William M. Thornton died and his widow petitioned for distribution of one half of the property to her on the theory that it had been converted into community property by the provisions of the statute when it was brought into California. The Supreme Court held the provisions of the Code section unconstitutional as applied to the facts of that case, saying:

"So long as we are bound by the holding that to limit the right of one spouse by increasing the right of the other in property acquired by their united labors is the disturbance of a vested right, we entertain no doubt of the application of at least two provisions of the 14th amendment to the Constitution of the United States. If the right of a husband, a citizen of California, as to his separate property, is a vested one and may not be impaired or taken by California law, then to disturb in the same manner the same property right of a citizen of another state, who chances to transfer his domicile to this state, bringing his property with him, is clearly to abridge the privileges and immunities of the citizen. Again, to take the property of A and transfer it to B because of his citizenship and domicile, is also to take his property without due process of law. This is true regardless of the place of acquisition or the state of his residence.

"The doctrine that a change of domicile to this state, accompanied by an importation of the personality is an implied consent to a submission to requirements of this statute, cannot be sustained, for to do so would be to give effect to a restriction prohibited by the Constitution. *Frost v. Railroad Comm.*, 197 Cal. 230, 240 P. 26;

Hartford Acc., etc., Co. v. Delta & Pine Land Co., 292 U.S. 143, 54 S.Ct. 634, 78 L.Ed. 1178, 92 A.L.R. 928, decided by Supreme Court of the United States, April 9, 1934."

The following cases are to the same effect: *In re Estate of Perkins*, 21 Cal.2d 561, 134 P.2d 231; *Boyd v. Oser*, 23 Cal. 2d 613, 145 P.2d 312; *In re Estate of Bruggemeyer*, 115 Cal.App. 525, 2 P.2d 534; *Melvin v. Carl*, 118 Cal.App. 249, 4 P.2d 954; *Scott v. Remley*, 119 Cal.App. 384, 6 P.2d 536. Thus it seems to be thoroughly settled that a legislative act of itself cannot deprive a person of vested property and that a person cannot be divested of property without due process of law.

Defendant has filed a supplemental brief in response to the constitutional questions just considered which were raised by the court during the oral argument. She argues that the division of property in a divorce action is incidental to the power to dissolve the marriage and is drawn from statutes; that where the statutes permit, separate property of the husband may be awarded the wife; that in such cases, where the separate property of one person has been awarded to the other in a divorce decree, the requirements of due process have been met. She cites many cases which support this argument.

We may assume the correctness of those decisions under the statutes of the various states where the causes of action arose but fail to understand their applicability to the case before us.

As we have pointed out there has been no judgment of any court restoring the insurance policy to Stephen B. Cooke. It was not made an issue in the pleadings in the Arkansas divorce action and was not mentioned in the decree. As we have said before, the claim of defendant to the proceeds from the policy rests on the Arkansas statute and nothing else. The policy had been given to plaintiff long before the divorce and continued to be her property. She had a vested property right in it and to disturb that property right by statute alone would be a violation of the Fourteenth Amendment to the Federal Constitution, and section 13 of Article I of the State Constitution, as well as of section 1 of Article I of the latter. This is thoroughly established by the cases already cited.

[7] As we have decided the case on its merits and must affirm the judgment we need not lengthen the opinion by considering the question of the correctness of the order refusing to terminate the proceedings for the preparation of the record on appeal. As such an order is admittedly not appealable the attempted appeal from it must be dismissed.

The appeal from the order refusing to terminate the proceedings for the preparation of a record on appeal is dismissed.

The judgment is affirmed.

BARNARD, P.J., and GRIFFIN, J., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.



POLK v. CITY OF LOS ANGELES et al.*
Civ. 14296.

District Court of Appeal, Second District,
Division 3, California.

Aug. 1, 1944.

Hearing Granted Sept. 28, 1944.

1. Electricity ⚡19(3)

A tree surgeon, injured by contact of pruner with worn space on wires among trees, could not recover from municipality maintaining wires without showing duty to maintain power lines in insulated and reasonably safe condition, failure to perform that duty, and resulting injuries.

2. Electricity ⚡13

An electric utility is not an insurer of public's safety.

3. Electricity ⚡16(2)

Wires of an electric utility are not required to be insulated everywhere.

4. Electricity ⚡14(1)

The standard to be attained by electric utility is "ordinary and reasonable care", meaning care which a reasonably careful and prudent person having in view the dangers to be avoided and the likelihood of injury therefrom would exercise, under circumstances, to prevent injury.

See Words and Phrases, Permanent Edition, for all other definitions of "Ordinary and Reasonable Care".

5. Electricity ⚡16(2)

A municipality which placed electric wires 42½ feet above ground among trees on private estate adjacent to highway could have anticipated danger to tree surgeon in trimming trees, and hence could be liable for injuries resulting from permitting insulation to wear.

6. Evidence ⚡13

It is common knowledge that ornamental trees on private estate adjacent to highway must be trimmed and have dead limbs removed from time to time.

7. Electricity ⚡19(7)

Whether municipality was negligent in permitting insulation on wires among trees adjoining highway to become worn, resulting in injury to tree surgeon, was for jury.

8. Electricity ⚡19(12)

Where tree surgeon inspected wires before starting to trim trees, and they seemed well insulated, he was not guilty of contributory negligence as matter of law in failing to use insulated pruner, rubber gloves, or other device to prevent shock which resulted when pruner touched uninsulated portion of wire.

9. Electricity ⚡18(2)

A tree surgeon could assume, within reasonable limits, from location and insulation of wires among trees adjoining highway, that they would be carefully inspected as often as reasonably necessary, and that worn or deteriorated portions of insulation would be promptly repaired.

10. Appeal and error ⚡996

To establish contributory negligence as against verdict of jury, evidence must enable appellate court to say that there is no substantial conflict on the facts, and that from the facts reasonable men can draw but one inference, which points unerringly to negligence of plaintiff proximately contributing to his injury.

11. Electricity ⚡19(12)

Whether tree surgeon was guilty of contributory negligence in not observing exposed place on wire among trees adjoining highway was for jury.

* Subsequent opinion 159 P.2d 931.

12. Electricity ⇨19(13)

In action against municipality and its water and power department for injuries suffered by tree surgeon from electric shock, instructions that plaintiffs were subject to general order of California Railroad Commission dealing with overhead power line construction and maintenance was erroneous.

13. Public service commissions ⇨6

The California Railroad Commission has no jurisdiction to regulate and supervise municipally owned public utilities.

14. Trial ⇨243

An instruction that not any degree of negligence, however slight, which directly concurred in producing the injury, will prevent recovery, but if plaintiff's negligence shall contribute proximately, in any degree, to the injury, it will prevent recovery, was improper as contradictory.

15. Negligence ⇨141(8)

That portion of instruction which stated that if plaintiff's negligence shall contribute proximately, in any degree, to injury, it will prevent recovery, was improper.

16. Negligence ⇨119(3)

The defense of unavoidable accident need not be affirmatively alleged, but is put in issue by defendant's denial of plaintiff's allegations of negligence.

17. Negligence ⇨121(5)

Defendant does not have burden of proving unavoidable accident.

18. Electricity ⇨19(13)

In action for injuries resulting from electric shock, instruction that unavoidable accident was an affirmative defense, and that defendants had burden of proving it, was erroneous.

19. Trial ⇨295(1)

All instructions must be read together and considered as a whole.

20. Trial ⇨296(1)

If a single instruction omits an essential element of the cause, but is correct so far as it goes, and omitted element is correctly given in another instruction, the omission will ordinarily be cured.

21. Trial ⇨296(1)

An erroneous instruction is not cured by correct instructions, where the effect is

simply to produce a clear conflict in instructions and it is impossible to know which instruction jury followed.

22. Trial ⇨296(7)

Error in instructing that defendants had burden of proving unavoidable accident was not cured by correct instruction on contributory negligence and plaintiff's burden of proving proximate cause of injury.

23. Electricity ⇨19(13)

In action by tree surgeon for injuries resulting from contact of pruner with bare place in wire among trees adjoining highway, instruction that plaintiff had right to assume that wires were insulated throughout the trees, and not bound to discover defects in insulation, stated a correct general principle, but should be modified so as to leave extent of plaintiff's reliance to jury.

24. Negligence ⇨68

The right to rely upon due care by another is not absolute, but must yield to realities, in that, if plaintiff observes a violation of duty which imperils him, he must be vigilant in attempting to avoid injury.

25. Negligence ⇨68

Assuming that another will exercise care is not consistent with due care for one's own safety, when relying upon it means ignoring a condition openly fraught with peril.

26. Electricity ⇨18(2)

A tree surgeon, who was unable to see wires at certain places in trees adjoining highway before beginning work, and had seen high-voltage sign and knew that wires were more likely to be worn where foliage was heaviest, could not blindly assume that he was safe.

27. Negligence ⇨68

One may not rely upon assumption that others will not breach duty to avoid injuring him where, under similar circumstances, an ordinarily prudent person would not do so.

28. Negligence ⇨136(26)

Whether reasonable care is used under circumstances in relying upon presumption that another will exercise care is for jury.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Earl H. Polk against the City of Los Angeles and another for injuries resulting from electric shock. From a judgment on a verdict for plaintiff, defendants appeal.

Reversed.

Ray L. Chesebro, City Atty., S. B. Robinson, Chief Asst. City Atty., and Everard L. McMurrin, Deputy City Atty., all of Los Angeles, for appellants.

Samuel A. Rosenthal and Burton B. Crane, both of Los Angeles, for respondent.

FOX, Justice pro tem.

This is an appeal by the defendants, The City of Los Angeles and its Department of Water and Power, from a judgment in the sum of \$20,000, entered upon the verdict of the jury in favor of the plaintiff.

The action was brought to recover damages for personal injuries sustained by respondent. The contentions of appellants may be divided into three groups: (1) That respondent failed to prove any actionable negligence on the part of the appellants; (2) that the evidence shows that respondent was guilty of contributory negligence as a matter of law; and (3) that the trial court committed prejudicial error in instructing the jury.

Appellants, as a part of their business of selling and distributing electricity, erected and maintained power lines along and above the northerly side of Rancho Street which is located in the San Fernando Valley section of the City of Los Angeles. The lines were immediately adjacent to a private estate and were supported by eight-foot cross-arms located near the top of wooden poles, and carried 4800 volts of electricity. The lines were about $\frac{3}{4}$ of an inch in diameter, and consisted of No. 6 gauge copper wire insulated with about a quarter of an inch of rubber, about a sixteenth of an inch of fiber, and a wrapping of cloth covered with tar or black paint. They were strung at a height of approximately 42½ feet above the ground and ran through a row of six eucalyptus trees which were rooted on the private estate. Many of their branches, however, extended beyond the property line and over the highway. These trees were from sixty to seventy feet in height and stood six to ten feet apart. On March 28, 1942, the owner of the estate

employed respondent to top and trim these trees. Respondent's tree-trimming equipment consisted of an extension ladder of two units, each twenty feet long, ropes, two pruning hooks that were eight feet two inches and twelve feet two inches long, respectively, and a saw. When injured, respondent was using the longer pruner. It consisted of a wooden pole, about one inch square, with a steel hook riveted to the upper end of the pole, and a steel blade that operated within this hook. A steel wire, about $\frac{1}{8}$ of an inch in diameter, extended from the blade to a steel lever about six inches in length which was fastened to the bottom of the pole. One end of a coil spring was attached to the lever, and the other end to the pole. The blade at the top of the pruning hook was opened and closed by manipulating the lever. The metal on the pruner was not insulated. At the time of the accident on March 29, 1942, respondent had already trimmed five of the trees, topped the sixth and cut out the dead limbs and thinned out the excess live branches down to a point where he was standing on the ladder between twenty-five and thirty feet from the ground. He was attempting to trim the outer edge of a branch about midway between trees No. 5 and No. 6. He held the bottom end of the pruner with his right hand, and operated the lever with his left. His right foot was on the ladder, which was leaning against tree No. 6, and his left leg was around the tree. He was leaning out from the ladder, fully extending the pruning hook from him. While in this position, respondent contacted one of the electric wires and was injured.

Respondent was an experienced tree-trimmer and tree surgeon, having been engaged in that line of work for a number of years, both in southern California and elsewhere. He had had considerable experience in trimming trees near high voltage wires. He saw a "High Voltage" sign posted on the cross-arm of a pole and knew it was a warning of danger. Respondent examined the wires running through the trees when he contracted for the work, again just before starting to trim the trees, and finally from each tree as the work progressed. The first and second inspections were made from the ground. These disclosed that the wires "were well insulated," that they were "covered wires," and he "could see no breakage" in the covering. However, respondent could not

see the wires at some places where the foliage was heavy. Likewise, there was some interference from the foliage with his inspection of the wires while working in the trees, but as far as he could see the wires were well covered. Actually, however, there was a bare or worn space of approximately three feet in length about midway between trees No. 5 and No. 6.

[1] Respondent bases his right to recover upon the theory that it was the duty of appellants, in the exercise of reasonable and ordinary care, to keep and maintain their power lines through this row of eucalyptus trees in an insulated and reasonably safe condition so that they would not endanger the safety of persons employed by the owner of said trees to work upon, in or among them; that appellants negligently failed to perform that duty; and that injury to respondent resulted from the failure to perform such duty. Respondent cannot recover unless he can sustain these propositions. *Minter v. San Diego Consol. Gas, etc., Co.*, 1919, 180 Cal. 723, 182 P. 749; *Monroe v. San Joaquin L. & P. Corp.*, 1941, 42 Cal.App.2d 641, 647, 109 P.2d 720.

[2-6] Appellants, however, attack the very foundation of respondent's argument by insisting that they violated no duty owed respondent. It is true, as appellants point out, that an electric utility is not an insurer of the safety of the public (29 C.J.S., *Electricity*, § 38, p. 573; *Hayden v. Paramount Productions, Inc.*, 1939, 33 Cal.App. 2d 287, 293, 91 P.2d 231), and that the law does not require its wires to be insulated everywhere. *Anderson v. Southern Cal. Edison Co.*, 1926, 77 Cal.App. 328, 337, 246 P. 559. "The standard to be attained is that of ordinary and reasonable care, and this means such care as a reasonably careful and prudent person, having in view the dangers to be avoided and the likelihood of injury therefrom, would exercise, under the circumstances, in order to prevent injury." *Fairbairn v. American River Electric Co.*, 1915, 170 Cal. 115, 118, 148 P. 788, 789; *McCormick v. Great Western Power Co.*, 1932, 214 Cal. 658, 663, 8 P.2d 145, 81 A.L. R. 678; *Irelan-Yuba, etc., Min. Co. v. Pacific G. & E. Co.*, 1941, 18 Cal.2d 557, 564, 116 P.2d 611. Appellants take the position that they have met this standard of care by placing their wires some 42½ feet above the ground. The soundness of this position must be tested by the proposi-

tion as to whether or not they could reasonably have anticipated the danger. *Fairbairn v. American River Electric Co.*, supra; *McCormick v. Great Western Power Co.*, supra; *Hauser v. Pac. Gas & Elec. Co.*, 1933, 133 Cal.App. 222, 226, 23 P.2d 1068; *Irelan-Yuba, etc., Min. Co. v. Pacific G. & E. Co.*, supra; *Monroe v. San Joaquin L. & P. Corp.*, supra. In our opinion, appellants could reasonably have anticipated the danger. Since the row of eucalyptus trees was on a private estate immediately adjacent to a public highway, it is apparent that they were being maintained for ornamental purposes as well as, perhaps, for other purposes. It is a matter of common knowledge that such trees so located must from time to time be trimmed and have the dead limbs removed. This is necessary to enhance their aesthetic appearance and to protect the traveling public from possible injury from falling branches that might be blown off such trees during a high wind. It was therefore to be anticipated that the owner of the estate would have occasion to send someone, as he did respondent, into these trees to perform for him the very service that respondent was performing when he was injured. Particularly applicable then on the question of the appellants' breach of duty is the statement of the Supreme Court in *Minter v. San Diego Consol. Gas, etc., Co.*, supra, 180 Cal. p. 726, 182 P. 749, 750 quoted with approval in *Irelan-Yuba, etc., Min. Co. v. Pacific G. & E. Co.*, supra, 18 Cal.2d pages 564, 565, 116 P.2d 611, that: "If, guided by those considerations which ordinarily regulate the conduct of human affairs, an ordinarily prudent person would have had reasonable ground to suspect that the wires so placed would cause injury, the plaintiff can be said to have proved a breach of duty. And if reasonable men might fairly differ as to the answer to this question, the verdict for the plaintiff should not be disturbed."

[7] This phase of the problem is further complicated from appellants' point of view by the fact that the wires had been, and appeared to respondent to be, insulated. Appellants knew that there were pretty brisk winds in that particular section in March, April and May—sufficiently strong to make these eucalyptus trees sway as much as from three to six feet at the approximate height where the electric line passed through them—and that the swaying of the trees caused the insulation to

deteriorate and wear off. Appellants had this line inspected only every six months—the last time prior to respondent's injury being in the previous October. The purpose of these inspections was to insure continuous service. If the covering on a particular wire was worn or bare in one or more places it was neither repaired nor reported because the service was in no way affected thereby. However, if different wires were worn or bare at places that were opposite each other, a report thereof was made because contact between two such spots might burn down the line. Since appellants could reasonably have anticipated the presence of persons lawfully in the pursuit of their business in these trees the jury might well have concluded that appellants' practice regarding inspection and repairs of said lines constituted a breach of the duty owed respondent. Support for this proposition is found in *Tackett v. Henderson Bros. Co.*, 1910, 12 Cal.App. 658, 663, 108 P. 151, 153, where, quoting from *Bourke v. Butte Electric & Power Co.*, 33 Mont. 267, 83 P. 470, the court said: "The owner or operator of an electric plant is bound to exercise a reasonable degree of care in erecting pole lines, selecting appliances, insulating the wires wherever people have a right to go and are liable to come in contact with them, and in maintaining a system of inspection by which any change which has occurred in the physical conditions surrounding the plant, poles, or lines of wire, which would tend to create or increase the danger to persons lawfully in pursuit of their business or pleasure, may be reasonably discovered." To the same effect see, also, *Foley v. Northern Cal. Power Co.*, 1910, 14 Cal. App. 401, 406, 112 P. 467, and *Roberts v. Pac. Gas & Elec. Co.*, 1929, 102 Cal.App. 422, 431, 283 P. 353.

[8,9] Appellants' contention that respondent was guilty of contributory negligence as a matter of law is not well founded. The first part of this argument is based on the proposition that respondent should have used an insulated pruner, rubber gloves, or some other protective device. The answer to this proposition is that upon respondent's inspection of the wires, when he started the work, they appeared to be "well insulated." Furthermore, respondent had the right to assume, within reasonable limits, from the location of these wires and the fact that they appeared to be in-

sulated that they would be carefully inspected as often as reasonably necessary and that any worn or deteriorated portions of the insulation would be properly and promptly repaired. He could not be expected to know that inspection and repair of the lines was for the sole purpose of maintaining continuity of service. Under such circumstances it cannot be said that respondent was guilty of contributory negligence as a matter of law in using the type of pruner that he used in trimming the trees.

[10,11] Appellants also argue that respondent was guilty of contributory negligence as a matter of law in his failure to observe the bare or exposed place on the wire between trees No. 5 and No. 6. "To establish the defense of contributory negligence as against the verdict of a jury, the evidence must be such that the appellate court can say that there is no substantial conflict on the facts, and that from the facts reasonable men can draw but one inference, which inference points unerringly to the negligence of the plaintiff proximately contributing to his own injury." *Crawford v. Southern Pacific Co.*, 1935, 3 Cal.2d 427, 45 P.2d 183, 184; *Bellon v. Silver Gate Theatres, Inc.*, 1935, 4 Cal.2d 1, 47 P.2d 462; *Cooper v. So. Pac. Co.*, 1941, 43 Cal.App.2d 693, 111 P.2d 689; *Matteoni v. Pac. Gas & Elec. Co.*, 1942, 53 Cal.App. 2d 260, 127 P.2d 574; *Demmon v. Smith*, 1943, 58 Cal.App.2d 425, 136 P.2d 660. Whether or not in view of the interference of the foliage and the other circumstances here disclosed the respondent was guilty of contributory negligence in not observing the bare or exposed place on this wire was clearly a question of fact for the jury. *McCormick v. Great Western Power Co.*, 1933, 134 Cal.App. 705, 26 P.2d 322; *Kerstens v. Pacific Gas & Elec. Co.*, 1935, 3 Cal.App. 2d 489, 39 P.2d 469.

[12,13] Appellants contend that the court erred in giving instructions Nos. 11, 11a, and 11b. This contention is sound. These instructions advised the jury that appellants were subject to General Order No. 64-A of the California Railroad Commission, which deals with overhead power line construction and maintenance. It was error to give these instructions, because the California Railroad Commission has no jurisdiction to regulate and supervise municipally owned public utilities, and therefore General Order No. 64-A has no

application to the case. The principle that such public utilities are not within the jurisdiction of the Railroad Commission was first announced by our Supreme Court in *City of Pasadena v. Railroad Comm.*, 1920, 183 Cal. 526, 192 P. 25. This principle has been adhered to in subsequent cases. See *Los Angeles Gas & Elect. Corp. v. Dept. of Public Service*, 1921, 52 Cal. App. 27, 197 P. 962; *Jochimsen v. City of Los Angeles*, 1921, 54 Cal.App. 715, 202 P. 902; *Water Users', etc., Ass'n v. Railroad Comm.*, 1922, 188 Cal. 437, 205 P. 682.

Since appellants were not subject to the jurisdiction of the Railroad Commission, it was prejudicial error to give these instructions because the jury was in effect told that any failure by appellants to maintain their electric lines in conformity with the rules embodied in General Order No. 64-A constituted negligence. This, of course, is not true, because "if the rules of the Railroad Commission were held to establish as a matter of law the measure of ordinary care, it would do away with the principle that negligence is a question for the jury to determine from the facts in the particular case." *Winkie v. Turlock Irr. Dist.*, 1937, 24 Cal.App.2d 1, 5, 74 P.2d 302, 305; see also *Langazo v. San Joaquin L. & P. Corp.*, 1939, 32 Cal.App.2d 678, 684, 90 P.2d 825.

[14, 15] Appellants complain that the court erred in giving instruction No. 23. That instruction reads as follows: "Applicable to the defense of contributory negligence, the rule is not that any degree of negligence, however slight, on the part of plaintiff, which directly concurs in producing the injury, will prevent his right to recover, but the rule is that if the negligence of the plaintiff amounting to the absence of ordinary care exercised by an ordinarily prudent person shall contribute proximately, in any degree, to the injury, it will prevent his right to recover." When considered by itself, this instruction is plainly contradictory. In a single sentence the rule of contributory negligence is first denied and then affirmed. Obviously, both statements cannot be correct. In fact, the negative statement as an instruction is untenable and directly conflicts with the declared law of this state. 19 Cal.Jur., sec. 74, p. 644.

[16-18] The court also erred in instructing the jury on the question of unavoidable accident. In instruction No. 24 the jury

was told that: "This is an affirmative defense and the burden of proving it rests entirely upon the defendants, who allege the same." This defense does not need to be affirmatively alleged. It is put in issue by the defendants' denial of plaintiff's allegations of negligence. "The law," says the court in *Sitkei v. Ralphs Grocery Co.*, 1938, 25 Cal.App.2d 294, at page 297, 77 P. 2d 311, at page 313, "is settled that under a general denial by defendant of a general allegation of negligence defendant may rely upon the defense of unavoidable accident and does not waive such defense by failing to specifically plead it * * *." That the burden of proving unavoidable accident does not rest upon the defendant is logically demonstrated in *Jolley v. Clemens*, 1938, 28 Cal.App.2d 55, 82 P.2d 51. At page 72 of 28 Cal.App.2d, at page 61 of 82 P.2d, the court said: "The dominating consideration in dealing with the whole subject of inevitable accident, as we see the matter, is the elementary requirement that before a plaintiff can recover he must make out his case by the preponderance of all the evidence before the court or jury regardless of the stage of the case at which it may have appeared or the particular party who introduced it. To do this in a negligence case he must show that the defendant was negligent and the negligence was the proximate cause of the injury complained of. But if the accident was inevitable or unavoidable that is the same thing as to say that the defendant was not negligent, or that his negligence, if any, did not cause the accident. In other words, it is to say that the plaintiff has failed in his proof." It was therefore plainly error to give the jury the above quoted portion of instruction No. 24.

[19-22] It should be pointed out, however, with respect to both instructions No. 23 and No. 24, that the jury was elsewhere in the instructions correctly advised on the question of contributory negligence and that the burden rested upon the plaintiff to prove that the negligence of the defendants was a proximate cause of his injury. The rule, of course, is that all instructions must be read together, and considered as a whole. *Gaster v. Hinkley*, 1927, 85 Cal.App. 55, 258 P. 988. "If a single instruction omits an essential element of the cause, but is a correct declaration of the law so far as it goes, and the omitted element is correctly given in another instruction, the omission

will ordinarily be cured thereby." *Soda v. Marriott*, 1931, 118 Cal.App. 635, 643, 5 P.2d 675, 678; *Ferguson v. Nakahara*, 1941, 43 Cal.App.2d 435, 442, 110 P.2d 1091. But, "It has been frequently held that the giving of an erroneous instruction is not cured by the giving of other correct instructions, where the effect is simply to produce a clear conflict in the instructions and it is not possible to know which instruction was followed by the jury in arriving at a verdict." *Akers v. Cowan*, 1938, 26 Cal.App.2d 694, 699, 80 P.2d 143, 145. See, also, *Rathbun v. White*, 1910, 157 Cal. 248, 253, 107 P. 309; *Pierce v. United Gas & Electric Co.*, 1911, 161 Cal. 176, 185, 118 P. 700; *Starr v. Los Angeles Ry. Corp.*, 1921, 187 Cal. 270, 280, 201 P. 599. In our opinion it is this latter rule that should govern in this case.

[23-28] Appellants also complain about instruction No. 27. It reads, as follows: "If you believe from the evidence that plaintiff, before undertaking to perform his work of trimming the trees on the property of Norman Levin, exercised reasonable and ordinary care as a reasonable and prudent person in observing defendants' electric wire strung through the said trees, and that in so making his observations of said wires they appeared to him insulated and in a reasonably safe condition so as to permit him to trim said trees without danger of an electric shock to his person, plaintiff was entitled to assume, and act upon this assumption, that defendants' wires were insulated throughout said trees, and he was not imposed with the duty to seek out concealed and hidden defects, if any, in the insulation of said wires, and he cannot be charged with negligence in failing to do so." The principle there stated is in general correct, but "the right to rely upon the performance by another of the duty to use due care is not absolute. The assumption that another will exercise due care must yield to the realities of the situation to the extent that if the plaintiff observes a violation of duty which imperils him, he must be vigilant in attempting to avoid injury to himself. The assumption is not consistent with the exercise of due care for one's own safety, where relying upon it means ignoring a condition which is openly fraught

with peril to the person. One may be guilty of contributory negligence in failing to anticipate and act upon the contingency of another's negligence." 38 Am.Jur., sec. 192, p. 873. Here, respondent had seen the "High Voltage" sign and knew that it was a warning of danger, and knew that a contact between a worn or bare place on one of the wires with the metal on his pruner would likely result in serious injury. Respondent had worked in and about these trees some seven hours on the day he was injured and had had an opportunity to observe the wires at close range from positions of vantage in each of these trees. His opportunity to observe the condition of the wires was constantly improved by the removal of dead limbs and the thinning out of those that had foliage on them. Also, he had the opportunity of seeing the wires from different angles and elevations. Respondent knew that the covering on the wires was more likely to be worn where the foliage was the heaviest and where a wire was in close contact with a limb. Furthermore, when respondent inspected the wires from the ground prior to starting the work he was unable to see them at certain places because of the interference of the foliage. Under these circumstances, he was not entitled to blindly assume that he was not exposed to any danger. 19 Cal. Jur., sec. 35, p. 597. In 45 C.J., sec. 512, p. 956, it is said that one "may not rely upon the assumption that others will not be guilty of any breach of their duty to avoid injuring him where, under the same or similar circumstances, an ordinarily prudent person would not do so * * *." "Whether reasonable care is used under the circumstances in any particular case in relying upon the presumption is a question for the jury." *Dickinson v. Pac. Greyhound Lines*, 1942, 55 Cal.App.2d 824, 828, 131 P. 2d 401, 403; *Scott v. San Bernardino Valley, etc., Co.*, 1908, 152 Cal. 604, 93 P. 677; *White v. Davis*, 1930, 103 Cal.App. 531, 545, 284 P. 1086. On a retrial, instruction No. 27 should either be modified or supplemented so as to present this question to the jury for its determination.

The judgment is reversed.

DESMOND, P. J., and PARKER WOOD, J., concur.

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JAMES I. BARNES CONST. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.
Civ. 14502.

District Court of Appeal, Second District,
Division 1, California,
July 25, 1944.

1. Workmen's compensation ⇨1723, 1939

Whether serious and wilful misconduct of employer caused employee's injury is essentially a question of fact, and commission's determination will not be disturbed if it has any evidentiary support. St.1937, p. 281, § 4553.

2. Workmen's compensation ⇨1939

The findings of the Industrial Accident Commission are subject to review only so far as they are without any substantial evidence to support them.

3. Workmen's compensation ⇨1939

The jurisdiction of the appellate court in proceedings to review award of Industrial Accident Commission is limited to determining whether there is any evidence sufficient to sustain the award.

4. Workmen's compensation ⇨941

Order of the Industrial Accident Commission that scaffolds shall be provided for all work that cannot be done safely by workmen standing on permanent or solid construction means that it is the duty of an employer to supply his employees a reasonably safe place in which to work.

5. Workmen's compensation ⇨939

Under Workmen's Compensation Act authorizing an additional award on account of "serious and wilful misconduct" of employer, to authorize an additional award, there must be an intentional doing of something either with the knowledge that it is likely to result in serious injury, or with wanton and reckless disregard of its possible consequences, and to constitute "wilful misconduct" there must be actual knowledge, or that which in law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with conscious failure to act to the end of averting injury. St.1937, p. 281, § 4553.

See Words and Phrases, Permanent Edition, for all other definitions of "Serious and Wilful Misconduct" and "Wilful Misconduct".

6. Workmen's compensation ⇨939

Where it was undisputed that when an employee met his death he was engaged in constructing a corbel at a place where a platform or scaffold had been erected to safeguard him and other employees working there, and that helpers had been provided to procure needed material and that decedent left safe place provided for him and went to other place to procure a plank and fell, which resulted in death, employer was not liable for additional award on ground of "serious and wilful misconduct" within statute. St.1937, p. 281, § 4553.

Proceeding by James I. Barnes Construction Company to review and annul an award of additional compensation made by the Industrial Accident Commission to Mabel Rawdon on account of the death of Byron C. Rawdon on ground that death was caused by employer's serious and wilful misconduct.

Award annulled.

Macdonald, Wallace, Cashin & Arrington, of Los Angeles, for petitioner.

Everett A. Corten and R. C. McKellips, both of San Francisco, for respondents.

YORK, Presiding Justice.

The petitioning employer seeks the review and annulment of an award of additional compensation which was granted on the finding that the death of the employee, Byron C. Rawdon, was caused by the employer's serious and wilful misconduct.

The employee Rawdon met his death while employed by petitioner copartnership as a carpenter in the construction of a Lighter-than-Air Base near Santa Ana, California. The award herein was made after three hearings were had, at which the witnesses used a model and several drawings in an attempt to describe the construction project and the circumstances surrounding the accident, and constantly made reference to "here", "there", "this side" and "that direction", etc., without other identification of the points referred to, with the result that the transcript has proved rather inadequate as a basis from which to make a reliable summary of the evidence. However, aided by the petition for writ of review and the return thereto, it appears that the project involved the construction of two giant hangars near Santa Ana to be used to house dirigibles for the United

States Navy. Decedent was working on one of these hangars, the sides of which were to be built of concrete. At the time of the accident, decedent had completed the placement of the topmost of the wooden frames, called a soffit, in which concrete was to be poured to form the sustaining beams or up-rights supporting the semi-circular roof of the hangar which was 185 feet in height. This soffit, 36 inches high, 30 inches wide, 21 feet long and 20 feet from the ground, had been lifted into place by a crane. Seventy-two of such forms had been completed at the time in question. After the soffit was in place, petitioner constructed a scaffolding over each end hereof, and corbels (small protrusions from the finished concrete beam to support another beam extending at right angles to the main beam and connecting the various beams with one another) were then being built on each side of the soffit. Two men were assigned to each end of the soffit for the purpose of constructing these corbels. Decedent was one of the two men assigned to construct the corbels on the slope, or outside end of the beam. The corbels were constructed low on the beam, therefore, in performing a portion of the work, it was necessary for the carpenters to sit on the scaffold. Petitioner provided a laborer at each end of the soffit to procure and draw up from the ground such material as was needed by the two carpenters. The two platforms or scaffolds were connected by a two inch by eight inch plank (referred to as plank A) which was 20 feet in length and 20 feet above the ground and used to brace the "A" frames supporting the soffit.

On the date in question, decedent left the place where he was working at the west end of the beam soffit, and walked easterly on plank A to the other end of the soffit. When he started to return, he stepped off, or fell, death resulting from the injuries sustained in the fall. At the time, decedent had a 2 by 4 inch wedge, 14 or 16 inches long, in his hand.

The award of \$2,500 additional compensation was made pursuant to section 4553 of the Labor Code, St.1937, p. 281, upon the ground of employer's wilful misconduct in not providing scaffolding or a railing along the entire length of plank A which connected the two platforms, in disregard of General Construction Safety Order No. 1118, i. e., "(a) Scaffolds shall be provided for all work that cannot be done safely by workmen standing on permanent or solid

construction, except where such work can be safely done from ladders."

A safety engineer was employed on the project by petitioner and petitioner's insurance carrier also employed a safety engineer.

Petitioning employer urges that the evidence does not support the purported findings of fact to the effect: (1) that the injury was proximately caused by the serious and wilful misconduct of said employer; and (2) that said serious and wilful misconduct of said employer consisted in the failure to furnish scaffolding within the meaning of Order Number 1118 of the Construction Safety Orders of the Industrial Accident Commission.

In this regard petitioner argues that no dangerous condition existed at the place where the deceased employee was required to work, in that a platform or scaffold with a railing had been erected at each end of the soffit where the corbels were being constructed and helpers were provided to assist the carpenters and to furnish the material as needed by them. Therefore, when decedent left a safe place where he was required to work and went about some other business where he had no right to be, employer could not be charged with the duty of providing scaffolding at the latter place.

What constitutes serious and wilful misconduct within the meaning of the Workmen's Compensation Act so as to entitle the employee to an increased award as therein provided has frequently been discussed by the courts of this state. In *E. Clemens Horst Co. v. Industrial Acc. Comm.*, 184 Cal. 180, 188, 193 P. 105, 108, 16 A.L.R. 611, serious and wilful misconduct is defined as follows:

"The first question presented is, then, Was the commission justified in finding that the petitioner was guilty of 'serious misconduct'? There is no statutory definition of this term. In this connection we may again quote from Beven (Workmen's Compensation) page 401: 'To constitute "serious misconduct," it is probably that the Legislature intended to signify conduct that an average workman in being guilty of, either would know, or ought to know, if he turned his mind to consider the matter, to be conduct likely to jeopardize his own and his fellow-workman's safety.' In our opinion the serious misconduct of an employer under our statute may be similarly defined. There should be no difference in principle

between the degree of care required of an employer and that exacted from an employé. 'Serious misconduct' of an employer must therefore be taken to mean conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employé. * * *

"Next, as to whether such serious misconduct was 'willful.' It has frequently been said that willful misconduct involves the knowledge of the person that the thing which he is doing is wrong. (Citation of authorities). Conceding that knowledge is required, it seems to us that in order to prove the requisite knowledge, it is not necessary for the evidence to show positively that the person was notified of the unsafe condition of his premises, but that it is sufficient if it appears that the circumstances surrounding the act of commission or omission are such as 'evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of.'" (Citation of authorities.)

[1-3] Whether serious and wilful misconduct of the employer caused the employee's injury "is essentially one of fact and the commission's determination will not be disturbed if it has any evidentiary support." *Bethlehem Steel Co. v. Industrial Acc. Comm.*, 23 Cal.2d 659, 665, 145 P.2d 583, 586, citing *Parkhurst v. Industrial Acc. Comm.*, 20 Cal.2d 826, 129 P.2d 113. Moreover, the "findings of the industrial accident commission are subject to review only insofar as they have been made without any substantial evidence whatsoever in support thereof. The jurisdiction of an appellate court in cases of this character is limited strictly to determining whether there is evidence sufficient to sustain the award." *Helme v. Industrial Acc. Comm.*, 46 Cal.App.2d 651, 661, 116 P.2d 658, 663.

"It may be conceded that, generally speaking, the mere failure of an employer to comply literally with the requirement of a safety order of the Industrial Accident Commission does not of itself justify a finding that the employer is guilty of serious and willful misconduct. In the final analysis, the circumstances presented by the evidence in any case will be determinative of the question of whether or not the employer's act may properly be characterized as 'serious and willful misconduct.'" *Ethel D. Co. v. Industrial Acc. Comm.*, 219 Cal. 699, 704, 28 P.2d 919, 921.

[4] The safety order, heretofore mentioned, with a violation of which petitioning employer is charged, required that "Scaffolds shall be provided for all work that cannot be done safely by workmen standing on permanent or solid construction * * *." In other words, an employer "is under the duty to supply his employees a reasonably safe place in which to work." *Hatheway v. Industrial Acc. Comm.*, 13 Cal.2d 377, 382, 90 P.2d 68, 71.

In *Dawson v. Industrial Acc. Comm.*, 54 Cal.App.2d 594, 598, 602, 129 P.2d 479, 482, the widow and minor children of a deceased employee were granted a review of an order denying additional compensation for the death of said employee on the ground of alleged "serious and wilful misconduct, in installing and maintaining in the shaft dangerously-defective and inadequate staging and structure upon which the employees were compelled to work, and in neglecting to properly brace, block or wedge the framework in the shaft so as to render it safe and secure." In affirming the order denying the award, the court stated: "It will be observed that the misconduct on the part of the employer which will justify an increase of compensation provided for by section 4553 of the Labor Code must be both 'serious and wilful.' The term 'wilful misconduct,' as it is used in that section, involves the same sort of dereliction of duty on the part of the driver of an automobile which authorizes an individual to recover damages for personal injuries sustained while riding as a guest in the machine of another person, under section 403 of the Vehicle Code * * *. In the case of *Norton v. Puter*, 138 Cal.App. 253, at page 258, 32 P.2d 172, at page 174, that term is defined as follows: 'Willful misconduct depends upon the facts of a particular case and necessarily involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom. (Citing numerous authorities.)' The preceding definition is approved by the Supreme Court in the case of *Porter v. Hofman*, 12 Cal.2d 445, at page 447, 85 P.2d 447.

[5] "In the case of *Helme v. Great Western Milling Co.*, 43 Cal.App. 416, at page 421, 185 P. 510, at page 512, the court says:

" 'Willful misconduct' means something different from and more than negligence,

however gross. The term "serious and willful misconduct" is described by the Supreme Judicial Court of Massachusetts as being something "much more than mere negligence, or even gross or culpable negligence," and as involving "conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with wanton and reckless disregard of its possible consequences." * * * To constitute "willful misconduct" there must be actual knowledge, or that which in law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury."

While it is true that Francis Reynolds, a carpenter working with decedent, testified that he had seen men walk back and forth on the 2" x 8" plank A prior to the fall, and Fred W. Maas, assistant superintendent, testified that he knew that the workmen used this plank to walk across from east to west, or from the west to the east end of the soffit "on certain occasions", and C. E. Epps, carpenter foreman, who put decedent to work on the beam soffit, in answer to the query: "Had you seen men walking across from east to west and west to east on this 2 x 6?", testified: "Well, I think, I don't know, but I imagine most of the other fellows did"—nevertheless, the record is clear that decedent at the time he met his death was engaged in constructing a corbel at the west end of the said beam soffit; that at the place in question a platform or scaffold had been erected for the purpose of safeguarding him and the other employees working there, and in addition he had been provided with helpers to procure such material as was needed by him and to assist him in the work which he was then doing, i. e., the construction of a corbel at the west end of the beam soffit. But that said decedent left the safe place provided for him and embarked on a mission the purpose of which can only be explained by speculation.

[6] Applying the foregoing principles of law, the undisputed facts do not disclose a sufficient showing of wilful and intentional disregard of the safety of its employees as would suffice to justify the findings and conclusions of the commission that petitioner was guilty of such serious and wilful misconduct as to bring it within the penalty

prescribed by section 4553 of the Labor Code which was imposed herein.

For the reasons stated, the additional award of \$2,500 is annulled.

DORAN and WHITE, JJ., concur.



In re STEVENS' ESTATE.

LAVENBARG v. SHETRONE.*

Civ. 14454.

District Court of Appeal, Second District,
Division 3, California.

July 19, 1944.

Hearing Granted Sept. 14, 1944.

1. Appeal and error ⇨909(4)

Where evidence taken at hearing on claim of creditor involving a compromise and settlement whereby a bequest to a stranger in preference to that to children and father of decedent was to be used in payment of claim was not brought up in the record on appeal, it must be presumed, in respect of contention that bequest of money to children and father was adeemed because it was transferred from branch bank designated in bequest to another branch of the same bank, that the testator in so transferring the account had no intention of disturbing the bequest of money to his children.

2. Wills ⇨770

Proof of an intention to abrogate bequests under a will was necessary to show an "ademption".

See Words and Phrases, Permanent Edition, for all other definitions of "Ademption".

3. Wills ⇨770

Bequest of money on deposit in branch bank was not adeemed because money was in another branch of the same bank at time of testator's death in the absence of evidence that testator in transferring account from one branch bank to another intended to disturb bequest of money to his children.

* Subsequent opinion 162 P.2d 918.

4. Wills Ⓒ804

A legacy is abated when it is used in whole or in part to meet a priority payment, whether of a debt, expense of administration, family allowance, or legacy, since to "abate" means to do away with or nullify or to lessen or diminish. Probate Code, §§ 750-752.

See Words and Phrases, Permanent Edition, for all other definitions of "Abate".

5. Wills Ⓒ807

Legacies to spouse or kindred do not abate until after legacies of same class to nonkindred have abated, whether resort to the legacies be had by reason of debts or by reason of other legacies having priority. Probate Code, §§ 750-752.

6. Wills Ⓒ812

One who makes a will leaving specific legacies to a spouse or kindred and to persons who are not related to him, ordinarily assumes that the estate will be sufficient to pay them all.

7. Wills Ⓒ812

If estate of testator is reduced by payment of all his debts during his lifetime to the point where specific legacies to his spouse or kindred and specific legacies to strangers can not all be paid, a spouse or kindred will be paid first.

8. Wills Ⓒ812

Where testator made specific bequest to stranger and also to his children and father, a creditor in case of insufficient assets to pay claims should be paid from legacy to stranger alone instead of charging it proportionately against her legacy and those of the father and children. Probate Code, §§ 750-752.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceedings in the matter of the estate of Guy D. Stevens, deceased. From an order granting a petition to compromise a creditor's claim, Edith Lavenbarg, a legatee under the will, appeals opposed by Elva L. Shetrone, administratrix with the will annexed of the estate of Guy D. Stevens, deceased.

Affirmed.

Ivan Miller, of Los Angeles, for appellant.

Stanley Arndt and Voorhees & Voorhees, all of Los Angeles, for respondent.

SHINN, Justice.

This is an appeal from an order in probate granting a petition to compromise a creditor's claim. Appellant, Edith Lavenbarg, was remembered in the will of Guy D. Stevens, deceased, to whom she was unrelated. Upon a hearing had upon petition of the administratrix-with-will-annexed, at which appellant and all other parties interested in the estate appeared and were heard, the court made an order interpreting the will, which order has become final. Under this interpretation appellant was declared to have the right to use a residence for a period of five years after the date of the death of decedent, with the right to purchase the property at the end of the five-year period for \$2,000, payable at the rate of \$20 per month, provided that her right to occupy the premises and to purchase them at the end of the five-year period was to terminate if she failed to pay the taxes as they fell due or if she married a man who was able to support her. If she lost the right of occupancy and the right to purchase by reason of the happening of either of these contingencies the property was to go to Earl Stevens and Elva L. Shetrone, children of decedent, in equal shares, and they were also to take the proceeds of the sale of the property to appellant if she concluded the purchase. All funds in the Bank of America in Santa Monica, California, were bequeathed to the two children. The proceeds of a note of \$400 due decedent were to be used for the payment of the expenses of last illness and funeral and of administration, and the remainder, if any, was to go one-third to T. G. Stevens, father of decedent, and two-thirds to the two children.

Vera M. Stevens, divorced spouse of decedent, presented a claim against the estate for \$990 and interest and it was allowed and approved. The devise to appellant was appraised at \$850 and the claim of Vera M. Stevens, with interest, amounted to more than \$1,100. There were no assets available for payment of the claim without recourse to one or more of the legacies. The administratrix took the position that recourse must be had to the legacy of appellant for satisfaction of the creditor's claim before the legacies of the children and the father of decedent could be invaded, and arranged a transfer of

appellant's legacy to the creditor in satisfaction of the latter's claim. The order appealed from approved this compromise and settlement.

[1-3] The first point made by appellant is that decedent's money at the time of his death was in the Bank of America, Highland Park branch, and not in the Santa Monica branch. It is contended that the bequest of the money was adeemed because there was no money in the Santa Monica branch. Evidence was taken at the hearing but has not been brought up in the record on appeal. It must be presumed that the evidence was sufficient to satisfy the court that the testator in transferring the account from one branch bank to another had no intention of disturbing the bequest of the money to his children. Proof of an intention to abrogate the bequests was necessary to show an ademption (*Estate of McLaughlin*, 1929, 97 Cal.App. 485, 275 P. 875), and it does not appear that the court committed error in ruling that the money went to the children.

The second question is whether the court followed the law in holding that the creditor should be paid from appellant's legacy alone, because she was a stranger to the testator, instead of charging it proportionately against her legacy and those of the father and children.

The code sections to be examined are sections 750, 751, and 752 of the Probate Code, which read as follows:

Sec. 750: "Order of resort to estate assets for payment of debts, expenses, etc. If the testator makes provision by his will, or designates the estate to be appropriated, for the payment of his debts, the expenses of administration, or family allowance, they must be paid according to such provision or out of the estate thus appropriated, so far as the same is sufficient. If insufficient, that portion of the estate not disposed of by the will, if any, must be appropriated for that purpose; and if that is not sufficient, the property given to residuary legatees and devisees, and thereafter all other property devised and bequeathed is liable for the same, in proportion to the value or amount of the several devises and legacies, but specific devises and legacies are exempt from such liability if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate."

Sec. 751: "Order of resort for payment of legacies. The property of a testator, except as otherwise provided in this code, must be resorted to for the payment of legacies in the following order:

"(1) The property which is expressly appropriated by the will therefor.

"(2) Property not disposed of by the will.

"(3) Property which is devised or bequeathed to a residuary legatee."

Sec. 752: "Order of abatement of legacies. Unless a different intention is expressed in the will, abatement takes place in any class only as between legacies of that class, and legacies to a spouse or to kindred shall abate only after abatement of legacies to persons not related to the testator."

The sections of the Civil Code and Code of Civil Procedure in effect before the adoption of the Probate Code and which related to the subject of the order in which the property of an estate, as well as the order in which legacies, should be appropriated to the payment of debts and legacies, were considered in *Estate of Apple*, 1885, 66 Cal. 432, 6 P. 7. Sections 1359, 1360, 1361 and 1362 of the Civil Code then read as follows:

Sec. 1359: "The property of a testator, except as otherwise specially provided in this code and the Code of Civil Procedure, must be resorted to for the payment of debts, in the following order:

"One. The property which is expressly appropriated by the will for the payment of the debts;

"Two. Property not disposed of by the will;

"Three. Property which is devised or bequeathed to a residuary legatee;

"Four. Property which is not specifically devised or bequeathed; and,

"Five. All other property ratably. Before any debts are paid, the expenses of the administration, and the allowance to the family, must be paid or provided for."

Sec. 1360: "The property of a testator, except as otherwise specially provided in this code and the Code of Civil Procedure, must be resorted to for the payment of legacies, in the following order:

"One. The property which is expressly appropriated by the will for the payment of the legacies.

"Two. Property not disposed of by the will.

"Three. Property which is devised or bequeathed to a residuary legatee.

"Four. Property which is specifically devised or bequeathed."

Sec. 1361: "Legacies to husband, widow, or kindred of any class are chargeable only after legacies to persons not related to the testator."

Sec. 1362: "Abatement takes place in any class only as between legacies of that class, unless a different intention is expressed in the will."

The court held that the preference under section 1361 was to be given effect as between legacies of the same class in cases where it was necessary to resort to such legacies for the payment of debts but that it was not to be given effect as between legacies of the same class where such legacies had not been resorted to for the payment of debts but the estate available was insufficient to pay all of them or, in other words, that the preference ran as to the payment of debts but not as to the payment of legacies.

Sections 750, 751 and 752, Probate Code, were considered in Estate of Wever, 1936, 12 Cal.App.2d 237, 55 P.2d 279, and they were construed as giving the spouse and kindred preference over legatees of the same class who were unrelated to the testator, where the available estate was insufficient to pay the legacies in full. The question was not involved and the court expressly refrained from stating whether the preference also existed where resort was had to legacies for the payment of debts. The concluding clause of section 752, Probate Code, at the time of this decision read: "* * * and legacies to a spouse or to kindred are chargeable only after legacies to persons not related to the testator." It was in 1939 that the words "are chargeable" were changed to "shall abate" and the word "abatement" was added.

The conclusion we reach from a study of the Probate Code sections in the light of the decisions is that the legislature intended that the preference in favor of kindred should exist in the payment of both debts and legacies. We cannot read Estate of Apple, supra, and Estate of Wever, supra, without believing that it was the intention

of the legislature in adopting the original sections to create a preference in favor of kindred with relation to the payment of both debts and legacies, although it must be conceded that such intention was not expressed as clearly as might have been done. But however that may be, for nearly 50 years after Estate of Apple was decided, it was the settled law that resort was to be had to legacies of non-relatives before those of kindred for the payment of debts; in fact, as declared in Estate of Apple, that had been the law since 1872. The decision was said by two of the participating Justices to be dictum upon that point, but it has been taken as the basis for text in Cal.Jur. and has never been overruled or departed from. In 1931, when the law on the same subject matter was rewritten, there was, in our opinion, no substantial change in the general plan except, as held in Estate of Wever, to make the preference applicable to the payment of legacies.

[4-8] Under section 1359, Civil Code, supra, all property of a testator, except as otherwise specially provided in that code and the Code of Civil Procedure, was liable for the payment of debts. This is also true of section 750, Probate Code. The phrase "except as otherwise specially provided", etc., found in section 1359, supra, is not in section 750, but we attach no importance to that fact. This phrase was not considered as a material one in the Apple decision and, in fact, it was also contained in section 1360 of the Civil Code when that matter was decided. There are other provisions of the code which create exceptions, just as there were before 1931, under which certain of the testator's property may be set apart free from liability for debts. As we read section 750 and former section 1359, we understand that their essential purpose was to direct the order in which the property of the estate should be taken for the payment of debts, expenses of administration and family allowance, which order runs to the several classes of property defined in the sections. All estates come within the scope of this purpose and we would not expect to find in section 750 directions upon the wholly unrelated matter of preference in the payment of legacies to kindred over legacies to others within a single class. Section 751 states the order in which legacies are payable. It differs in phraseology but not at all in meaning

from former section 1360 of the Civil Code. Down to this point the law deals with different classes of property and different classes of legacies, giving preference to some classes above others. The legacies we are considering all belong to the class of specific legacies. It is not until we reach section 752, Probate Code, which combines former sections 1361 and 1362 of the Civil Code, that we find a definition of the rights of legatees of a single class as among themselves. Here for the first time the matter of abatement of legacies is dealt with specifically and we find that legacies abate by classes and necessarily ratably within each class but with the exception that "legacies to a spouse or to kindred shall abate only after abatement of legacies to persons not related to the testator." The words "abate" and "abatement" are more appropriate than the word "chargeable," which was used in former section 1361, Civil Code, and section 752, Probate Code, before 1939, and which was held to refer to the payment of debts in Estate of Apple and to the payment of legacies in Estate of Wever. To abate means to do away with or nullify or to lessen or diminish. A legacy is abated when it is used in whole or in part to meet a priority payment, whether of a debt, expense of administration, family allowance, or legacy. The words "abate" and "abatement" are not qualified in any way nor used in a restricted sense in section 752, and we think that legacies to spouse or kindred do not abate until after legacies of the same class to non-kindred have abated, whether resort to the legacies be had by reason of debts or by reason of other legacies having priority. We think this construction follows from a history of the law on the subject, which we have briefly reviewed, and it does not bring section 752 into conflict with section 750. It also follows from the common sense and logic of the situation as well. One who makes a will leaving specific legacies to a spouse or kindred and to persons who are not related to him ordinarily assumes that the estate will be sufficient to pay them all. The preference which the law gives to the spouse and kindred where all the legacies cannot be paid is but the expression of the legislative purpose to do what the testator would naturally have done if he had thought of it, namely, give preference to spouse and kindred above strangers in

the contingency that the combined legacies would, for any reason, exceed the estate available for their payment. If the estate of the testator is reduced by the payment of all of his debts during his lifetime to the point where specific legacies to his spouse and kindred and specific legacies to strangers cannot all be paid, the spouse and kindred will be paid first. This is the effect of the holding in Estate of Wever, supra, the soundness of which we think is beyond question. Why then, with debts of the same amount and estate of the same value, should the spouse and kindred lose their preference through the circumstance that the testator neglected to pay his debts and it became necessary for his executor to resort to legacies with which to pay them. If the legislature had intended to change the law, as declared in Estate of Apple, section 752, in providing for abatement of legacies, would have denied the preference to kindred in cases of abatement on account of debts instead of using the new words without any qualification whatever.

We have not overlooked section 753, Probate Code, which reads as follows: "When property given by will to persons other than the residuary devisees and legatees is sold for the payment of debts or expenses or family allowance, all the devisees and legatees must contribute according to their respective interests to the devisee or legatee whose devise or legacy has been sold, and the court, when distribution is made, must settle the amount of the several liabilities and decree the amount each person shall contribute, and reserve the same from his distributive share for the purpose of such contribution." While appellant does not rely upon this section for a reversal of the order, we have considered it and deem it to be inapplicable to the question before us. Manifestly the section must be read in harmony with the other sections we have discussed and, when so read, it does not destroy the preference given to spouse and kindred over other legatees of the same class. A contrary construction would bring it in conflict with the scheme of the three preceding sections as we understand it. The section is in substance the same as former section 1564 of the Code of Civil Procedure, which was adopted in 1880. That section has never been construed as affecting in any way the preference to kindred over others in a

given class. If it had been the intention to nullify the holding in Estate of Apple by destroying the preference to kindred in the payment of debts, we think section 1564, which was in effect when the Apple decision was rendered, would not have been carried into the Probate Code without the expression of that intention.

The order is affirmed.

DESMOND, P. J., and PARKER
WOOD, J., concur.



CHAMBERS v. DUVAL et al.*

Civ. 3333.

District Court of Appeal, Fourth District,
California.

July 26, 1944.

Rehearing Denied Aug. 17, 1944.

Hearing Granted Sept. 21, 1944.

1. Taxation ⇨793

Plaintiff may not recover in a quiet title action when his only evidence of title is a tax deed which is insufficient under statutes by virtue of which it was issued.

2. Taxation ⇨745

Repeal of sections of Political Code prescribing form of deed conveying to third person land sold to state for delinquent taxes and enactment of sections of Revenue and Taxation Code requiring such deed to set forth the year of sale to state, effected a material change. St. 1939, pp. 1325, 1326, 1373, §§ 3476, 3479, 3480, 50002; Pol.Code, §§ 3785b, 3786.

3. Taxation ⇨761

Recital, in deed conveying to third person land sold to state for delinquent taxes, that land was assessed for taxation in specified year, was not a substantial compliance with statutory requirement that deed specify year of sale to state. St. 1939, pp. 1325, 1326, §§ 3476, 3479, 3480.

4. Taxation ⇨679(5)

The Legislature has the right and power to fix the conditions under which property deeded to state for nonpayment of taxes may be sold and conveyed to third persons.

* Subsequent opinion 156 P.2d 921.

5. Taxation ⇨788(5)

Where deed conveying to third person land sold to state for delinquent taxes does not specify as required by statute the year of sale to state, it cannot be presumed in favor of validity of deed that the land was properly sold to state. St. 1939, pp. 1325, 1326, 1327, §§ 3476, 3479, 3480, 3481, 3513, 3517.

6. Taxation ⇨761

Where deed purporting to convey to third person land sold to state for delinquent taxes did not specify, as required by statute in effect when land was sold to third person, the year of sale to state, it was ineffective to vest title in grantee. St. 1939, pp. 1325, 1326, 1327, §§ 3476, 3479, 3480, 3481, 3513, 3517.

7. Taxation ⇨679(5)

The state may fix the conditions upon which property deeded to state for delinquent taxes will be sold, and purchaser must bid it in upon the conditions fixed by statutes. St. 1939, pp. 1325, 1326, 1327, §§ 3476, 3479, 3480, 3481, 3513, 3517.

8. Taxation ⇨745

The law in effect when land sold to state for delinquent taxes was sold at public auction, and not the law in force when property was originally sold to state, governed the form of deed conveying such land to purchaser at auction. St. 1939, pp. 1325, 1326, 1373, §§ 3476, 3479, 3480, 50002; Pol.Code, §§ 3785b, 3786.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Lovell C. Chambers against James A. Duvall and others to quiet title to realty. From a judgment decreeing that plaintiff had no title to or interest in the realty and enjoining him from asserting any such title or interest, plaintiff appeals.

Judgment affirmed.

Solon S. Kipp and W. E. Starke, both of San Diego, for appellant.

Herbert C. Kelly, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action to quiet title. The plaintiff claims title to certain land in San Diego County by virtue of a tax deed issued to him on July 29, 1941, by the tax collector of San Diego County following

a sale at public auction pursuant to the provisions of section 3476 of the Revenue and Taxation Code, St. 1939, p. 1325, which sale was held on July 2, 1941.

At the trial the plaintiff rested his entire case on this tax deed and produced no other evidence except in rebuttal to certain of the defendants' evidence on a point which is not material to this discussion. The Court found that the plaintiff was not the owner of this property; that his tax deed is void on its face and ineffective to vest title in him; that the amount expended by him for said tax title and in connection therewith was \$124.78; that he was entitled to be reimbursed in this amount; and that said amount had been paid into court by the defendants for him. A judgment was thereupon entered decreeing that the plaintiff has no title to or interest in the property, and enjoining him from asserting any such title or interest. From this judgment the plaintiff has appealed.

[1] It is well settled that a plaintiff may not recover in a quiet title action where his only evidence of title is a tax deed which is insufficient under the statutes by virtue of which it was issued. *Swann v. Carson*, 56 Cal.App.2d 502, 132 P.2d 863; *Henderson v. De Turk*, 164 Cal. 296, 128 P. 747; *Carter v. Chevalier*, 100 Cal.App. 567, 280 P. 706.

The appellant contends that the tax deed here in question substantially conforms to all requirements of law at the time it was issued and that it was prima facie evidence of the regularity and sufficiency of all prior proceedings.

While this deed was issued following a sale pursuant to the provisions of section 3476 of the Revenue and Taxation Code it follows the form provided in the old Political Code section 3785b and sets forth only the facts suggested by that form. Under former section 3786 of the Political Code a deed in that form was made primary evidence that the property had been sold as prescribed by law. Both of these sections of the Political Code were repealed as of February 1, 1941, before the sale here in question took place. Sec. 50002, Revenue and Taxation Code, St. 1939, p. 1373. At the time of this sale section 3479 of the Revenue and Taxation Code, St. 1939, p. 1325, provided for the execution of a deed following a sale held pursuant to section 3476 of that code, and section 3480 of that code, St. 1939, p. 1326, provided that such a deed, in

addition to the usual provisions, should set forth certain specified facts. These requirements differed in a number of respects from those formerly applicable to such a deed when sections 3785b and 3786 of the Political Code were in effect.

One of the most important of these changes is that whereas formerly such a deed was not required to set forth any statement that the property had been sold to the state and the deed itself was primary evidence of such fact, section 3480 of the Revenue and Taxation Code requires such a deed to set forth "(a) The year of sale to the State." This requirement necessarily includes the fact that the property has been sold to the state. Both the fact that a sale to the state has taken place and the date thereof are extremely important as affecting subsequent procedure in connection with tax delinquent property. Section 3481 of the Revenue and Taxation Code, St. 1939, p. 1326, then provides that a deed containing the recitals required by section 3480 is evidence of the same facts as a deed to the state. Not only is section 3481 not effective for this purpose unless the deed contains the recitals required by section 3480 but section 3513, St. 1939, p. 1326, covering a deed to the state, requires similar recitals and section 3517, St. 1939, p. 1327, makes a deed containing those recitals prima facie evidence that the property has been sold as prescribed by law.

The deed here in question contains no statement of the year the property was sold to the state and no statement of any kind to the effect that it had ever been sold to the state. On the other hand, following the form prescribed by section 3785b of the Political Code, it recited that this real property was duly assessed for taxation in the year 1935 to Jas. A. Duvall and that it was thereafter, on the second day of July, duly sold to L. C. Chambers by the tax collector for the nonpayment of delinquent taxes which had been legally levied in the year 1935 and were a lien upon said real property.

[2-6] The change thus brought about by requiring the setting forth of the year of sale to the state in such a deed, in place of the former requirement, cannot be held to be an immaterial change, and it cannot be held that the setting forth of the fact that the property was assessed for taxation in a different year is a substantial compliance with the requirement that the year of sale to the state be set forth in the deed. It

does not necessarily follow from the fact that property was assessed in a certain year that it was sold to the state the following year, or even that it was ever sold to the state, properly or otherwise. The legislature had the right and power to fix the conditions under which property deeded to the state for the nonpayment of taxes might be sold and conveyed to third parties. There are good reasons for requiring such a deed to recite the fact that the property was actually sold to the state and the year when this occurred. For example, this requirement might occasionally avoid an injustice by preventing a sale to third parties when, as a matter of fact, through some oversight the property had never been sold to the state. In the absence of such a recital in the deed, and under the law in force at the time this deed was issued, the fact that the property had been properly sold to the state cannot be presumed in favor of the validity of the deed. In effect, these statutes very specifically provided that instead of presuming a sale to the state from the issuance of such a deed that fact must be set forth in the deed itself. The deed here in question failed to conform to this requirement either substantially or at all, the appellant failed to meet the burden of proof resting upon him, and the trial court correctly held that the deed was ineffective to vest title to the property in him.

In a number of other respects the deed here in question failed to comply with the requirements of section 3480 of the Revenue and Taxation Code and failed to set out certain facts as there required. With respect to these other matters it is argued that the recitals contained in this deed were so similar to those required by that section as to constitute a substantial compliance therewith. Because of the importance we attach to the matter above discussed, we refrain from any detailed discussion of these variances although they emphasize the fact that the deed in question does not comply with the statutes in force at the time the deed was issued. It clearly ap-

150 P.2d—34½

pears, not only that an old form was used, but that no attempt was made to comply with the new statutes.

[7, 8] The appellant further contends that the law in force at the time the property was originally sold to the state governs the form of such a deed rather than the law in force at the time the property is sold to a third party, and that this deed was therefore entirely sufficient and proper. In support thereof, cases are cited in which it was held that the law existing at the time of the sale to the state regulated the right of redemption and affected certain proceedings dependent upon that sale. It may be observed that this general rule has been considerably modified, to say the least, by more recent decisions. *Bray v. Jones*, 20 Cal.2d 858, 129 P.2d 357; *Campbell v. Woolner*, 57 Cal.App.2d 511, 134 P.2d 822; *Smith v. Addiego*, 54 Cal.App. 2d 230, 129 P.2d 953; *Mercury Herald Co. v. Moore*, 22 Cal.2d 269, 138 P.2d 673, 147 A.L.R. 1111. Moreover, we are here concerned with the rights of a third party who first enters the picture as the purchaser at an auction sale held by the state or on its behalf. The state may, and does, fix the conditions upon which such property will be thus sold and the purchaser must bid it in, if at all, upon the conditions fixed by the statutes. Insofar as this matter is concerned, the law in effect on July 2, 1941, when this sale was held, is controlling. At that time the only law in effect governing this matter was section 3480 and related sections of the Revenue and Taxation Code, and the deed in question fails to conform to the requirements then in force.

The respondents also contend that even if this tax deed were held sufficient as a prima facie showing of title, the proceedings upon which it was based were irregular and void for a number of reasons which are extensively argued. Under the views above expressed it is unnecessary to consider these other points.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

65 Cal.App.2d 288

RUBATTINO v. INDUSTRIAL ACCIDENT COMMISSION.

Civ. 7054.

District Court of Appeal, Third District,
California.

July 28, 1944.

Hearing Denied Sept. 25, 1944.

1. Stipulations ⇨14(10)

A stipulation may be relied upon as evidence, but where the facts contained in such stipulation are either insufficient, or immaterial to a determination of the issues, the stipulation itself cannot endow such facts with materiality or sufficiency. Code Civ.Proc. § 283, subd. 1.

2. Workmen's compensation ⇨1429

Where there was no evidence to support a finding that deceased had contracted silicosis before his last employment, and evidence as to conditions under which he worked for previous employer formed no basis for an inference that his health was impaired or that he had a disease at that time which could have been aggravated by his last employment, a stipulation that deceased had been exposed to silica dust during the entire period of his employment by several employers was insufficient basis for compensation award against all employers rather than against last employer. St. 1937, pp. 269, 284, §§ 3600, 4663; Code Civ. Proc. § 283, subd. 1.

3. Workmen's compensation ⇨1530

To be entitled to compensation for occupational disease of silicosis, exposure alone is not sufficient, but adequate knowledge concerning the quantity and quality of dust exposure as well as the length of the employment period is necessary to establish a distinct causal relationship between the injury and the employment. St.1937, p. 284, § 4663.

4. Workmen's compensation ⇨201

The statute relating to apportionment of liability among successive employers for death or disability resulting from occupational diseases was not intended to create a liability if none existed, but rather a paring down of liability. St.1937, pp. 269, 284, §§ 3600, 4663.

5. Workmen's compensation ⇨1347

An employer, upon whom the facts and the law place responsibility for compensa-

tion for silicosis, who would escape a portion of the load on theory that he alone is not responsible, has burden of proving that other employers should share the responsibility. St.1937, pp. 269, 284, §§ 3600, 4663.

6. Workmen's compensation ⇨201

Where it is made to appear that an employment had brought about a case of silicosis which was aggravated by a subsequent employment, the burden of compensating employee for the resulting disability is properly divided among the employers upon whom liability exists. St.1937, pp. 269, 284, §§ 3600, 4663.

Appeal from Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Joanne Rubattino, a minor, by John Delaney, the guardian of her person and estate, against the Industrial Accident Commission. To review an award of the Commission granting compensation and apportioning the liability therefor over the entire period of employment of deceased and imposing a proportionate liability only as against employer before the Commission, the minor brings certiorari.

Award annulled and application remanded for further proceeding.

Rutherford, Rutherford & Rutherford, of Napa, for petitioner.

Everett A. Corten, Fred G. Goldsworthy, and R. P. Wisecarver, all of San Francisco, for Industrial Indemnity Exchange.

W. N. Mullen, of San Francisco, for New Amsterdam Casualty Co.

Donald Gallagher and Edmund J. Thomas, Jr., both of San Francisco, for State Comp. Ind. Fund.

PEEK, Justice.

Petitioner, the minor daughter of Guseppe Rubattino, deceased, by her general guardian John Delaney, seeks a review for the purpose of annulling amended findings and award of the respondent Industrial Accident Commission.

The Commission found that the deceased father of the minor applicant had sustained injury arising out of and occurring in the course of his employment as a miner, the said injury being the disease of silicosis, which proximately caused his death on March 6, 1943.

At the hearing had before the Commission it was stipulated by all parties that the entire period of the decedent's employment as a miner, 199½ months, had been worked under exposure. It was further stipulated that of the period of 199½ months, 15 months had been in the employ of J. F. Knapp Corporation, who had operated the Aetna Mine, and 73 months had been in the employ of Great Western Mine, which had been operated by defendants Richard Deter, and Bumstead Mining Company, respectively. The balance of the period of exposure, other than the 88 months, had been in the employ of other mine operators, who were not before the Commission as parties defendant.

In order to simplify calculation the Commission doubled the figure of 199½ months to 399 one-half months, and correspondingly doubled the total of 88 months to 176 one-half months. Award was made of 176/399 of the maximum benefit allowable (\$4159.96 and \$150 for burial expenses) or \$1577.06 and \$54.88 respectively, against the insurance carriers of the employers before the Commission. No award was made for the balance, or any part thereof, against the other employers.

The petitioner challenges such apportionment on the grounds that the Commission exceeded its jurisdiction when it so apportioned the liability over the entire period of the employment during which the decedent was found to have been exposed to dust; that there is no evidence that the decedent was in any way affected by the disease of silicosis prior to his employment at the Great Western Mine during 1928; that in order for the Commission to make a finding as regards the existence of such disease it is necessary that there be scientific evidence to that effect and not conjecture; that the only basis for the apportionment is found in section 4663 of the Labor Code, St. 1937, p. 284, which provides that "In case of aggravation of any disease existing prior to a compensable injury, compensation shall be allowed only for the proportion of the disability due to the aggravation of such prior disease which is reasonably attributed to the injury", and that, therefore, in the absence of any evidence of disease existing prior to his last two employments the award herein cannot be sustained in that the above-cited section calls for findings of the existence of the disease and aggravation thereof by subsequent employments.

The record before this court discloses that decedent's employment as a miner began in 1908, and that from such date until 1942, he worked intermittently at such employment, finally quitting work in January 1942, because of his physical condition which was diagnosed as the disease of silicosis.

It appears from an unverified written statement of decedent, which was received in evidence, that he had no physical examination either before going to work or upon quitting at any of the mines at which he had been employed. His only illness during such time occurred when he was stricken with influenza while working at the Aetna Mine and was off from work for approximately three months. Employment in several different mines followed, and from 1928 to 1935 he worked at the Great Western Mine near St. Helena, which mine was then operated by defendants Richard Deter and Bumstead Mining Company respectively. His work in this mine was both on the surface and underground. Following that the employee did outside work for Union Lumber Company at Fort Bragg.

In 1936 frequent colds and chills caused him to consult a physician. X-rays of his chest, taken by Dr. George J. Wood of St. Helena, disclosed that he was suffering from tuberculosis. As a result of such diagnosis he spent several months in the Silverado Sanitarium on Mt. St. Helena, and was discharged therefrom on December 19, 1937. He did not work again until April 15, 1938, when he was again employed at the Aetna Mine, then operated by defendant J. F. Knapp Corporation, and he worked there steadily until January 1942. He quit because of his weakened condition. An examination by Dr. M. M. Booth of St. Helena, on February 21, 1942, disclosed that he was suffering from the disease of silicosis, and he was so advised by his physician.

On September 1, 1942, decedent filed his application for adjustment of his claim for workmen's compensation with respondent Commission. Additional employers were named as defendants upon the motion of the Commission but no service was had upon any of them because of the lack of information of their whereabouts. Upon the hearing of that claim the Commission found that the date of injury was February 21, 1942; that more than six months having elapsed between the date of injury

and the filing of his claim for compensation, and no disability indemnity having been paid or medical treatment furnished, the claim was barred by the statute of limitations.

Mr. Rubattino died on March 6, 1943, the cause of his death being silicosis, and on April 6, 1943, petitioner herein, as the minor and wholly dependent child of the decedent, filed her claim for compensation death benefits.

At the hearing of her petition it was agreed that the record in the proceeding filed by the decedent would be considered as a part of the record in the present case. It also was stipulated as follows:

"Referee: Let the record show that the parties stipulate that the exposure in this case may be taken at a total exposure of 199-1/2 months, of which fifteen months were with J. F. Knapp, insured by Industrial Indemnity Exchange, and seventy-three months were with Great Western Mine, covered by State Compensation Insurance Fund; that the fraction which may be used in calculating the apportionment is 176/399, of which 30/399ths is chargeable to Industrial Indemnity Exchange and 146/399ths to State Compensation Insurance Fund."

At the conclusion of the hearing the Commission found that the decedent, while employed as a miner in certain named mines during the period from 1909 to February 1942, "sustained injury arising out of and occurring in the course of said employment, said injury consisting of the disease known as silicosis as the result of exposure to silica dust during a period of 199.5 months, proximately causing death on March 6, 1943," and that the applicant waived any claim against any of the named mines except the Great Western Mine, which was insured by the State Compensation Insurance Fund, and the Aetna Mine, which was operated by J. F. Knapp Corporation, insured by the Industrial Indemnity Exchange, "due to the fact that she has been unable to ascertain whether said employers were insured, and due to the difficulty in obtaining collectible judgments."

The Commission then made its award in favor of petitioner in the total sum of \$1577.06, divided between the two mining companies in the proportions as previously mentioned. A petition for rehearing was filed with the Commission and was denied.

Thereafter a writ of review was sought in this court to annul such award.

The questions herein presented are all involved with and relate to the determination of the one question: In the absence of evidence of demonstrable silicosis due to exposure to silica dust, did the Commission exceed its jurisdiction when it apportioned liability for the death of Rubattino over the entire period of his employment as a miner, or did the stipulation previously quoted furnish sufficient evidence in regard to the dust conditions of his previous employments to substantiate such apportionment?

The petitioner argues that the total lack of such evidence in the record is not cured by said stipulation inasmuch as it merely refers to "exposure", and therefore entirely fails to establish the necessary elements of the quantity and quality of such exposure; that the portions of decedent's testimony and written statement relating to dust conditions in the various mines is not complete; that it refers only to some, not all of said mines; that the medical testimony is likewise of little value; that from the time he first began his employment as a miner in 1909 until 1918 when he was afflicted with influenza, his history shows that of a normally healthy individual; that from 1918 until 1937, when he entered the Silverado Sanitarium for tuberculosis, his history is likewise of the same character, and that it was not until February 1942, when he was so advised by Dr. M. M. Booth of St. Helena, that he had any knowledge of silicosis. A letter from Dr. Wood, upon whose advice he entered the sanitarium in 1937, dated September 25, 1942, and addressed to the Medical Department of the State Compensation Fund, which letter was received in evidence, states: "It is my impression that Mr. Rubattino had bilateral pulmonary tuberculosis and some silicosis at this time."

It is to be noted, however, that the letter from Dr. Wood is dated subsequent to the death of Rubattino, and that the information contained therein relative to the existence of silicosis was not communicated to the decedent at the time he was examined by said doctor in 1937. The only apparent reason for his confinement to the sanitarium at that time was his tubercular condition.

It is further contended by petitioner that as the previously mentioned evidence is all

that the record discloses regarding dust conditions, recourse to medical testimony would be necessary to establish the existence of the disease prior to February 1942, and that mere exposure would not be sufficient to warrant a finding that the initial exposure in 1909 was the inception of the disease. In this regard petitioner argues that at the time decedent was admitted to the sanitarium in May 1937 for a tubercular condition, his attending physician was able to discover only "some silicosis".

Petitioner strenuously urged that it was incumbent upon the Commission to find, upon complete evidence, when the disease of silicosis first prevailed; that its general finding to the effect that the disease attached in 1909 merely by exposure to silica dust without evidence in regard to the duration, quality or intensity of such exposure, was without the jurisdiction of the Commission, and for the same reason a finding that the disease prevailed at any time prior to decedent's employment at the Great Western Mine in 1928 (14 years prior to his disability) had no foundation, and therefore cannot be sustained. In support thereof petitioner relies upon the case of *Moquin v. Industrial Acc. Comm.*, 33 Cal. App.2d 511, 515, 92 P.2d 413, 415, wherein the court stated: "Conceding that reviewing courts may not invade the field of the fact-finding body, and that under well settled rules where a conflict in the evidence exists the findings of the triers of fact are conclusive, it is nevertheless equally well settled that the application of the foregoing doctrine is limited to cases *where the conflict is substantial and real, and not fanciful or fictitious*. We recognize the rule that the burden is upon the applicant to establish the fact of injury; but nevertheless, where, as here, the injury is conclusively proven, but the employer contends it is not a new one and did not occur on the date or under the circumstances alleged, the burden is on such employer to prove his contentions in that regard."

The record discloses evidence that Rubattino worked in various mines over a period of years prior to his going to the sanitarium in 1937 and also prior to his last employment, but there is no evidence to support a finding that he had contracted silicosis before his employment with the Great Western Mine. The character of the conditions under which he worked is revealed solely by his testimony and his unverified statement, which are, at best,

most meager, and contain nothing from which even an inference may be drawn that his health was impaired or could have been impaired by such conditions or that he had a disease at that time which could have been aggravated by his last employment, thereby bringing him within the provisions of section 4663 of the Labor Code.

In the case of *Moore Shipbuilding Co. v. Industrial Acc. Comm.*, 70 Cal.App. 495, 233 P. 392, 393, the Commission found that the employee had sustained injury from lead poisoning while employed by his last employer but held that the compensation should be apportioned in accordance with the time worked by the employee "under exposure to lead", thereby including the Moore Company.

On review the District Court stated:

"The power of the Commission to apportion the liability among several employers under the terms of the section cited [Sub. 4, Sec. 3, Workmen's Compensation Act, Stat.1917, p. 831, as amended by Stat.1919, p. 911 (now sec. 4663 of the Labor Code)], is limited to a 'case of aggravation of any disease existing prior to any such injury.'

* * *

"The apportionment of the award against the petitioner was based solely on the conjecture that, while employed by petitioner, the applicant *might have* contracted the disease to some extent. But the direct testimony of the applicant showed that he had no symptoms of the disease while in the employ of the petitioner. * * * It follows that the Commission exceeded its jurisdiction." (A petition for a hearing before the Supreme Court was denied.)

In the present case respondent Commission, though not directly attacking the conclusion of the two cases last cited, endeavors to evade the effect thereof by predicated its case almost solely upon *Marsh v. Industrial Acc. Comm.*, 217 Cal. 338, 18 P.2d 933, 934, 86 A.L.R. 563, a case wherein two applicants filed claims for death benefits as the result of silicosis, while a third made application for compensation benefits for the same cause. The Commission denied all of the applications upon the sole ground that each was barred by lapse of time under the provisions of the Workmen's Compensation Act. The only issue on review, as stated by the court, was "the determination of this question."

The respondent Commission acknowledges that the rule established in the *Marsh*

case, *supra*, was for the sole purpose of applying the statute of limitations to cases of latent disease or latent injury. But it argues that as the date of injury as therein stated is the date of the culmination in the disability of the accumulated effects of the latent disease that therefore death benefits should be apportioned over the entire period of employment. The Commission also admits that "it is necessary, in order to establish liability for compensation, that it be ascertained in what prior employment, or employments, the silica dust, which eventually culminated in disability and death, was inhaled." As we have noted, the record discloses no substantial evidence of the prior employments in which silica dust was fatally inhaled. This omission, the Commission argues, was cured by the stipulation that the decedent had been "exposed to silica inhalation for 199½ months". However, the stipulation does not say "exposed to silica inhalation" nor does it refer to exposure to a particular quantity and quality of silica dust. It is merely that "exposure in this case may be taken at total exposure of 199½ months."

The respondent Industrial Indemnity Exchange raises but one issue and states that inasmuch as it believed its insured, the Aetna Mine, did not represent a silicosis hazard, and as a determination of such question would have necessitated a long drawn out trial, it therefore agreed that "the exposure to silica hazard" was as set forth in said stipulation. Thus it contends there are presented to this court but two questions. (1) "Is the stipulation of counsel of parties of any sanctity; that is, may the Industrial Accident Commission rely upon it in lieu of proof" and (2) "Is a stipulation of facts some evidence on which the Industrial Accident Commission may enter a findings and award and which may therefore not be reviewed by an appellate court. * * *

[1] We are entirely in accord with the contentions made by said respondent and with cases cited in support of its statements that a stipulation may be relied upon as evidence. But where the facts contained in such a stipulation are either insufficient, or immaterial to a determination of the issues presented, the stipulation itself cannot endow such facts with materiality or sufficiency.

[2] Subdivision 1 of Section 283 of the Code of Civil Procedure states that an at-

torney may bind his client in any of the steps of a proceeding by his agreement filed with the clerk or entered upon the Minutes. Obviously, therefore, such section relates only to the power of an attorney to bind his client. The question of the sufficiency of that to which he attempts to bind his client is a question for the courts. Even assuming that from the wording of such stipulation it may be inferred that it was to cover 199½ months of exposure to silica dust, it still would lack the sufficiency necessary for a proper determination of the causal connection between the disease and the conditions under which the employee worked and the apportionment of the death benefits as is herein presented.

[3] It is well established by all medical authorities that exposure alone is not sufficient. As stated in Sappington: *Medicolegal Phases of Occupational Diseases*, p. 81: "One may be able to see dust in the air, but the mere observance of it will not give any indication as to the amount of free silica contained in the dust, the particle of dust, nor any fairly accurate estimate of the amount of dust in the air at the time." And again, at page 123, " * * * adequate knowledge concerning the quantity and quality of dust exposure, as well as the length of the employment period, is necessary to establish a distinct causal relationship."

The causal relationship mentioned by Sappington has also found support in this state in the Marsh case, *supra*, wherein the court stated, 217 Cal. at page 351, 18 P.2d at page 938, 86 A.L.R. 563: " * * * In order to justify an award for disability or death due to an occupational disease, *there must always be established an unbroken causal connection between the injury and the employment or the condition under which the employee is required to carry on his work. The connection must be such as to show that the disease or injury was proximately caused by the employment or the conditions of work*; and when such unbroken chain of causation is found to exist, then all physical consequences flowing from the disease or injury are proper elements for consideration in determining the merits of a claim for compensation or death benefits. *Madore v. New Departure Mfg. Co.*, *supra*, 104 Conn. 709, 134 A. 259; *Cishowski v. Clayton Mfg. Co.*, [*supra*], 105 Conn. 651, 136 A. 472; *Kovaliski v. Collins Co.*, *supra*, 102 Conn. 6, 128 A. 288;

London G. & A. Co. v. Industrial Acc. Comm., 202 Cal. 239, 241, 259 P. 1096, 54 A.L.R. 1392; Singlaub v. Industrial Acc. Comm., 87 Cal.App. 324, 262 P. 411. In the cases under consideration the record sufficiently establishes a chain of causation between the conditions of employment and the physical consequences of the disease contracted." (*Italics ours.*)

This court also recognized this situation when it stated in the case of Argonaut Mining Co. v. Industrial Acc. Comm., 21 Cal.App.2d 492, 495, 70 P.2d 216, 219: "The contributing cause of silicosis is well known to the medical profession and to mining industries. It is prevalent among employees in mines, potteries, stone and slate factories, and in file-cutting and metal-grinding enterprises, where the air is permeated with minute particles of stone, quartz, slate, or metal dust which is inhaled to the detriment of the tissues, glands, and lungs. Some men appear to be immune from the disease, but a large proportion of those who are engaged in such pursuits are susceptible to silicosis. The incurring and development of this disease depends somewhat upon the constitution of the employee and upon the conditions under which he works. The course of the disease may be rapid or gradual, sometimes extending over a period of several years before the victim is finally disabled for the performance of manual labor. * * *

The respondent Commission further contends that as section 3600 of the Labor Code, St.1937, p. 269, provides that liability for compensation shall exist against an employer for any injury sustained by his employees arising out of and in the course of employment, and for the death of any employee if injury proximately causes death, that in order that such liability shall exist, the injury must be proximately caused by the employment; that therefore as silicosis is a disease which is the accumulated effect of the inhalation of silica dust, it is the employment, or employments, during which silica dust was inhaled, which are the employments proximately causing the injury.

With such contention there can be no disagreement. However, an obvious question immediately presents itself, i. e. what is the factual or evidentiary basis for such a conclusion in the present case? We have already determined that the record is devoid of substantial evidence in this regard. We

have likewise found that said stipulation is not sufficient to cure such lack of evidence. The conclusion, therefore, is incapable that no evidence either by stipulation or otherwise was before the Commission upon which it could base its findings.

But the respondent Commission argues that although it is true, as petitioner contends, that "the period of exposure is not controlling", and that "there is no evidence of any silicosis being present in the body of her father prior to his employment at the Great Western Mine in 1928", yet it is contended that as "no examination was made prior to that time", and because of the insidious nature of the disease, this merely meant that "the effects of the inhalation had not progressed to the point at which her father's health was noticeably affected."

Such argument falls squarely within the issues raised by petitioner that the finding and award by the Commission, because of the total lack of evidence of the dust condition of the mines is therefore pure speculation of lay minds upon a question which could be solved only by scientific evidence, but that no such evidence appears in the record whatever.

In the quoted portion of the Argonaut case, supra, this court held to the same effect, that the nature of the disease is such that "Some men appear to be immune * * *. The incurring and development of this disease depends somewhat upon the constitution of the employee and upon the conditions under which he works." The course of the disease is not necessarily slow but may be rapid as was the situation in the Marsh case, supra, where the exposure of the three parties involved was a year and two months, one year and one month, and eleven months, respectively.

The only scientific medical evidence herein, other than the previously mentioned letter of Dr. Wood, was that of Dr. M. M. Booth, who examined the decedent in February, 1942, and in his communication to the Commission under date of September 28, 1942, stated: "There is no doubt in my mind that the silicosis had been existent probably for quite a few years. * * * As far as estimating the period of years that this condition has been existent I feel that it is impossible."

Dr. Jesse L. Carr, pathologist, of San Francisco, who performed a post-mortem examination of the lungs of the decedent,

wrote to the Commission on March 11, 1943, in part as follows: "There is considerable age and sequence here and much of the fibrous tissue is extremely old and hyaline."

On March 18, 1943, he further informed the Commission by letter, in part as follows: "The disease sequence as reflected in the slides here is an extremely long and old one and has been developing for a matter of years."

Obviously, therefore, the conclusion of the respondent Commission "that its procedure, as followed in the present case, which is that of apportionment of liability for compensation over all the employments in which exposure to silica dust and its consequent inhalation is proved to exist, is a proper procedure under the statute and the decisions of our courts. Each such employment contributed to the eventual disability and each had a part in proximately causing the resulting injury", is entirely untenable in that the record discloses no actual evidence of inhalation of silica dust—all that appears are the statements of Drs. Wood, Booth and Carr.

The brief of the respondent State Fund argues upon the authority of *Blanchard v. Industrial Acc. Comm.*, 68 Cal.App. 65, 228 P. 359, 360, which it contends first enunciated the rule in this state of "apportionment of liability" among successive employers, and specifically quotes that portion of the decision wherein the court, in commenting upon Subdivision 4, section 3 of the Workmen's Compensation Act [now section 4663 of the Labor Code], stated: "Under this section it was plainly the duty of the Commission to apportion the award of compensation among the respective employers."

The *Blanchard* case involved a question concerning the liability of one who had become afflicted with what is commonly termed "glassblowers' arm." It appears from the report of that case that *Blanchard* had contracted the disease in his right arm while in the employment of his first employer, and knew it, but continued to work on, though with less efficiency, during his two remaining employments until finally he was compelled to quit. The Commission determined that he had a certain percentage of total permanent disability and awarded him a sum which was apportioned among the three employments. Upon review by the District Court of Appeal, the

court stated: "The purpose of this petition is, therefore, to seek the annulment of that portion of the Commission's award which prorates the compensation between the three employers." The court then proceeded with a discussion of the Labor Code, and held as above quoted.

It should be noted from a factual standpoint that there was involved an *aggravation* of a *previous disease* which first manifested itself at the time of his original employment and continued on through the remaining employments until he was ultimately forced to stop working. Though the court did state that under such section and such circumstances it was the duty of the Commission to apportion the award, yet, nevertheless, in so doing it was required to "exercise a discretion *based upon the evidence* of the various periods of employment." (Italics added.)

It also should be noted that in said section 4663 which the court therein quoted, and which it declared made plain the duty of the Commission to apportion the award, contains neither the words "apportion" or "prorate" or any words of similar import.

[4] The purposes for which that section was enacted to accomplish might well be construed to have been a paring down of liability rather than the imposition thereof. This observation is not intended as a criticism of the court's conclusion in the *Blanchard* case but to emphasize that that conclusion was based on two grounds. As specifically mentioned in the case it was based not alone on the subdivision specifically referred to as its support but also on the facts previously reviewed but not mentioned, which reveal that the liability for compensation rested upon the earlier employers. This court does not interpret the *Blanchard* case as either holding or declaring that section 4663 authorized the spread of the burden of compensating an employee injured by an occupational disease upon previous employers who, but for the subdivision, would have no liability. Our conviction that said section is not to be construed as creating a liability is fortified by a further decision, *Moore Shipbuilding Co. v. Industrial Acc. Comm.*, *supra*, rendered by the same court six months after the opinion in the *Blanchard* case.

The balance of the brief of the respondent State Fund is given over entirely to an academic discussion of the disease of silicosis. In such discussion excerpts from

various medical books and journals upon medical jurisprudence are quoted. It is the evident intent of such citations to emphasize the progressive nature of the disease. But it must be noted that in each of such authorities emphasis also is placed upon the length of exposure, the degree of intensity of dust during such exposure, or as stated in Cecil, Textbook of Medicine, 4th Ed., page 884, and quoted by respondent State Fund: "As a general rule from 15 to 20 years working exposure to 15 or 20 million particles of pure crystalline silica are required to produce demonstrable silicosis."

While in Gray, Attorneys' Textbook of Medicine, 2d Ed., page 1071, likewise quoted by respondent State Fund in its brief, is found the following statement: "Investigation must be carried out along three lines before it can be determined that a particular employment is at fault; duration and intensity of exposure, true formula of dust, and actual cause of disability must be known."

After a discussion concerning the necessity that the silica must actually exist in the dust as silicon dioxide, formula SiO_2 , called "free silica", the text last quoted states: "It has been established that silica causes silicosis only in the crystalline form * * * combined silica, as silicates, and the host of other chemical substances containing the element silicon, do not lead to silicosis."

It is then stated that:

"Quartz, the principal constituent of sand, is almost universally distributed. We are all exposed to dust containing this compound throughout our lives. Nature has developed a protective mechanism that will care for any ordinary amount, and even excessive amounts for years, before symptoms appear. Russell (3) points out that 10,000,000 particles of dust per cubic foot, with 35% free silica as quartz, is not necessarily dangerous. This produces only a very slight fibrosis of the lung, as occurs in practically all people, but without danger as a cause of tuberculosis.

"The U. S. Public Health Service (20) considers from 10 to 20,000,000 particles under 10 microns of granite, 35% quartz, to be reasonably safe, while probably 50,000,000 particles of anthracite, 5% quartz, fails to produce silicosis. Cummings believes 5,000,000 particles of 100% quartz to be safe.

"Particles larger than 10 microns (1/2500 inch) are rapidly removed from the body. Most of them lodge in the nose and throat, and are either spit out or swallowed, ultimately to be eliminated through the intestine. Thousands of others lodge in the bronchi and bronchioles. The mucus membrane lining the air passages has tiny hair-like projections called cilia. These keep up a continual lashing motion, carrying mucus from the depths of the lung to the throat, where it is either coughed out or swallowed. Most of the silica and other dust is carried along with this stream and leaves the lung.

"The relatively few particles, less than 10 microns (1/2500 inch) in size and thus small enough to pass through the finest bronchioles to the alveoli, and which are not accidentally caught in the sticky mucus on the walls of the air passages are beyond the eliminating action of the cilia. The phagocytic, or 'dust cells' carry some of them to the bronchioles, to be swept out of the lung. Others are carried deeper toward the lymphatic glands near the pleural covering. From here they may be taken still further to the larger bronchial glands."

In summary, Gray concludes that the following points must be specifically investigated:

"1. What degree of exposure to free silicon dioxide was present, making sure that other substances as silicates are not so reported?

"2. How long has exposure continued * * * ?

"3. How long and intensive was exposure during previous employments throughout the patient's life?

"4. Are you sure that a diagnosis has not been made largely on X-ray findings without making certain that other disease is not the real causative factor of symptoms?

"5. Do dust counts show more than 10,000,000 particles per cubic foot, of size less than 10 microns, and containing at least 35% free silica? If a different percentage of silica was present, was there a proportionate number of particles?

"6. Are inhibiting agents present in the dust that will prevent silicosis, as carbon, coal, or clay?"

This court also has noted that the Industrial Accident Commission, by resolution,

has adopted a list of "potentially harmful industrial dusts" entitled "Suggested Maximum Permissible Concentrations (Toxic Thresholds)" which parallels the excerpts above quoted, and is as follows:

"Substance	Unit of measurement	Limit
Dusts:	Million particles per cubic foot	
*Silica (25-35% SiO ₂)	"	10
	(0.5 to 5.0 microns)	
Silica (over 75% SiO ₂)	"	5
	(0.5 to 5.0 microns)	

*Dust Count (million particles per cubic foot of air) multiplied by percentage of free silica (silicon dioxide), should be less than 5."

If evidence and investigation of three factors, i. e., duration, intensity and the true formula of the dust inhaled, are necessary, then the conclusion of respondent State Fund "that the existing rule in California is based upon sound principles of medicine" and is a fair and logical rule to follow, is without merit.

Although the apportionment of benefits by the respondent Commission, such as was the case herein, has been the policy of the Commission, yet this so-called rule has never been approved as such by the courts of this state.

To follow the Marsh case in relation to the limitation of actions is one thing, but to adopt the same rule without qualification as determinative of the question of apportionment of liability between successive employments without sufficient evidence upon which to predicate such a finding, is quite another.

We previously have pointed out that the Marsh case, decided purely upon the question of limitation of action, did not depart from the well-established principles of evidence but reiterated the necessity of proof of "unbroken causal connection between the injury and the employment * * * to show that the disease * * * was proximately" caused thereby. Likewise, the Blanchard case, relied upon by respondent State Fund, while it did approve the award therein, it did not, in our opinion, authorize the imposition of the burden of compensation of an employee injured by an occupational disease upon previous employers who, but for section 4663, would have had no liability, and such case also reiterated the elementary rule that an award must be "based on evidence."

There can be no argument with the statement of the respondent State Fund that silicosis is a disease "particularly favorable to apportionment", and so it is, but because that is true it does not follow that courts

should go outside of a record and from pure speculation determine an issue wherein there is involved so many questions of a technical nature without the aid of any evidence whatsoever upon such questions.

It cannot be denied that silicosis is such a disease as to warrant special legislative consideration. Respondents, however, because of the peculiar characteristics of the disease, would have this court assume legislative powers and by judicial decision write into the law substantive changes in the well-established and time-tried rules of evidence and procedure. Such changes, if any, must come as the result of legislative action, not by the courts.

We conclude that the finding by the Commission that the decedent, while employed as a miner, sustained certain injuries (the disease of silicosis) arising out of and in the course of his employment as the result of exposure to silica dust in certain named mines from the date of his first employment as a miner in "1909 to and including February 21, 1924", is not supported by substantial evidence except as to the period from 1928 to February 1942, when he was employed by the Great Western and Aetna mines respectively. In fact the record of his employments prior thereto is barren either of any evidence of silica dust of the chemical consistency necessary to produce the disease or of any evidence of the disease of silicosis as such. Therefore, any apportionment of the death benefit among decedent's employers prior to his employment at the Great Western Mine in 1928 was without the jurisdiction of the Commission. If this were not true it otherwise might be held in all reasonableness that the first imperceptible infiltration of

silica dust during early childhood could be likewise included.

[5] The same is true of years spent in industry which have passed without that effect upon the bodily health which constitutes a disease; these years are not to be counted in apportioning the burden which the law places upon industry. Where the line is to be drawn between a healthy condition and a diseased one is, of course, a problem of fact, often difficult to solve with definiteness. An employer, upon whom the facts and the law place responsibility for compensation for silicosis, who would escape a portion of the load on the theory that he alone is not responsible, necessarily has the burden of proving that other employers should share the responsibility. *Moquin v. Industrial Acc. Comm.*, supra.

[6] Where it is made to appear that an employment had brought about a case of silicosis which was aggravated by a subsequent employment, the burden of compensating the employee for the resulting disability is properly divided among the employers upon whom liability exists. This is not only supported by the *Blanchard* case, but also by *Associated Ind. Corp. v. Industrial Acc. Comm.*, 1932, 124 Cal.App. 378, 384, 12 P.2d 1075, where the *Blanchard* case was cited, and by *Argonaut Mining Co. v. Industrial Acc. Comm.*, supra, where such an award was affirmed as a matter of course.

For the reasons herein stated the award is annulled, and the application is remanded for further proceeding in accord with the views herein expressed.

ADAMS, P. J., and THOMPSON, J., concur.

Hearing denied; SHENK, CURTIS, and EDMONDS, JJ., dissenting.



65 Cal.App.2d 278

BENNETT v. ROBERTSON.

Civ. 14340.

District Court of Appeal, Second District,
Division 3, California.

July 28, 1944.

1. Automobiles ⇨245(72)

Where pedestrian, who was struck while crossing street in dimmed-out zone

by automobile which had only parking lights, either looked and did not see the lights of defendant's automobile, or saw lights but misjudged the speed and distance of automobile, whether pedestrian was negligent was for the jury.

2. Automobiles ⇨245(46, 59)

Where pedestrian while crossing street in dimmed-out zone was struck by automobile which traveled at a speed of 18 miles per hour, though it had only parking lights on, whether motorist was negligent with respect to speed, and whether accident was due to that negligence, was for the jury.

3. Automobiles ⇨245(40)

Proof of speed in excess of one of the prima facie limits set forth in Vehicle Code does not establish negligence of motorist as matter of law in automobile accident. Vehicle Code, § 511, St.1941, p. 2716; § 513, St.1935, p. 177.

4. Automobiles ⇨246(20)

Instruction that fact that injury to pedestrian, who was struck by automobile while crossing street, resulted because automobile was driven at speed greater than was reasonable or prudent, did not in itself show that driver was negligent was erroneous. Vehicle Code, § 511, St.1941, p. 2716; § 513, St.1935, p. 177.

5. Appeal and error ⇨1064(1)

Error in instruction, stating that fact that injury to pedestrian resulted because automobile was driven at a speed greater than was reasonable and prudent did not in itself show that driver was negligent, was not cured by concluding sentence which stated whether driver was negligent was to be determined from the surrounding circumstances, and, where appellate court could not say that instructions did not deter jury from finding that motorist was negligent because of speed, error was prejudicial. Vehicle Code, § 511, St.1941, p. 2716; § 513, St.1935, p. 177.

6. Automobiles ⇨246(22)

An instruction that, if proximate cause of injury to pedestrian by motorist was the lighting condition existing at scene of accident, jury should find the accident was unavoidable regardless of whether pedestrian was in crosswalk, was error, since jurors' attention should have been centered on whether the motorist exercised care not to injure others particularly the pedestrian

and not on care exercised by motorist on his own behalf.

Appeal from Superior Court, Los Angeles County, Clarence M. Hanson, Judge.

Action by Ben S. K. Bennett against William D. Robertson for injuries sustained when plaintiff was struck by an automobile driven by defendant. From a judgment for defendant, plaintiff appeals.

Reversed.

Joel Terrell, of Los Angeles, for appellant.

Parker & Stanbury, of Los Angeles, for respondent.

BISHOP, Justice pro tem.

The plaintiff and the front of defendant's automobile came together, about nine o'clock on a 1942 October evening, near the middle of a street which was in the dim-out zone along the ocean front. Neither party saw the other until the moment of impact, and the jury could, with reason, have found each guilty of negligence which was a proximate cause of the accident. Plaintiff does not appear to have been negligent, as a matter of law, however, so that erroneous instructions which placed plaintiff's cause in a bad light before the jury require the reversal of the judgment for the defendant.

[1] Plaintiff knew that the dim-out conditions prevailed. He walked rapidly across the street and into the path of defendant's car. Before he started across the street he looked for oncoming cars, so he stated, and as he progressed he looked again, but saw no car approaching. The record reads: "I saw headlights up the street but I saw no white lights." It does not matter whether, as plaintiff claims, for "headlights," there should appear "red lights," for it would appear either that plaintiff looked and did not see the lights of defendant's car, if, as defendant's witnesses stated, they were burning, or saw them and misjudged its speed and distance. In either event, whether the plaintiff was negligent was a question of fact for the jury. *Watkins v. Nutting*, 1941, 17 Cal.2d 490, 495, 110 P.2d 384; *Sankor v. Humborg*, 1941, 48 Cal.App. 2d 203, 204, 119 P.2d 431. We cannot with propriety say, therefore, that the jury returned a verdict for the defendant because of plaintiff's negligence.

[2-5] The defendant, according to his own testimony, was driving in the dimmed out zone, with only his parking lights to illumine objects in his path, yet was traveling eighteen miles per hour. As he failed to see the plaintiff until a "second" before he struck him, the jury might well have concluded that the defendant was guilty of negligence in driving at the speed at which he drove, and that the accident was due to that negligence. But the court advised the jury: "The basis speed law of this State reads as follows: 'No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of the highway, and in no event at a speed which endangers the safety of persons or property.' The fact, if it be a fact, that the injury to the plaintiff resulted because the car was driven at a speed greater than was reasonable or prudent does not in and of itself show that the driver was guilty of negligence. Whether he was or was not guilty of negligence is to be determined from the surrounding circumstances of which the speed at which he traveled is one of such circumstances." This instruction contains an incorrect statement of the law. Proof of speed in excess of one of the prima facie limits set forth in section 511 of the Vehicle Code, St.1941, p. 2716, does not establish negligence as a matter of law (section 513, Vehicle Code, St.1935, p. 177) but to state that driving a motor vehicle "at a speed greater than was reasonable or prudent" is not negligence, is to rob "negligence" of much of its meaning. The concluding sentence, by creating a further conflict of ideas, did not cure the confusion. We cannot say that this instruction did not deter the jury from finding that the defendant was negligent because of the speed at which he drove. The error in its giving must be characterized, therefore, as prejudicial.

[6] The following instruction is also an incorrect statement: "You are instructed that if you find from the evidence that both the plaintiff Mr. Bennett and the defendant Mr. Robertson were exercising ordinary care in their own behalves at the time and place of the accident involved herein, and that the proximate cause of the said accident was the lighting condition and poor visibility existing at the scene of the accident, then you should find that the said accident was unavoidable, and under these

circumstances your verdict must be in favor of the defendant Mr. Robertson herein, regardless of whether the plaintiff was in the cross walk or not." In considering whether or not the defendant exercised ordinary care, the jurors' attention should have been centered on whether he exercised care not to injure others, particularly the plaintiff, not on the care exercised by the defendant on his own behalf.

The defendant complains of other matters, but we feel it unnecessary to discuss them.

For the reasons given, the judgment is reversed.

DESMOND, P. J., and PARKER WOOD, J., concur.



65 Cal.App.2d 228

LUCEY v. MUNICIPAL COURT OF CITY OF LOS ANGELES et al.

MALATESTA v. LUCEY et al.
Civ. 14266.

District Court of Appeal, Second District,
Division 2, California.

July 19, 1944.

Rehearing Denied Aug. 14, 1944.

Hearing Denied Sept. 14, 1944.

Judgment ¶472

Since there can be no direct appeal to the District Court of Appeal from the appellate department of the superior court, its judgment being final and conclusive upon all civil matters within its jurisdiction, a collateral attack upon its judgment rendered three years previously cannot be considered. Const. art. 6, § 5.

Appeal from Superior Court, Los Angeles County; W. Turney Fox and Clarence L. Kincaid, Judges.

Action by Mildred Lucey against the Municipal Court of the City of Los Angeles and Honorable Lucius P. Green, Judge of Division 14 thereof, for a writ of mandate commanding the Municipal Court to dismiss an action brought by one Joseph F. Malatesta for failure to bring the action to trial, wherein Joseph F. Malatesta filed

pétition in intervention as against plaintiff, and "Lucey's", a partnership, and United States Fidelity & Guaranty Company. Both petitions were dismissed, and Joseph F. Malatesta appeals.

Affirmed.

Ray Howard, of Los Angeles, for appellant.

Martin S. Ryan, of Los Angeles, for respondents.

MOORE, Presiding Justice.

On August 5, 1936, one Joseph F. Malatesta filed his action in the Municipal Court of Los Angeles against Mildred Lucey and Antonio Lucey individually and against "Lucey's," a copartnership consisting of Mildred and Antonio Lucey, John Doe and Richard Roe. Mildred and Antonio duly filed their answer. However, the summons was returned showing proof of service on "Lucey's" by serving Mildred Lucey, a member thereof. Inasmuch as the numerous proceedings and appeals of the case prior to January 20, 1938, are not of importance to this discussion, we omit that portion of the narrative with reference to them.

On January 20, 1938, without notice the complaint was amended by substituting the name of Barbara Wallace in lieu of John Doe. The action was then dismissed as against all individual defendants. No service of the amended complaint was made, but on the same day judgment was entered against the firm. Upon appeal to the superior court, February 11, 1938, appellate department, the judgment was reversed on the ground that the amendment was one of substance and therefore opened the default of "Lucey's." Following an unsuccessful attempt to have the municipal court dismiss the action for failure to bring it to trial within three years after filing the remittitur (on July 30, 1938) under Section 583, Code Civil Procedure, on June 12, 1941, Malatesta filed his notice of motion to set the case for trial along with his notice of motion to amend by substituting Barbara Wallace as the partner of Mildred in Lucey's. The motion was heard on June 16 and the case was set for June 25. When the case was called on the latter date the copartnership, being the sole defendant, suggested that the case was not at issue since the default against Lucey's had been opened and set aside by the reversal and the complaint had not been properly

amended to include Barbara. The continuance was denied, whereupon Malatesta introduced in evidence a photostatic copy of Lucey's application for a liquor permit, which document showed that Lucey's consisted of Mildred Lucey and Barbara Wallace. The case then went off the calendar, whereupon plaintiff filed his amended complaint alleging that Lucey's consisted of Mildred Lucey and Barbara Wallace. Its demurrer having been overruled, Lucey's filed its answer August 14, 1941. In the following February it filed its second notice of motion to dismiss the action for failure to bring it to trial within three years after the filing of the remittitur in the municipal court. The motion was again on March 2, 1942, denied without prejudice on condition that the cause be set for trial within 14 days. On Malatesta's request filed March 10, it was set for trial on April 2.

Alleging the foregoing recitals Mildred filed her petition in the Superior Court whereby she sought a writ of mandate, commanding the municipal court to dismiss the action by reason of Malatesta's failure to bring the action to trial within the three years following the filing of the remittitur. Malatesta promptly filed his petition in intervention wherein he alleges (1) that at the time of taking its appeal of February, 1938, Lucey's filed an undertaking on appeal with the United States Fidelity & Guaranty Company as surety; (2) that the judgment was not reversed by the appellate department for the reasons that (a) it was without jurisdiction under Section 4½ of Article VI and Section 22, Article I of the Constitution; (b) the appeal was taken on the judgment roll alone; (c) the reversal purports to have been based upon error in pleading and procedure only and not after an examination of the entire cause and could not have been founded upon a conclusion that any error complained of had resulted in a miscarriage of justice and the appellate department could not have determined whether the evidence showed the amendment to be necessary or whether the amendment in the presence of counsel for Lucey's or their appearance after judgment and before amendment constituted due notice of application to amend or dispense with the necessity for the amendment; (d) the facts assumed by the appellate department were not true but the true facts were such as justified the trial judge in rendering the judgment against Lucey's, in favor of Malatesta. He then recites the story of the proceedings prior to the judgment;

his proof of the copartnership; the amendment to conform to the evidence; the continuance at the request of Lucey's; his attempt to reset the case while reserving his objection to the validity of the reversal; his motion for judgment against the surety on the stay bond on the ground that the reversal of the judgment was void; the only party that could move to dismiss the action is Lucey's, the sole defendant. The petitions came on for hearing before Department 22, Superior Court, and after submission both were by order duly entered dismissed.

Appellant makes neither assignments of error nor sets forth in his brief each point separately under an appropriate heading, or any heading descriptive of the subject matter. Rule XV, Rules on Appeal. His only headings are "General Statement of the Case," "Facts," "Legal Principles," "Appellate Departments' Ruling Not Final." However, we have carefully explored the record and appellant's lonely brief in order to ascertain the merit of the contentions alleged in his petition. His demand that we declare the reversal of his judgment by the appellate department is supported by no authority or citation of legal principle within our knowledge. There is no such thing as an appeal from that court. Its judgments are final and conclusive upon all civil matters coming within their cognizance. Article VI, Section 5, Constitution. Since there can be no direct appeal from that court, collateral attack upon its judgment of three years ago cannot be seriously considered. A disappointed litigant cannot enter the back door of an appellate court if admittance be denied him at the front. If the appellate department committed error in reversing the judgment of January, 1938, it did so in the proper exercise of its jurisdiction and constitutional power. It is trite to say that the validity of a judgment is not to be determined by its freedom from error. The appellate department received the appeal of Lucey's from the municipal court, both parties were represented and, unfortunate for Malatesta, his judgment was reversed upon a legal opinion derived from the record and arguments. A discussion of the virtues of that opinion would take us beyond the confines of propriety.

Order affirmed.

McCOMB, J., concurs.

Hearing denied; SCHAUER, J., not participating.

65 Cal.App.2d 241

PEOPLE v. LONG,
Cr. 2294.

District Court of Appeal, First District,
Division 2, California.

July 24, 1944.

Rehearing Denied Aug. 8, 1944.

Robbery ⇨27(1)

Where evidence in robbery prosecution showed two different fights between defendant and prosecuting witness, in the second of which defendant took knife from witness, instruction that defendant would not be guilty if he took knife only to disarm witness was properly refused as confusing.

Appeal from Superior Court, Alameda County; Hon. Lincoln S. Church, Judge.

Roscoe Long and Lovell Barclay were convicted of robbery in the second degree, and defendant Long appeals.

Affirmed.

Willard W. Shea, Public Defender, Alameda County, Cal., of Oakland, for appellants.

Robert W. Kenny, Atty. Gen., State of California, and David K. Lener, Deputy Atty. Gen., State of California, for respondent.

STURTEVANT, Justice.

The district attorney filed an information charging the defendants Roscoe Long and Lovell Barclay with the crime of robbery. Separately they entered pleas of not guilty. They were tried together. Both were found guilty of robbery in the second degree, each made a motion for a new trial, the motions were denied, and the defendant Long has appealed.

The facts as stated by the attorney general are as follows. Jacob Gensburg, an employee of the Moore Shipyard, resides at 715 Myrtle Street, between 7th and 8th Streets, in Oakland, California. On the night of June 4, 1943, about 10:05 p.m., he left his place of abode and visited a bar on the northwest corner of 7th and Market Streets in said city, where he ordered and consumed a bottle of beer. Both defendants, whom he knew by sight, were at said bar at the time. He left the bar for his room about 11:20 p.m. and walked west on 7th Street to Myrtle. While walking down

7th Street he looked behind him and observed the defendants walking in his direction, apparently following him. Arriving at the northeast corner of Myrtle and 7th Streets, he crossed over Myrtle diagonally in a northwesterly direction in line with the place where he lived. As he approached the curb of the sidewalk in front of said place, the defendants set upon him, threw him to the pavement and took from him by force and violence a wallet containing \$10, a red-handled pocket knife, and other articles of personal property, the latter of which were not made a part of the charge. The defendants upon securing said personal property broke away from the complaining witness who had clung to the jacket of the defendant Long, tearing or ripping it. Upon breaking away from the complaining witness the defendants ran up Myrtle Street in a northerly direction towards 8th Street, the defendant Long in the lead. The defendant Barclay disappeared within the block, which was later found to be 731½ Myrtle Street, and the defendant Long continued his flight to 8th Street, where he turned to his left down 8th Street to Filbert, and down Filbert to 7th, and then in an easterly direction to 7th Street, back to the corner of 7th and Myrtle, where he was apprehended by the police and placed under arrest, as was the complaining witness, the latter for intoxication.

Gene Viola, the owner of a liquor store at the northwest corner of Myrtle and 7th Street, had returned to his store about 11:30 p.m. of said night to get his car, which had been parked in front of his store on Myrtle facing 8th Street earlier in the evening; he had just returned from a wrestling match he had witnessed. He had stopped at the drugstore on the northeast corner of 7th and Myrtle, purchased a newspaper, and crossed the street corner to his car, which he entered. Upon switching his lights on he observed the defendant Long and the complaining witness, who appeared to be fighting or wrestling. He called to them and inquired "What is going on here?" When the defendant Long replied, "This guy is trying to rob me." The complaining witness spoke up and said, "You stole my wallet and my keys." The witness then testified that Long broke loose and ran up Myrtle Street from 7th to 8th, west on 8th, south on Filbert and east on 7th, back to the northwest corner of 7th and Myrtle. Viola, riding in his car, followed him around the block. When

Viola returned to 7th and Myrtle, several officers were at the scene of the robbery talking to the complaining witness. Viola pointed to the defendant Long and said to the officers, "Here is the man you are looking for." The police officers then took appellant Long into custody. They searched him and found on his person a razor and the knife with the red handle, the property of the complaining witness. Viola did not recall seeing Barclay.

Alford, an officer in the Oakland Police Department, was on special duty that night with Officer Lilienthal. They cruised about the district in a police car and came upon the scene. They heard the complaining witness shout he was robbed and wanted to go to his room. The defendant Long had returned to 7th and Myrtle and was walking at a fast pace east on the north side of 7th Street just east of the northerly curb of Myrtle, when Viola returned after following the defendant about the block and directed the attention of the officers to Long as one of the holdup men. Long crossed the street, practically running, when the officers placed him in custody and took from his person the razor and the red-handled knife, which Long resisted. Long was acting in a very high state, he refused to meet the demands and requests of the officers. He tried to pull away from them and refused to answer their questions. His eyes were rolling. He had the appearance of a man intoxicated, although there was no odor of liquor upon his breath to any extent. He appeared to be under the influence of drugs. Gensburg was bleeding on the left side of the face, around the ear, and from lacerated lips received by him when thrown against a tree by Long. When he saw the knife the officers took from Long he claimed it as his property and demanded of him the return of his money and keys in the presence of said officers, to which Long made no answer. Long was taken to the City Hall, where he gave his address as Room 4, Sather Hotel, which proved to be the room of a white man and which Long had shared with him for several weeks without the knowledge of the hotel management. The Sather Hotel is situated at 918 7th Street. Long was taken from the City Hall to the Sather Hotel by the officers and on the way to the hotel he told the officers he and "Frisco" (Barclay) robbed Gensburg and after the robbery ran up Myrtle Street to 8th, Barclay to the place where he lived at

731½ Myrtle within the block, Long around the block, as indicated. From the Sather Hotel the officers took Long to Barclay's basement apartment at the address indicated, after midnight, between 1 a.m. and 2 a.m., where they found a young lady by the name of Eula Thompson with him. Long's testimony was similar to that of Alford.

The defendant also states the facts. In his statement he claims that Jacob Gensburg accused him of having possession of his keys and wallet and proceeded to tussle with him. That in the tussle Gensburg drew out his knife and the defendant in the struggle got possession of it and retained it to protect himself. In other words the prosecution claimed the defendants assaulted Gensburg, whereas the defendant Long claimed that Gensburg assaulted him.

In instructing the jury the trial court gave no instruction regarding an assault. The defendant requested an instruction as follows: "If you believe from the evidence that the witness Gensburg attempted to strike the defendant Long with a knife and that the defendant Long took the knife and nothing more, without any intention of stealing it, but only for the purpose of disarming Gensburg, then he would not be guilty of robbery." *People v. Sheasbey*, 82 Cal.App. 459, 463, 255 P. 836. The trial court refused to give it. The defendant claims that refusal was error. We think not. The record discloses there were two different fights. The first was disclosed by the testimony of the complaining witness Gensburg who testified that Long and Barclay overtook, assaulted him, and robbed him. After that act was completed Gensburg testified that as he got up he grabbed and tussled with the defendant Long. That was the second assault. It was in that second assault that the defendant claimed he took from Gensburg the knife and did so to protect himself from being injured. The requested instruction, if given, would have applied to the second assault only, and would have directed the jury to find that no robbery had been committed. The proposed instruction was confusing and the trial court did not err in refusing to give it. *People v. Driscoll*, 53 Cal.App.2d 590, 128 P.2d 382.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concur.

GRIMM v. GRIMM et al.*
Civ. 14488.

District Court of Appeal, Second District,
Division 1, California.
July 17, 1944.

Rehearing Denied July 31, 1944.
Hearing Granted Sept. 14, 1944.

Insurance ⚡587

Failure of divorced husband to exercise his power to change beneficiary of life policy payable to wife established intent to have insurance money paid to wife, and her right to proceeds was not barred by provision in property settlement agreement that husband could change beneficiary and that wife transferred all interest in policy to husband.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Clara Grimm against Walter E. Grimm and another, as administrators of the estate of Lewis Grimm, also known as Lewis L. Grimm, deceased, and the Connecticut Mutual Life Insurance Company, for declaratory relief concerning rights to proceeds of insurance policy. From a judgment for plaintiff, defendant administrators appeal.

Affirmed.

John J. Craig and Rush M. Blodget, both of Los Angeles, for appellants.

Stephen Monteleone, of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

Husband and wife entered into a property settlement agreement, vesting portions of the community property in each as his sole and separate property. Among the community assets was an insurance policy for \$5,000 in favor of the wife, with the right in the husband to change the beneficiary. The following clause with reference to the insurance policy appears in the property agreement: "Said first party shall have the right to change the beneficiary of the life insurance policy, described in Article VIII of Exhibit A, and second party agrees to execute upon request any instrument necessary or convenient to accomplish such change, and second party hereby transfers, releases and relinquishes to first

party all interest in and to said policy of insurance and the premiums paid thereunder and the avails thereof."

After the parties were divorced the husband died, without having changed the beneficiary.

In this action the personal representatives of the decedent contend that the property agreement by its terms conveyed to the husband all of the right, title and interest of the wife in and to the insurance policy, and therefore the avails thereof should be paid to them.

The trial court found that the failure of the decedent to exercise his power to change the beneficiary established that it was his intent to have the insurance money paid to his former wife, and that the property agreement alone did not go so far as to bar her right to take the proceeds of the policy.

This view finds support in the following cases: *Cook v. Cook*, 17 Cal.2d 639, 111 P.2d 322, holding that upon death an insurance beneficiary's right becomes vested, no change having been made by the insured prior to death; *Sandrosky v. Prudential Ins. Co.*, 217 Cal. 578, 20 P.2d 325, holding that there may be drawn from a property agreement and subsequent conduct of the parties an inference that the husband intended that the wife should take under the policy at his death; and *Mayfield v. Fidelity & Casualty Co.*, 16 Cal.App.2d 611, 61 P.2d 83, and *Mutual Life Ins. Co. v. Franck*, 9 Cal.App.2d 528, 50 P.2d 480, holding that a wife's right to take as beneficiary under a life insurance policy is an expectancy.

Appellants contend that *Sullivan v. Union Oil Co.*, 16 Cal.2d 229, 105 P.2d 922, requires a reversal of the judgment.

The facts in the *Sullivan* case and in this case are not the same. In that case the property agreement applied to all of the property of the spouses without exception, which obviously included a provident fund set up by the husband's employer. In this case the deceased husband reserved a power to change the beneficiary, and the wife covenanted and agreed that that might be done. But the power was not exercised and the policy was left without change of beneficiary until the death of the insured. Under these circumstances, the beneficiary is entitled to the proceeds of the policy.

The facts in the pending case bring it more nearly within the rule in *Jenkins v. Jenkins*, 112 Cal.App. 402, 297 P. 56, where in it was held that the proceeds of an insurance policy went to the beneficiary because the property agreement in question excluded the policy.

Judgment affirmed.

YORK, P. J., and WHITE, J., concur.



64 Cal.App.2d 540

STEWART v. NORSIGIAN et al.

Civ. 3126.

District Court of Appeal, Fourth District,
California.

June 19, 1944.

Hearing Denied July 20, 1944.

1. Courts ⇐107

Weight to be given statements in opinion must be measured by facts before court and ultimate action taken on the case and isolated statements may not be lifted from opinion and regarded as abstract and correct statements of the law.

2. Automobiles ⇐242(6)

In addition to permissive use of automobile, either employment of operator by automobile owner or that operator was member of family group of owner or was operating automobile under control of or for a member of family group of owner must be established to justify inference of agency. Vehicle Code, § 402, St.1937, p. 2353.

3. Automobiles ⇐192(6)

Mere possession and permissive use of automobile does not make owner liable for negligence of operator under doctrine of "respondeat superior". Vehicle Code, § 402, St.1937, p. 2353.

See Words and Phrases, Permanent Edition, for all other definitions of "Respondeat Superior".

On petition for rehearing.

Petition for rehearing denied.

Prior opinion, 149 P.2d 46.

Rae B. Carter and Edmond A. Chevalier, both of Fresno, for plaintiff and appellant.

Crider, Runkle & Tilson, of Los Angeles, for defendant and appellant.

Chester O. Hansen, of Fresno, for defendant and respondent.

PER CURIAM.

Plaintiff has filed a petition for rehearing in which she cites numerous cases not called to our attention before. She maintains they support her argument that the inference may be drawn that Norsigian was the agent of Pacific Finance Corporation under the proven facts of the case. She argues that these cases support the rule that the inference of agency may be drawn from possession of the car by Norsigian with the consent of the owner, without any showing that he was an employee or belonged to the family group of the owner.

She cites *Montanya v. Brown*, 31 Cal. App.2d 642, 88 P.2d 745. In that case the owner consented that his wife, who could not drive, could use the car and that it could be driven by her sister. The trial court rendered judgment against the owner for \$35,000 on the theory of agency. The judgment was reduced to the \$5000 permitted under section 402 of the Vehicle Code, St.1935, p. 153, against an owner where permissive use is established. The family group theory was not considered on appeal although it might have been applicable under the facts of that case, as it might have been held that the car was under the control of the wife although actually operated by her sister, had that question been raised. See *Souza v. Corti*, 22 Cal. 2d 454, 139 P.2d 645, 147 A.L.R. 861.

Plaintiff relies on the case of *Malmstrom v. Bridges*, 8 Cal.App.2d 5, 47 P.2d 336. That case turned on the question of employment and subagency which the appellate court held was established by the evidence, and not on agency inferred from permissive use.

Our attention is directed to the case of *Fahey v. Madden*, 56 Cal.App. 593, 206 P. 128, 130. The defendant Madden was the owner of an automobile which one Boen was driving with his consent at the time of the accident. The jury returned a verdict for plaintiff and the trial court granted Madden's motion for new trial. This order

Appeals from Superior Court, Fresno County; Ernest Klette, Judge.

was affirmed on appeal on the ground that the jury was erroneously instructed, as follows: "It is admitted by the pleadings that the defendant Madden was the owner of the automobile at the time of the accident and that the defendant Boen was driving the automobile at the time of the accident with the permission, consent and approval of the defendant Madden. This is prima facie proof that the driver was engaged in the owner's service and a presumption arises that the automobile was in use for the owner's benefit. Testimony that the automobile was loaned to Boen does not, as a matter of law, destroy the presumption unless from the evidence you find that it was loaned as claimed by the defense. If you should find that the said automobile was not loaned to said Boen as claimed by the defense, and if you also find that the injury to Fahey was the result of the negligent operation of the automobile your verdict must be for the plaintiff, and against defendants Madden and Boen unless you further find that the plaintiff was guilty of contributory negligence."

This instruction was held to be erroneous and sufficiently prejudicial to support the order granting the motion for new trial.

Dierks v. Newsom, 49 Cal.App. 789, 194 P. 518, 520, involved a judgment for damages caused by an automobile being driven by one Gregory and owned by the defendant Newsom. The evidence justified the conclusion by the trier of fact, as stated in the last paragraph of the opinion, "that Gregory was authorized by the appellant to take the car for the purpose of having it repaired, its judgment holding the appellant responsible for Gregory's negligence in performing his mission must be affirmed, and it is so ordered." This evidence certainly indicated something more than permissive use and justified the holding of an agency for a special purpose.

In *McWhirter v. Fuller*, 35 Cal.App. 288, 170 P. 417, the plaintiff recovered judgment against the defendant who was the owner of an automobile which was being operated by his wife with his express permission and consent. Under the facts before the court it was held that a prima facie case of agency of the wife was established which is in accordance with the rule followed in many jurisdictions where the family group rule is applied.

We fail to understand why plaintiff has cited the case of *Hathaway v. Mathews*, 85 Cal.App. 31, 258 P. 712. It is true that

the opinion contains a general statement that the fact of ownership alone establishes a prima facie case against the owner for the reason that the "presumption" arises that the driver is an agent of the owner. From any point of view this is not a technically correct statement of the law as, among other things, it omits the question of permission. Miss Grant was the owner of the car which she had loaned to Neal Mathews for a trip to Venice. On this journey Mathews took Miss Grant to her place of employment and the accident happened while Miss Grant was in the car going to that destination. The trial court rendered judgment in favor of Miss Grant and against Mathews. This judgment was affirmed on appeal because of the facts found. Had judgment gone against Miss Grant it might have been affirmed on appeal under the rules announced in *Bosse v. Marye*, 80 Cal.App. 109, 250 P. 693, and *Souza v. Corti*, supra. The accident occurred before the adoption of section 1717¼ of the Civil Code which was superseded by section 402 of the Vehicle Code. This is true of the other cases considered here where the accident happened prior to August 14, 1929. (Stats. 1929, p. 565, Civil Code, § 1714½.)

The case of *Perry v. A. Paladini, Inc.*, 89 Cal.App. 275, 264 P. 580, 583, contains statements to the effect that proof of ownership and possession is sufficient to establish a prima facie case of agency. The first question decided was the sufficiency of the evidence to support the finding that A. Paladini, Inc., was the owner of the truck at the time of the accident. The trial court so found and the appellate court was of the opinion that the evidence was amply sufficient to support such a finding. The question of the agency of Raymond Zanetta, the driver, was considered at length. A. Paladini, Inc., was engaged in the wholesale distribution of fresh fish and had places of business in Monterey and San Francisco and transported fresh fish by truck from Monterey to San Francisco. Raymond Zanetta had been employed by A. Paladini, Inc., for ten months preceding the accident and was so employed by it at the time of trial. The appellate court made the following comment on this evidence: "Summarizing the evidence of plaintiff, we have these facts: The truck of appellant, engaged in a business similar to that of the appellant, at a place where the appellant would usually be engaged in

the conduct of his business, and being operated by one who previous to the accident and subsequent thereto was in the employ of appellant. It will thus be noted that plaintiff went much beyond the establishing of a prima facie case resting upon mere ownership."

Certainly such evidence was sufficient to support a finding of agency without relying on any inference.

Ransford v. Ainsworth, 196 Cal. 279, 237 P. 747, is the last case cited by plaintiff in support of her contention that permissive possession and use of an automobile raises the inference of agency without the further proof that the operator is an employee or a member of the family group of the owner or is operating the car for or under the control of a member of such family group. In this case the operator was the husband of the owner which places the case within the family group class.

[1,2] In practically all of the cited cases there are statements to the effect that the inference of agency arises from the fact of possession and permissive use. Those statements were by way of argument under the facts before the court. The weight to be given them must be measured by those facts and the ultimate action taken on the case. Isolated statements and paragraphs may not be lifted from an opinion and regarded as abstract and correct statements of the law. They must be considered in connection with the factual situation the author of the opinion is discussing. They are modified by such factual situation. This is illustrated in the instant case where we have referred to the family group rule without attempting any exact definition of it. Thus the cases relied upon by plaintiff do not establish the rule that mere permissive use of an automobile raises the inference of agency. They do not cause us to change our views that, in addition to permissive use the plaintiff must also prove either employment of the operator by the owner, or that the operator was a member of the family group of the owner, or was operating the car under the control of or

for a member of the family group of the owner in order to justify the inference of agency.

Plaintiff argues that the family group theory has been rejected in California, citing *Perry v. Simeone*, 197 Cal. 132, 239 P. 1056; *Idemoto v. Scheidecker*, 193 Cal. 653, 226 P. 922; *Spence v. Fisher*, 184 Cal. 209, 193 P. 255, 14 A.L.R. 1083; *Ormston v. Lane*, 90 Cal.App. 481, 266 P. 304; *Grillich v. Weinshenk*, 64 Cal.App. 474, 222 P. 160, and *Sanfilippo v. Lesser*, 59 Cal.App. 86, 210 P. 44. Speaking very generally, those cases are based on the old and well-established rule that in the absence of statute a parent is not liable for the torts of a child. The distinction between those cases, and others which we classify as falling within the family group class, is pointed out in *Sanfilippo v. Lesser*, supra.

[3] Prior to the adoption of section 1717 $\frac{1}{4}$ of the Civil Code, now section 402 of the Vehicle Code, St.1937, p. 2353, no right of action existed against the owner of a vehicle simply because he had given another permission to operate it. Such right of action is clearly a creature of statute which limits the recovery against the owner to five or ten thousand dollars, depending on circumstances, and also depending on the further condition that the right of action does not arise "through the relationship of principal and agent or master and servant." If the mere possession and permissive use of an automobile made the owner liable for the negligence of the operator under the doctrine of respondeat superior, then subdivision "b" of section 402 of the Vehicle Code is entirely meaningless and there would be no limitation on the amount that an injured plaintiff could recover against such owner. To so hold would be the worst kind of judicial legislation and would nullify a clear and unambiguous enactment of the legislature. This court cannot legislate and it does not propose to do so. We adhere to the views formerly expressed.

The petition for rehearing is denied.

Hearing denied; CARTER, J., dissenting.

**GARTNER et al. v. ROTH, County Auditor,
et al. ***

Clv. 3269.

District Court of Appeal, Fourth District,
California.

July 18, 1944.

As Modified on Denial of Rehearing
Aug. 2, 1944.

Hearing Granted Sept. 14, 1944.

1. Taxation ☞696

The statute "postponing" and "suspending" until June 1, 1945, the "operation" of a prior statute terminating right of redemption of property deeded to state for taxes on and after June 1, 1942, applies to property deeded before the enactment of suspension statute, and as so construed such statute is constitutional. St.1939, p. 1325, § 3476; St.1941, p. 1425, § 3511.3; St.1943, p. 2804.

See Words and Phrases, Permanent Edition, for all other definitions of "Operation", "Postpone" and "Suspend".

2. Statutes ☞181(1), 185

The court should not go beyond express or clearly implied intention of legislative acts.

Appeal from Superior Court, City and County of San Bernardino; F. A. Leonard, Judge.

Mandamus proceedings by Henry A. Gartner, James Harrison, and Allie Harrison against V. L. Roth, as Auditor, and Ray E. Williams, as Treasurer of San Bernardino County, and the State of California, to compel the respondents to permit redemption of certain real property that had been deeded to the state for non-payment of taxes. From a judgment for respondents, the plaintiffs appeal.

Reversed and remanded with directions.

C. E. Crowley, of Ontario, for appellants.

John P. Knauf, Co. Counsel, and R. J. Farrell, Deputy Co. Counsel, both of San Bernardino, Robert W. Kenny, Atty. Gen., and John L. Nourse and Daniel N. Stevens, Deputy Attys. Gen., for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order denying a petition for a writ of mandate. The appeal is presented on an agreed statement

* Subsequent opinion 157 P.2d 361.

from which it appears that certain real property in the city of Upland was assessed to J. Julius Gartner for the year 1936; that the taxes for that year were not paid; that Gartner died in 1937 and this property was distributed by the Los Angeles Superior Court to Henry A. Gartner, who sold the property under contract to James and Allie Harrison, who have been in possession since 1937; that on August 3, 1942, the property was deeded to the state for nonpayment of the 1936 taxes; that the plaintiffs first discovered that said taxes had not been paid in November, 1942, after the deed to the state was recorded; that the plaintiffs immediately thereafter made application to the defendant auditor for an "estimate of redemption" and offered to pay said taxes with all penalties and interest to the defendants auditor and treasurer; that these officers, on advice of counsel, refused to give an estimate of redemption or to permit redemption to be made on the ground that the provisions of sections 3476 and 3511.3 of the Revenue and Taxation Code, St.1939, p. 1325, St.1941, p. 1425, precluded them from permitting said property to be redeemed; that ever since said time the plaintiffs have stood ready and have repeatedly offered to pay all delinquent taxes with all penalties and interest; that since November 15, 1942, the plaintiffs have paid rental on the property to the state and the rent paid now nearly equals the amount of taxes, interest and penalties that would be due if redemption had been made; that on October 8, 1943, the plaintiffs filed a petition for a writ of mandate and secured an alternative writ requiring the defendants auditor and treasurer to show cause why they had not made an estimate and permitted redemption to be made; that at the hearing of said matter it was stipulated that the above facts were admitted, that there was no question of fact to be determined, and that the only issue to be decided was the question of law as to whether or not the plaintiffs had a right to redeem said property; that the judge held and found that Chapter 932, page 2804, Statutes of 1943, cannot be applied retroactively for the purpose of allowing a redemption of property deeded to the state for taxes between June 1, 1942, and August 4, 1943, and that during that period section 3511.3 of the Revenue and Taxation Code was in full force and effect; and that the court thereupon made and entered an order quashing the alternative writ and

denying the petition for a peremptory writ of mandate. From that order the plaintiffs have appealed.

So far as material here, section 3511.3 of the Revenue and Taxation Code provides: "On or after June 1, 1942, and prior to January 1, 1947, on execution of the deed to the State, the right of redemption is terminated as to all property * * *." That section was adopted in 1941. Stats. 1941, p. 1425. In 1943, an act was passed (Stats. 1943, Ch. 932) which provides, in part, as follows: "Sec. 2. The operation of Sections 3511.3 (and ten other sections) of the Revenue and Taxation Code shall be postponed and suspended until June 1, 1945." The controversy here is as to the meaning and effect of that provision, which became effective on August 4, 1943. For convenience, these two statutes will be referred to as section 3511.3 and Chapter 932.

The appellants contend that it was the express and implied intent and purpose of the legislature, in adopting Chapter 932, to suspend the bar to redemption theretofore imposed by section 3511.3 and to permit the redemption of all property deeded to the state for taxes, and not sold by the state, at any time up to June 1, 1945.

On behalf of the respondents the county counsel argue that section 3511.3 "is in all probability constitutional" since it affects the termination of the right of redemption as to property deeded to the state on and after June 1, 1942, and since another statute passed in 1941, affecting the same right with respect to property deeded prior to June 1, 1942, was upheld in the case of *Mercury Herald Co. v. Moore*, 22 Cal.2d 269, 138 P.2d 673, 147 A.L.R. 1111; that Chapter 932 contains no provision for its retroactive application; and that section 3511.3 instantly and finally terminated any right of redemption with respect to this property when it was deeded to the state on August 3, 1942. County counsel frankly and honestly admit that their interpretation of the meaning and effect of Chapter 932 would result in an unjust discrimination between those whose property was deeded to the state between June 1, 1942 and August 4, 1943, and those whose property was deeded to the state before or after that period, and say: "Such discrimination is no doubt due to legislative inadvertence, and this result probably was not foreseen by the legislature. While the

effect on taxpayers seems harsh we see no legal means of escaping it."

The attorney general has filed a brief on behalf of the state in which it is contended that the right of redemption as to this property was terminated when it was deeded to the state on August 3, 1942; that Chapter 932 could not revive this right of redemption unless it is held to be retroactive in effect; that Chapter 932 contains no language indicating any intent that it should be retroactive in effect; that Chapter 932 should be construed "prospectively" because to give it a retroactive effect would raise a serious doubt as to its constitutionality; and that since Chapter 362, p. 1598, also adopted in 1943, sets forth that its purpose is to avoid any conflict between the laws of this state and the federal Soldiers' and Sailors' Relief Act of 1940, as amended, 50 U.S.C.A. Appendix, § 501 et seq., it must be assumed that the sole purpose of adopting Chapter 932 was the same. And that it was no part of that purpose to get property back on the assessment rolls or to enable people, whose financial status had been improved by wartime conditions, to redeem their property.

It may first be observed that the purpose expressed in Chapter 362 would seem to have been accomplished by that enactment. Chapter 932 must have been adopted for a different purpose. If it be assumed that any part of its purpose was to avoid a conflict with federal laws with respect to property deeded to the state in 1942, this is an additional indication that it was intended to have a retroactive effect.

[1] In the act adopting Section 3511.3 the legislature declared a policy of using the revenues derived from tax deeded property "for the primary purpose of restoring tax-deeded property to the rolls", and in another section provided that the act should take immediate effect in order to carry out the purpose of encouraging and securing the early return of tax deeded property to the tax rolls. In *Mercury Herald Co. v. Moore*, 22 Cal.2d 269, 138 P.2d 673, 147 A.L.R. 1111, the court pointed out that other provisions for the termination of the right of redemption, adopted in 1941, were a part of an integral plan to rehabilitate tax deeded property and to expedite the restoration of such property to the tax rolls. We think that Chapter 932 was adopted as a part of the same plan and for the same general purpose.

There is no merit in the suggestion that Chapter 932 might be unconstitutional if intended to have any retroactive effect. The state would not be giving away property but would be merely restoring a right which all delinquent taxpayers originally possessed and which had been temporarily withdrawn from a part of them.

These considerations may have, in part, led to the adoption of Chapter 932, along with the well-known change in economic conditions making possible and more probable an early restoration to the assessment rolls of large numbers of parcels of tax deeded property. In any event, the language used in Chapter 932 is controlling and we cannot agree that it contains no indication of any intent that it be retroactive, in the sense of applying to or affecting deeds issued to the state during the time section 3511.3 had been effective. Had there been no such intention, it would have been a simple thing, and the natural thing, to have merely provided that section 3511.3 should not be applicable to sales made to the state in the future and before June 1, 1945. Instead of thus limiting its effect to future sales to the state Chapter 932 makes the broad provision that the "operation" of section 3511.3 shall be "postponed and suspended" until the date named. The fact that the word "suspended" was also used indicates that something more than "postponed" was intended. The word "postpone" carries with it the idea of putting off the doing of something or the taking effect of something, until a future time, while the word "suspend" has also the idea of holding up or delaying an effect which has already been operative. As the attorney general well says: "Certainly, in every day usage 'postpone' means to defer until later something which has not yet occurred. 'Suspend', on the other hand, indicates that something is already in operation which is to be stopped for a time." Not only is this the plain meaning of the words thus used, but this is emphasized and the intent of the legislature further disclosed by another word which is used. The thing that is postponed and suspended is not merely section 3511.3, as an existing statute, but it is the "operation" of that statute. This clearly implies that the entire operation of the statute is both postponed and suspended, its past operation as well as its future operation. As defined by Webster, "operation" means the act, process or effect of operating; a deed; efficacy, virtue, potency; an act done as a part of a

plan; a transaction; a product or work; a definite passage from one form to another. As commonly used in connection with a statute it means the effect of the statute. A part of the "operation" of section 3511.3 was to shut off the right of redemption in cases coming within its terms. Deeds to the state during 1942 did not, in themselves, terminate the right of redemption. This was done by the operation of this statute. In a very real sense the "operation" of a statute means its effect and what it has done, as well as what it may do in the future. In view of this language of Chapter 932 a clear intention appears not only to postpone but to suspend both the past and future operation of section 3511.3 for the period named. Under the language used, the entire operation of section 3511.3 is suspended. A part of that operation was the termination of the right of redemption on the property with which we are here concerned. That operation being suspended, the plaintiffs had a right of redemption at the time here in question.

Aside from the plain meaning of the language used in Chapter 932, and the clear implication from the manner and circumstances in which it was used, it would be unreasonable to assume that the legislature could have intended, while granting relief to taxpayers whose lands had been deeded to the state and had not yet been sold by the state, to have so provided that those taxpayers whose lands were deeded after August 4, 1943, the effective date of Chapter 932, should have the same right of redemption that was still had and enjoyed by taxpayers whose lands had been deeded to the state over many years and up to June 1, 1942; and that those taxpayers whose lands were deeded to the state during this period of a little more than a year should be in a different class and should lose the rights and privileges enjoyed by all of the others. No reason appears, in justice or in law, for such a distinction and discrimination and we cannot believe that it was intended by the legislature. In suspending the operation of section 3511.3, Chapter 932 suspended its entire operation and effect and provided that it should be ineffective for any purpose until June 1, 1945.

[2] We cannot believe that the main purpose of the legislature was to get and keep for the state the increased value, brought about by improved economic conditions, of lands deeded to the state during

the depression years. From the statute in question, and from much other legislation about the same time, it must be assumed that the main purpose was to collect what is justly due to the state by encouraging the redemption of property sold for taxes, and at the same time to get as much of such property as possible back on the assessment rolls. This has long been a recognized principle in connection with such taxation, where the doctrine of *in invitum* has long been applied, and if this is to be changed to a new system designed to enable the state to obtain and retain the full value of property, rather than a reasonable tax thereon, this should be accomplished through a clear, express and distinct pronouncement by the legislature and not by judicial interpretation. In the meantime, the courts should not go beyond the express or clearly implied intention of legislative acts, and thus give them the effect of taking away, for a small fraction of their value, the homes and property of people who are now able and willing to pay the full amount of their taxes and penalties.

The order appealed from is reversed with directions to the trial court to grant the peremptory writ prayed for.

MARKS and GRIFFIN, JJ., concur.



65 Cal.App.2d 245

In re LAIR'S ESTATE.

SHNELL et al. v. BRUNTON et al.

Civ. 14368.

District Court of Appeal, Second District,
Division 3, California.

July 24, 1944.

Hearing Denied Sept. 21, 1944.

1. Appeal and error ⇨347(1)

Where a signed decree apportioning and distributing assets of a testamentary trust provided, "Let a decree be entered accordingly," filing of decree was not equivalent of "entry of decree at length" in minute book, and date of "entry" of decree, for determining time for appeal, was date decree was entered in minutes, and not date of filing of decree. Probate Code, § 1221.

See Words and Phrases, Permanent Edition, for all other definitions of "Entry" and "Entry of Decree at Length."

2. Appeal and error ⇨347(1)

Where date of entry of decree was June 8, and notice of appeal was filed on August 5, notice of appeal was filed within 60 days as required by court rules. Rules on Appeal, rule 2.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Proceedings in the matter of the estate of Nancy Ray Lair, deceased, between A. W. Brunton, individually and as administrator with the will annexed of the estate of John W. Lair, deceased, trustee of a testamentary trust, and John W. Shnell and others. From a judgment and decree settling the final account of the trustee and apportioning and distributing the assets, John W. Shnell and others appeal. On respondent's motion to dismiss the appeal.

Motion denied.

Charles W. Cradick, of Los Angeles, for appellants.

A. W. Brunton, of Los Angeles, for respondent.

PARKER WOOD, Justice.

This is a motion by respondent to dismiss the appeal herein upon the ground that the notice of appeal was not filed within the time provided by law. The appeal is from a "judgment and decree" settling the final account of a trustee of a testamentary trust after termination of the trust, allowing fees for "services as attorney and as administrator," and apportioning and distributing the assets of the testamentary trust.

The decree was signed by the judge, and was filed June 3, 1943. It was entered June 8, 1943. The notice of appeal was filed August 5, 1943.

Respondent contends that the appeal was not taken within 60 days from the date of entry of the decree at length in the minutes. He asserts that the date of such entry was June 3, 1943, the date the signed decree was filed; and that the filing of the signed decree was equivalent to an entry at length in the minute book of the court. In support of said assertion he relies upon the Estate of Hanley, 1943, 23 Cal.2d 120, on

page 122, 142 P.2d 423, on page 424, particularly the statement therein that, "The filing of a signed decree is equivalent to entry 'at length in the minute-book of the court.' Prob.Code, sec. 1221." He also relies upon the Estate of Tierney, 1944, 63 Cal.App.2d 295, at page 301, 146 P.2d 700, at page 703, wherein that statement was quoted.

The appellants contend that the 60 days' period within which the appeal could have been taken should be computed from the date of the entry of the decree on June 8, 1943, and that the notice of appeal, having been filed on August 5, 1943, was therefore within the proper time. They argue in support of said contention that the signing and filing of a *decree of distribution* was not equivalent to an entry at length in the minute book for the reason that section 1221 of the Probate Code provides that a decree of distribution "must always be" entered at length in the minute book of the court; and that "by reason of the logic of things, the provisions of sec. 1221 of the Probate Code must apply to decrees distributing testamentary trusts as well as to decrees distributing estates."

Section 1221 of the Probate Code provides: "All orders and decrees of the court or judge must be entered at length in the minute-book of the court, or else signed by the judge and filed; but decrees of distribution must always be so entered at length."

Rule 2 of the new Rules on Appeal provides in part: "* * * notice of appeal shall be filed within 60 days from the date of entry of the judgment * * * (b) [What constitutes entry] For the purposes of this rule. * * * (2) The date of entry of an order *which is entered in the minutes* shall be the date of its entry in the minutes, unless the entry in the minutes expressly directs that a written order be prepared, signed and filed, in which case the date of entry shall be the date of filing of the signed order. * * * (4) The date of entry of a decree of distribution in a probate proceeding shall be the date of its entry at length in the minutes." (Italics added.) It is further provided in the Rules on Appeal (Rule 40, subdiv. (g), p. 28) that "'Judgment' includes any judgment, order or decree from which an appeal lies."

The signed decree herein was entered in the minutes on June 8th. The signed de-

creed, having been filed on June 3—before the date of the entry in the minutes on June 8—it was not, of course, filed in pursuance of a direction in the minutes, as required by said Rule 2 if the date of filing a signed order is to constitute the date of entry. (It is to be noted as hereinafter stated that, on the contrary, the signed decree directed that a minute entry be made.)

[1] Under the Rules on Appeal, the decree herein having been entered in the minutes and said entry not having directed that a written order be prepared, signed and filed, the date of entry of the decree was the date the decree was entered in the minutes, June 8, 1943, and the date of the filing of the signed decree herein, June 3, 1943, did not constitute the date of entry of the decree.

Furthermore, the decree herein provided at the end thereof, immediately preceding the signature of the judge, as follows: "Let a decree be entered accordingly." (Emphasis added.) By reason of said direction by the court that a decree be entered accordingly, the filing of the signed decree was not the equivalent of the entry of the decree at length in the minute book. Said direction indicated that the signed decree should be regarded as a memorandum of the decision of the court; and that the signed decree should be entered in the minute book and when so entered it should constitute the decision of the court and the date of the entry thereof.

As above mentioned, the Estate of Hanley and the Estate of Tierney, upon which respondent relies, stated that "The filing of a signed decree is equivalent to entry 'at length in the minute-book of the court.'" The former case was an appeal from an order settling an account, and the latter case was an appeal from an order appointing additional trustees—which orders, under section 1221 of the Probate Code, were not required to be entered at length in the minutes. Said cases are distinguishable from the present case in the following respects: that the notices of appeal therein were filed before the new rules on appeal became effective on July 1, 1943; and the signed orders in said cases did not direct (as the decree herein directed) that said orders be entered. It is not necessary to discuss the contention of appellants that said cases are further distinguishable from the present case—said contention being that the latter part of section 1221 of the Probate Code (that decrees of distribu-

tion must always be entered at length) is applicable to the decree in the present case distributing a testamentary trust, whereas the first part of said section (that orders must be entered at length or else signed and filed) is applicable to the orders in the cited cases.

[2] The notice of appeal having been filed on August 5, 1943, it was filed within 60 days from the date of entry of the decree, June 8, 1943, and therefore it was filed within the time allowed by law.

The motion to dismiss the appeal is denied.

DESMOND, P. J., and SHINN, J., concur.



65 Cal.App.2d 218

KAISER CO., Inc., et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 12700.

District Court of Appeal, First District,
Division 2, California.

July 14, 1944.

Hearing Denied Sept. 11, 1944.

1. Workmen's compensation ☞1564

Evidence authorized award of compensation to shipbuilding employee who was assaulted by assistant foreman whom she asked not to beat a woman whom assistant foreman accused of reporting his misconduct with another woman employee, on ground that injuries occurred in the course of and arising out of employment.

2. Workmen's compensation ☞686

Suppression of a quarrel between employees in attempt to rescue injured employee was employer's duty, so that a fellow employee interceding for that purpose acts for benefit of employer, and resulting injuries "arise out of the employment".

See Words and Phrases, Permanent Edition, for all other definitions of "Arise Out of Employment".

demnity Company, insurance carrier, to annul an award of workmen's compensation to Mollie Pruitt made by the Industrial Accident Commission of the State of California.

Award affirmed.

R. P. Wisecarver, of San Francisco, for petitioners.

Everett A. Corten, Attorney for Industrial Accident Commission, and R. C. McKellips, Asst. Atty., Industrial Accident Commission, both of San Francisco, for respondents.

NOURSE, Presiding Justice.

The petitioner seeks an annulment of the award of compensation to an employee who was injured during an altercation between an assistant foreman and a fellow employee.

The applicant, Mollie Pruitt, was a negro woman employed as a tank scaler at petitioner's shipbuilding plant located at Richmond. She worked in a gang composed of two white women, one colored, and four others whose race and color were not identified. All members of the gang were instructed to take orders only from their leaderman. A white man, Fay Jones, was an assistant labor foreman of the plant, who was not connected with this gang and had no authority over it. On the day in question Jones, in a drunken condition, came to the place where the gang was working and engaged in making love to Daisy, one of the white women. He ordered Willa Mae, one of the colored women, to leave the place and work in some other part of the ship. She refused and an altercation arose. He then took Daisy to the hold of the ship where they remained for more than an hour.

In the meantime the two colored women and one of the white women went to the rest room where they discussed Jones' order to Willa Mae. Unknown to them Mrs. Jones was present, and having learned of her husband's conduct with Daisy, she set out to find him. Husband and wife later came to the place where applicant was working and he demanded that he be told who had given the information to his wife. The colored women told him that all they had discussed in Mrs. Jones' presence was his order to Willa Mae to leave the gang. Mrs. Jones told him that a white woman told her about his affair with Daisy. Jones threatened to beat the one who told. Willa Mae insisted that she had talked only

Petition by Kaiser Company, Inc., employer, and the Hartford Accident & In-

about his order to her. Without further provocation Jones started to beat Willa Mae. He knocked her to the floor and was kicking her when the applicant pleaded with him not to hurt the woman. He then turned on her and struck her over the eye with a steel helmet. The leaderman interfered and was also beaten.

[1] The propriety of the award rests upon the question whether the injuries inflicted upon the applicant arose out of, and in the course of, her employment. In support of the award the commission found that the injuries to the applicant occurred "in the course of and arising out of her employment." This finding is amply supported by the evidence and must be sustained unless it can be said as a matter of law that when an employee goes to the protection of a fellow employee while both are engaged in the course of their employment he thereby leaves his master's service and acts upon his own time and responsibility.

[2] The early cases upon which petitioner relies are out of harmony with the modern rule that the suppression of a quarrel between employees and an attempt to rescue an injured employee is a duty imposed upon the employer, and that, when a fellow employee intercedes for that purpose he acts in the interest of and for the benefit of his employer. A case directly in point is *United States Casualty Co. v. Hampton*, Tex.Civ.App., 293 S.W. 260. A fight arose between a sub-foreman and an employee. All the other employees quit working. One employee endeavored to separate the parties and was injured. It was held that this was in the service of the employer and hence that the injuries arose out of the employment.

Illustrative of the modern rule is *Hartford Acc. & Ind. Co. v. Cardillo*, 72 App. D.C. 52, 112 F.2d 11, where injuries sustained in a fight between two fellow employees were held compensable.

The opinion contains an interesting discussion of the transition from the early decisions founded on the defenses of contributory negligence and the negligence of a fellow servant and refers to the resistance against the liberal rule of compensation. It is said (72 App.D.C. at page 56, 112 F.2d at page 15), "Several factors have sustained the resistance. One is the hangover from common law conceptions of profiting by one's own wrong. But this ap-

plies as well, in logic, to contributory or one's own exclusive negligence. Another was the now thoroughly dissipated notion that voluntary responsible action cannot be accidental. The volitional character of the act also raised a supposed analogy to 'independent, intervening agency' in tort causation. There was, further, an assumed essential opposition between 'personal' acts and those of an 'official' (i. e., related to the work) character. An assault necessarily involves emotional make-up and disturbance. In a broad sense nothing is more personal. Quarreling is always so. This accounts for the early disposition to regard all injuries from wilful assault as not compensable, a view also necessarily dictated, except rarely when duty requires fighting, if tendency of the particular act to forward the work or direct connection with line of duty are the tests of liability. But that view now is repudiated universally in recognition that work causes quarrels and fights. That they involve volition and fault, have no tendency to forward the work, and are permeated with the personal element of anger no longer suffices to break the causal connection between work and injury. Emotional disturbance is not of itself an 'independent, intervening cause' or a 'departure from the work.'"

And again (72 App.D.C. at page 58, 112 F.2d at page 17), "This view recognizes that work places men under strains and fatigue from human and mechanical impacts, creating frictions which explode in myriads of ways, only some of which are immediately relevant to their tasks. Personal animosities are created by working together on the assembly line or in traffic. Others initiated outside the job are magnified to the breaking point by its compelled contacts. No worker is immune to these pressures and impacts upon temperament. They accumulate and explode over incidents trivial and important, personal and official. But the explosion point is merely the culmination of the antecedent pressures. That it is not relevant to the immediate task, involves a lapse from duty, or contains an element of volition or illegality does not disconnect it from them nor nullify their causal effect in producing its injurious consequences. Any other view would reintroduce the conceptions of contributory fault, action in the line of duty, nonaccidental character of voluntary conduct, and independent, intervening cause as applied

in tort law, which it was the purpose of the statute to discard. It would require the application of different basic tests of liability for injuries caused by volitional conduct of the claimant and those resulting from negligent action, mechanical causes and the volitional activities of others."

It is a fair inference from the evidence here that the applicant interceded in the affray for the protection of herself and her fellow workers and that in doing so she was engaged in the service of the employer to stop the fight and permit the work of the employer to go on. To hold otherwise it would be necessary to follow the discarded theory that any voluntary act done in the course of employment for the benefit of the employer is an assumption of risk and not compensable.

The award is affirmed.

STURTEVANT and SPENCE, JJ., concur.



65 Cal.App.2d 282

BRACEY et ux. v. GRAY et al.

Civ. 7027.

District Court of Appeal, Third District,
California.

July 28, 1944.

Rehearing Denied Aug. 28, 1944.

Hearing Denied Sept. 25, 1944.

1. Appeal and error ⇐1239

Where cross-complaint, which defendants sought to file in action to recover on appeal bond filed by defendants in prior action set up defendants' alleged right of possession to real property which had been determined adversely to defendants in prior action in which judgment had become final, permission to file cross-complaint was properly denied. Code Civ.Proc. §§ 389, 442.

2. Pleading ⇐138

The purpose of allowing a cross-complaint is to enable all matters in dispute between the parties relating to the subject matter upon which the action is brought, or affecting the property to which it relates, to be determined by a single action and by a single judgment. Code Civ.Proc. §§ 389, 442.

3. Pleading ⇐138

The purpose of statute providing for filing of cross-complaint is not to allow persons having independent claims against each other to settle them all in one action upon sole ground that as they had been brought into court with respect to one case or dispute, they should at the same time settle all matters of controversy existing between them. Code Civ.Proc. §§ 389, 442.

4. Pleading ⇐147

The test in determining whether permission to file cross-complaint should be given is whether the matter alleged therein bears the necessary and proper relation to the matter constituting the cause of action, and if such relation is present it is immaterial that the relief sought is independent of and different from that prayed for in the complaint. Code Civ.Proc. §§ 389, 442.

5. Appeal and error ⇐1239

A cross-complaint alleging defendants' right to possession of realty had no connection with defendants' liability as principals on appeal bond filed in prior action involving right to possession of such property, and permission to file the cross-complaint in action on the bond was properly denied. Code Civ.Proc. §§ 389, 442.

6. Parties ⇐51(4)

Statute authorizing the bringing in of additional parties does not give the court power to bring into the action a controversy between the defendant and strangers to the action which is irrelevant to the action between the parties already before the court. Code Civ.Proc. § 389.

7. Pleading ⇐149

Permission to file cross-complaint which sought to bring in additional parties was properly denied where the cross-complaint contained no allegation as to what interest such additional parties had in the controversy, or why such parties were necessary to determination of the liability of defendants which plaintiff sought to impose. Code Civ.Proc. § 389.

— — — — —
Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by Arthur Bracey and Adelaide Bracey, husband and wife, against John Gray and Dora Stuart Gray, husband and wife, and others to recover damages under

an appeal bond. From an order denying defendants named permission to file cross-complaint, they appeal.

Affirmed.

John Gray and Dora Stuart Gray, in pro. per.

Coyle E. Bybee, of Chico, for respondents.

PEEK, Justice.

Prior to her marriage to defendant John Gray, the defendant Dora Stuart Gray purchased certain real property located near the city of Chico, which property was then subject to a note and deed of trust. Sometime after her marriage to John Gray a joint declaration of homestead was filed covering said real property. Default was made in payment of the obligation and the property was foreclosed. The plaintiffs herein subsequently acquired the property from the purchaser at the foreclosure sale. At the time of such acquisition by the plaintiffs the defendants still occupied the premises, and in order for plaintiffs to obtain possession thereof an action was filed against Gray and his wife. Subsequently John Gray executed and delivered a quitclaim deed to plaintiffs and the action was dismissed as against him. The cause was then tried and a judgment was rendered against Dora Stuart Gray alone. John Gray did not participate as a party in that trial. Thereafter, however, he and Dora Stuart Gray moved for a new trial and to vacate and set aside the judgment in addition to sundry other motions, all of which were denied by the trial court. Upon appeal to this court the judgment and orders appealed from were affirmed (Bracey et al. v. Gray et al., 49 Cal.App. 2d 274, 121 P.2d 770), and the said judgment has now become final.

Pursuant to that judgment a writ of execution was issued and delivered to the sheriff of Butte County for service upon the defendants for the purpose of placing Bracey and his wife in possession of the property. John Gray and his wife then filed in this court two separate proceedings, one of which was a petition for certiorari and the other a petition for a writ of supersedeas, to review the proceedings in the former case and to recall and quash the execution therein. Both petitions were denied.

In the later case of Gray v. Bybee et al., 60 Cal.App.2d 564, 574, 141 P.2d 32,

37, this court, after summarizing the evidence concluded that: "Whatever interest the plaintiff [John Gray] may have had in the property by virtue of the homestead which his wife filed within three months after their marriage, it was terminated by the foreclosure of the trust deed. Mrs. Gray took title to the real property subject to the trust deed and prior to her marriage. The homestead was also subject to the trust deed. John Gray relinquished whatever homestead interest he may have had by executing and delivering to the owners of the land his quitclaim deed. He had full knowledge of the entire transaction. The court therefore properly refused to quash the execution."

After entry of the final judgment in the first case (Bracey et al. v. Gray et al., supra), Bracey and his wife filed the present action for damages against the defendants John Gray and Dora Stuart Gray as principals and Uel L. Garner and Levi H. Maxwell as sureties upon the appeal bond filed by said defendants Gray and his wife. Said defendants by their answer to said complaint admitted the judgment previously rendered against them but alleged that such judgment was ineffectual and void because of what defendants allege therein to have been reversible error in the two previous cases. When the case was placed on the trial calendar for the purpose of setting a date for the hearing thereon, Gray and his wife moved the court for permission to file a cross-complaint which motion was denied. It is from that order that defendants have appealed to this court.

[1] An examination of the cross-complaint discloses that it is predicated solely upon defendants' alleged right of possession of the real property in question, which was the subject matter of the original actions, and which actions have been decided adversely to them. The judgments in both of said cases have now become final and are complete answers to defendants' allegations therein. Said cross-complaint is purely an attempt by said defendants again to try the issues previously decided against them in both of the former cases.

The sole purpose of the present action is for a money judgment against the persons signing the undertaking as principals and as sureties. The subject of the action is the undertaking on appeal and has nothing to do with nor is any issue made therein in regard to the title or possession of

the real property which was in controversy in the previous cases.

However, defendants now insist, in support of their appeal herein, that said cross-complaint should have been allowed by virtue of the provisions of sections 442 and 389 of the Code of Civil Procedure in that the cross-complaint relates to the property previously in controversy and that a complete determination of the case cannot be had without the presence of the other parties named therein.

Section 442 of the Code of Civil Procedure provides in part, that: "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. * * *

Section 389, so far as is pertinent herein, provides that: "* * * when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleadings, or a cross-complaint to be filed * * *."

[2] The purpose of allowing a cross-complaint is to enable all matters in dispute between the parties relating to or depending upon the contract, transaction or subject matter upon which the action is brought or affecting the property to which it relates, to be determined by a single action and by a single judgment. In other words, to avoid a multiplicity of suits and thereby save vexation and expense. *Lowe v. Superior Court*, 165 Cal. 708, 134 P. 190.

[3] In the enactment of such section or of the procedure therein set forth it was not the intention to allow persons having independent claims against each other to settle them all in one action upon the sole ground that as they had been brought into court to contend against each other with respect to one case or dispute, they should at the same time and place settle all matters of controversy existing between them. *Meyer v. Quiggle*, 140 Cal. 495, 74 P. 40; *Clark v. Kelley*, 163 Cal. 207, 124 P. 846; *United Casting Co. v. Duncan*, 44 Cal.App. 384, 186 P. 403.

[4] Under the provisions of such section the test is whether the matter alleged

in the cross-complaint bears the necessary and proper relation to the matter constituting the cause of action. It is true that if such relation is present it is immaterial that the relief sought by the cross-complaint is independent of and different from that prayed for in the complaint. And the cross-complaint not only may tend to diminish or defeat the plaintiffs' recovery but may demand affirmative relief distinctive from that prayed for in the complaint. *Metropolitan, etc., Co. v. Margulis*, 38 Cal. App.2d 711, 102 P.2d 459.

[5] The proposed cross-complaint does not meet the requirement of section 442 of the Code of Civil Procedure for as previously stated, the present cause of action is merely a request for a money judgment against the persons signing the undertaking on appeal. The purported claim of the defendants as set forth in said cross-complaint has no connection with the liability of either the principals or sureties therein.

[6] In further support of their contention that the trial court was in error in denying their motion, defendants also rely upon section 389 of the Code of Civil Procedure. It has been stated in the case of *Alpers v. Bliss*, 145 Cal. 565, 570, 79 P. 171, 173: "This section does not give the court power to bring into the action for determination a controversy between a defendant and strangers to the action, which is irrelevant to the action between the parties already before it, except for the purpose of making its determination of the controversy between the parties already before it complete, and without prejudice to the rights of others. A defendant cannot inject into the action a controversy between himself and an outsider, even though it affects the property to which the action relates, unless some party already before the court is interested in or will be affected by the determination of such controversy."

[7] Said cross-complaint contains no allegation as to what interest if any, the proposed cross-defendants *Bybee*, *Bainbridge* or *Taylor* have, or claim to have, in the property, or why they or either of them are necessary parties to a determination of the liability of the principals and sureties on the undertaking on appeal. It therefore cannot be said that the additional parties endeavored to be brought into the action by the cross-complaint were in any way interested in, or would be affected by, a determination of the present controversy.

We are entirely in accord with the trial court, when, in denying defendants' motion to file said cross-complaint, it said: "A cross-complaint may be filed where the defendant seeks affirmative relief relating to or depending on the contract on which the action is brought or affecting the property to which the action relates. This action does not affect any property. All that is sought is a money judgment on an undertaking on appeal. The proposed cross-complaint purports to be an action based on a conspiracy on the part of the plaintiffs and others illegally to deprive by means of void process and to convert personal property to their own use by like method. Such a cause of action would not be a proper one to set up by way of cross complaint in this action. The motion to file a cross-complaint will therefore be denied."

In 1942, in the case of *Bracey v. Gray*, supra [49 Cal.App.2d 274, 121 P.2d 772], this court concluded: "This appeal is devoid of any substantial merit." Again in 1943, in the case of *Gray v. Bybee*, supra, this court stated: "* * * there is no merit in this * * * appeal." Now, in 1944, a like conclusion is inescapable, that this appeal must likewise be dismissed as being devoid of merit.

The judgment and orders appealed from are affirmed.

ADAMS, P. J., and THOMPSON, J.,
concur.



65 Cal.App.2d 232

In re BLAK'S ESTATE.

DOEST v. DOEST et al.

Civ. 14166.

District Court of Appeal, Second District,
Division 3, California.

July 20, 1944.

1. Evidence 334(1), 383(4)

In proceeding involving right of Netherlands alien under German occupation to inherit in California under California statute making such right dependent upon reciprocity, a document by Nether-

lands ambassador to the United States certifying that under Netherlands law such reciprocity was accorded citizens of the United States and that as the Royal Netherlands Government in exile had not modified the Netherlands law, the reciprocity was in full force was properly accepted as conclusive. Probate Code, §§ 259-259.2.

2. Descent and distribution 10(2) War 10(2)

The right to take property by inheritance and right to receive that inheritance by payment in money are part of substantive incidents of normal legal order of society, and that exigencies of war may temporarily suspend the remedy to enforce the right does not militate against the right.

3. Evidence 383(4)

A Netherlands alien under German occupation seeking to inherit property in California sustained burden imposed by California statute to establish existence of reciprocal rights to inherit by introducing statement of Netherlands ambassador to the United States to effect that under Netherlands law the reciprocity contemplated by California statutes was accorded citizens of the United States. Probate Code, §§ 259-259.2.

4. Allens 13

Decedent's brother, a resident of the United States, was not entitled to participate in decedent's estate, but sole heir at law was decedent's daughter who was an alien residing in the Netherlands under German occupation where it was proved that reciprocal rights of inheritance existed between the United States and Netherlands citizens. Probate Code, §§ 259-259.2.

5. Trial 404(2)

That a finding of fact was mistakenly placed in conclusion of law did not detract from its efficacy as a finding.

Appeal from Superior Court; Los Angeles County; Jess E. Stephens, Judge.

In the matter of the estate of John Blak, also known as John Blok, also known as Gysbertus Doest, deceased, wherein there were two contested petitions, one for partial distribution filed by John C. Doest and a petition to determine the heirship filed by Hendrika Doest and Adrian Hartog, Consul of the Netherlands at Los Angeles.

From two orders in probate by which John C. Doest was barred from taking any interest in the estate of decedent, John C. Doest appeals.

Affirmed.

Marshall Stimson and Noel Edwards, both of Los Angeles, for appellant.

Walter G. Danielson, of Los Angeles, for respondents.

DESMOND, Presiding Justice.

John C. Doest, who is the surviving brother of Gysbertus Doest, otherwise known as John Blak, appeals from two orders in probate by which he was barred from taking any interest in the estate of his brother. Both orders were made upon the same day, December 29, 1942, when two contested petitions were consolidated for hearing: (1) petition for partial distribution filed by appellant, in which he stated that, as an heir at law of the decedent, he was entitled to all the residue of the estate; (2) a petition to determine heirship filed by Hendrika Doest, the daughter of decedent and a citizen of The Netherlands, residing in Amsterdam, in which she stated that she was the sole and only heir at law of the decedent.

In support of his claim that he is the heir at law entitled to inherit his brother's property, appellant directs our attention to sections 259, 259.1 and 259.2 of the Probate Code, enacted by the Legislature in 1941, effective on July 1st of that year. (Statutes 1941, Chap. 895, p. 2473.) They read as follows:

"Sec. 259. Aliens residing abroad: Dependence of rights upon reciprocity. The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries."

"Sec. 259.1. Same: Burden of establishing that rights are reciprocal. The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in Section 259."

"Sec. 259.2. Same: Disposition of property on finding of non-reciprocity. If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property."

At the trial, a portion of a letter from the State Department at Washington, D. C., addressed to counsel for appellant, was received in evidence, reading as follows: "In reply to your letter of July 21, 1942, you are informed that there is not in force, between the United States and The Netherlands, any treaty or other agreement containing provisions relating to the rights of nationals of either country, with respect to inheritance of property in the other country." The deposition of appellant was then offered and admitted in evidence, showing that he is a resident of the City of San Francisco; that he had last seen his brother, Gysbertus Doest, in 1923, at Santa Barbara, California; that he had not received any letters from him since that date; that the decedent was married in Amsterdam in 1902, to Hendrika Van Straaten, who died in the following year; that deceased had one daughter, Hendrika Doest, and deponent was unable to say whether or not she was living; that he knew of no other immediate relatives of the deceased. After the introduction of these documents, it was stipulated that Hendrika Doest, the decedent's daughter, is an alien, resident in Amsterdam, Holland, and that The Netherlands was occupied by the Germans by force in June, 1940. (This was an error, such occupation having taken place in May, 1940.)

Thereupon the respondents offered in evidence various exhibits, which were admitted without objection. The first, Exhibit A, is a letter, dated June 18, 1942, from the Embassy of The Netherlands at Washington, D. C., which reads as follows:

"To Whom It May Concern

"In connection with certain probate matters pending in the Superior Court of the State of California, in and for the County of Los Angeles, The Netherlands Ambassador begs to certify hereby that under Netherlands law the reciprocity as meant

in Sections 259, 259.1 and 259.2 of the California Code, is accorded citizens and residents of the United States.

"Article 9 of the Act of May 15, 1829, (State Law Record No. 28) provides that the civil law obtaining in the Kingdom of the Netherlands shall equally apply to Netherlands and to aliens, unless a statute shall provide for the contrary. As the Netherlands decedents' estate law does not contain a provision by which the reciprocity under consideration is denied, such reciprocity has to be deduced therefrom by indirection; by the fact that no discrimination is made therein as between the hereditary rights of Netherlands and those of aliens.

"The reciprocity in question, which was in full effect and force at the time of the invasion of The Netherlands by German forces could only be repealed by virtue of legal provision enacted by the Royal Netherlands Government recognized as such by the Government of the United States. As, however, the Royal Netherlands Government, temporarily residing and exercising its functions in London, England, which is recognized by the Government of the United States as the lawful government of Netherlands to all intents and purposes, has not modified the Netherlands decedents' estate law in any shape or fashion, the reciprocity which is the subject of this statement continues in full force and effect.

"Washington, D.C.

"For the Ambassador

"June 18, 1942

"(Signed) H. Reimens."

[1] In view of the authority which attaches in the present international crisis to statements of the duly accredited Envoy Extraordinary and Minister Plenipotentiary of the Netherlands relative to actions or decrees by the Royal Netherlands Government, the foregoing document was properly accepted as conclusive by the trial court (Anderson v. N. V. Transandine, etc., Sup., 28 N.Y.S.2d 547, 551, affirmed 263 App.Div. 705, 31 N.Y.S.2d 194; Agency of Canadian Car & Foundry Co., Lim., v. American Can Co., 2 Cir., 258 F. 363, 6 A.L.R. 1182), and, in itself, practically decides adversely the claim of appellant that respondents failed to sustain the burden of establishing the reciprocal rights mentioned in section 259 of the Probate Code. This conclusion is fortified by reference to other documents admitted in

evidence, including Exhibit D, a translation certified as true, from the office of the Netherlands Ambassador, of Article 9 of the Act of May 15, 1829, reading, "The civil law of the Kingdom shall equally apply to Netherlands and to aliens, unless a statute shall provide for the contrary." It was stipulated that this law is still in effect and that it has not been amended. Exhibit C consists of a letter from the Federal Reserve Bank of New York, to which is attached Royal Decree of May 24, 1940, and power of attorney to the Minister of Netherlands, Washington, D. C. It appears from the transcript that it is unnecessary to incorporate a copy of this letter since "it is admitted that Adrian Hartog, under the law, has the right to represent Hendrika Doest as an alien subject of The Netherlands Government in California, as a representative of that government." Also introduced was Exhibit E, a memorandum from the State Department, Washington, D. C., which it was stipulated contained a "true statement of the law as interpreted by the Department of State, and that the Government of the United States continues to recognize as the Government of the Kingdom of The Netherlands, the Royal Netherlands Government, which is temporarily residing and exercising its functions in London, and continues to recognize Dr. Alexander Loudon as the duly accredited Envoy Extraordinary and Minister Plenipotentiary of The Netherlands to the United States." From this memorandum it appears that "persons in occupied Netherlands territory who at the time of the occupation were Netherlands nationals" are considered by the government of the United States not to have had their nationality affected by the occupation but as still retaining their Netherlands nationality, and "While for the purpose of certain of such laws, rules, regulations or orders Netherlands territory occupied by the enemy may be treated as enemy territory, it is not the territory of the enemy belligerent in occupation but remains Netherlands territory, and is recognized by the Government of the United States as territory occupied by the enemy but belonging to the Netherlands, one of the nations united with the United States in the prosecution of the war."

[2] The appellant argues that the introduction in evidence of Article 9 of the Act of May 15, 1829, does not establish the fact that Netherlands may inherit under

any conditions or that Netherlands or any one residing in the United States may inherit and have property paid to them in the United States arising from estates of persons dying in the Netherlands. He overlooks the reference by the Ambassador, in his letter of July 18, 1942, to the fact that "the Netherlands decedents' estate law does not contain a provision by which the reciprocity under consideration is denied, [etc.]" and the additional statement, in the same letter, that as the Royal Netherlands Government "has not modified the Netherlands decedents' estate law in any shape or fashion, the reciprocity which is the subject of this statement continues in full force and effect." These statements would seem to answer satisfactorily the first objection of the appellant that Article 9, above mentioned, does not establish that Netherlands may inherit under any conditions. The second objection is answered also in the quoted statements, for we may assume that the decedents' estate law of the Netherlands effectively disposes of property of a decedent with proper regard to testamentary directions or the rights of succession, and since there is no distinction in that disposition between Netherlands and citizens of the United States, who, by right of inheritance or testamentary disposition, are entitled to take property located in the Netherlands, it is apparent that the right of citizens of the United States to receive payment within this country of a legacy or a share of an estate originating in the Netherlands is secured, thus meeting the requirement of section 259. We agree in general with the following statements in the brief of respondents. "The 'right' to take property by inheritance and the 'right to receive' that inheritance by payment in money, have long been recognized as part of the substantive, legal and sanctioned incidents of the normal legal order of society. They are in the same category as the 'right' of life, liberty, free speech, religious worship and of property. The 'right' to receive the benefits of the inheritance is a necessary and inherent corollary to the 'right' to take by inheritance. One is not separable from the other. The one includes the other. If the right to take exists, afortiori [sic], the right to receive exists. That the exigencies of war may temporarily suspend or defer the remedy to enforce the right to receive does not militate against the right. The right of United States citizens to receive payment in the United

States of moneys originating from a Netherlands estate, is now and has been since 1829, a substantive right which has been an integral, inherent and extant feature and part of The Netherlands jurisprudence. Though the country is now temporarily occupied by the Germans, nevertheless, the Royal Netherlands Government, her laws and the attendant rights under the laws are intact, are existing and are recognized as such by the United States Government." Quoting further, "It will also be observed that the Legislature did not say *when* United States citizens were to receive payment. It used the words 'the rights' to receive. The Legislature therefore necessarily contemplated and had in mind that the availability of the proceeds of such foreign estates for immediate distribution and payment to United States citizens would be controlled by the exigencies of the battlefield. It placed no time or other limitation as to when payment was to be made. It was concerned only with the existence of 'rights' accorded to United States citizens by and under the legally constituted and recognized laws and government of the country of which the alien was a citizen and resident, to receive their inheritance, knowing that such rights persist and carry on in the scheme and order of society in spite of the immediate fluctuations of war, and that, at most, the remedies for the enforcement of the right may be temporarily suspended." In this connection we may note that Hendrika Doest, in her petition to determine heirship, did not ask the court to decree an immediate distribution; on the contrary, the prayer in her petition is as follows: "That upon distribution in this estate the same be delivered to your petitioner Dr. Adrian Hartog for transmission to The Netherlands Embassy in Washington, D. C., where the same is to be deposited in the Riggs National Bank, Washington, D. C., for the credit to the blocked account on the books of said account in the name of the Royal Netherlands Legation, Custodian Account, and that upon the administrator herein receiving the receipt of your petitioner for said distributive share that said administrator be relieved and discharged of and from any and all further duties or obligations in connection with said distribution * * *." Payment in this form will, as we understand it, conform strictly with the requirements of Executive Order No. 8785 of the President of the United States, dated June 14, 1941, 12 U.S.C.A. § 95 note, govern-

ing transactions by license issued by the Secretary of the Treasury "by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof," and License No. W 1722 issued November 23, 1942, by the Secretary of the Treasury.

[3] The appellant claims that the respondent, Hendrika Doest, has failed to sustain the burden cast upon her by section 259.1 to establish the fact of existence of the reciprocal rights set forth in section 259, but, in our opinion, she made a sufficient showing of meeting the requirements by introducing the statement of the Ambassador of the Netherlands to the effect "that under Netherlands law the reciprocity as meant in sections 259, 259.1 and 259.2 of the California Code is accorded citizens and residents of the United States." The appellant introduced no evidence whatever to contradict or offset this showing and accordingly it prevails.

[4,5] The appellant further states in his reply brief, "By no stretch of the imagination or tedious explanation can a finding be implied that any inheritance would have been paid within the United States from an estate arising in The Netherlands. Respondent must prove to the court that payment would be made within the United States. That is the meaning of the reciprocal right required by the sections of the Probate Code involved here." We note that the trial judge made a sufficient finding upon that subject in acting upon the petition of John C. Doest for partial distribution, for he found "that by the laws of The Netherlands citizens of the United States have the right to inherit real and personal property left by a citizen and resident of The Netherlands, and that reciprocal rights of inheritance exist between the citizens and residents of the United States and the citizens and residents of The Netherlands; the court further finds that although the Kingdom of The Netherlands has been invaded and occupied by Germany, the Government of The Netherlands and her laws with their attendant rights have not been abrogated by any authority recognized by the United States or The Netherlands, but that said Netherlands' Government and the laws thereof, and particularly the rights of United States citizens and residents to inherit from estates of Netherlands' citizens and residents, are now and were at the date of decedent's death, present and existing."

(Italics added.) He made a similar finding in the petition of Hendrika Doest to determine heirship, and as a conclusion of law stated "that reciprocal rights of inheritance exist between citizens and residents of the United States and the citizens and residents of The Netherlands. That said petitioner Hendrika Doest has satisfied the requirements in establishing that such reciprocal rights of inheritance exist and *that said John C. Doest, a brother of the decedent, is not entitled to participate in any share or to any extent in this estate but that the sole and only heir at law is said petitioner, Hendrika Doest.*" (Italics added.) The italicized portion of the last quotation constitutes, in our judgment, the proper conclusion of law, while the balance of the quotation is, in fact, not a conclusion of law but a misplaced finding. Its efficacy as a finding is, in no way, affected by that mistake. New York Life Ins. Co. v. Occidental Pet. Corp., 1941, 43 Cal.App.2d 747, 111 P.2d 707; Otis v. Winter Investment Co., 1934, 138 Cal.App. 682, 33 P.2d 4.

Both orders are affirmed.

SHINN and PARKER WOOD, JJ.,
concur.



65 Cal.App.2d 329

PEOPLE v. REESE.
Cr. 1853.

District Court of Appeal, Third District,
California.
July 31, 1944.

Hearing Denied Aug. 30, 1944.

1. Criminal law ☞1159(3)

Where facts are reasonably susceptible of two or more inferences, reviewing court is without power to substitute its deductions for those of the jury.

2. Criminal law ☞1144(13)

A reviewing court must view evidence in light most favorable to respondent.

3. Homicide ☞254

Evidence was sufficient to sustain conviction for murder in second degree.

4. Criminal law Ⓒ1165(1)

In a close case where evidence is sharply conflicting, substantial and serious errors vital to defendant that may have resulted in a miscarriage of justice must be regarded as prejudicial and grounds for reversal.

5. Criminal law Ⓒ770(1)

Instructions should not ignore any findings of fact which a jury might reasonably make on evidence before them.

6. Homicide Ⓒ276

In murder prosecution, where there was evidence that defendant had previously warned deceased to keep away from defendant's ranch, that in spite of warning deceased returned, that when defendant again told him to stay off ranch deceased instead of complying advanced in a threatening manner, holding a pipe over his shoulder and cursing defendant and threatening injury, questions whether deceased was a trespasser and whether appearances of injury to defendant at hands of deceased were real or apparently real were for jury. Pen.Code, § 197.

7. Homicide Ⓒ340(1), 341

In murder prosecution, where there was evidence that defendant had previously warned deceased to keep away from defendant's ranch, that in spite of warning deceased returned, that when defendant again told him to stay off ranch deceased instead of complying advanced in a threatening manner, holding a pipe over his shoulder and cursing defendant and threatening injury, failure to instruct jury properly on defendant's right to evict a trespasser and giving of instruction that such right was not involved was prejudicial error. Pen. Code, § 197.

8. Homicide Ⓒ276

In murder prosecution, testimony of defendant that deceased with an iron pipe raised over his right shoulder kept coming toward defendant even after first shot was sufficient to raise issue of self-defense. Pen.Code, § 197.

9. Homicide Ⓒ340(1)

In murder prosecution, where evidence was sufficient to raise issue of self-defense, the giving of instruction containing the antiquated "retreat to the wall" doctrine was prejudicial error. Pen.Code, § 197.

10. Homicide Ⓒ276

If testimony of any witness is sufficient to raise issue of self-defense, it should be presented to jury.

11. Criminal law Ⓒ823(6)

In murder prosecution, instructions correctly stating general principles of law in relation to plea of self-defense did not overcome prejudicial effect of erroneous instruction stating the antiquated "defense to the wall" doctrine. Pen.Code, § 197.

12. Homicide Ⓒ341

In murder prosecution, failure to instruct jury that defendant had right to have a revolver in his possession was not prejudicial error where record did not disclose that issue had been made concerning ownership or possession of revolver.

13. Criminal law Ⓒ1173(1)

To justify reversal for alleged error in failing to give requested instruction, it must appear from all evidence that an error in such respect resulted in a miscarriage of justice.

14. Criminal law Ⓒ829(5)

In murder prosecution, failure to instruct jury regarding standard by which law gauges the conduct of one suddenly assailed was not prejudicial error in view of instructions given.

15. Criminal law Ⓒ822(1)

It is not necessary that any instruction embody every fact or element essential to sustain or defeat a particular issue, but it is sufficient if instructions, as a whole, substantially and correctly cover law applicable to the issues.

16. Criminal law Ⓒ745, 778(11)

In murder prosecution, where record disclosed that immediately following shooting defendant left scene and hid gun and cartridges in vineyard and later same evening defendant voluntarily surrendered to law enforcement officers, question of flight was for jury and the giving of a flight instruction was not error.

17. Witnesses Ⓒ277(3)

In murder prosecution, where on direct examination defendant testified that he had serious heart condition and that excitement or exertion not only could but probably would prove fatal and by such testimony defendant endeavored to show that he was physically handicapped and by

reason thereof was further justified in defending himself with a revolver, it was proper for prosecutor to develop by cross-examination that alleged critical heart condition did not deter defendant from engaging in previous physical encounters with others.

18. Witnesses ⇨277(3)

It is proper in a criminal case to cross-examine a defendant on any relevant and material matter testified to on his direct examination, for purpose of showing conduct or statements inconsistent with his direct testimony.

19. Criminal law ⇨1170½(1)

Witnesses ⇨380(5)

Where state's witness had given prosecutor and sheriff statement of facts on night of homicide but on cross-examination at trial gave testimony different from statements given to officers, there was reasonable justification for permitting prosecution to cross-examine witness relative to former inconsistent statements and no prejudice resulted especially in view of fact that witness admitted the inconsistent statements.

20. Witnesses ⇨380(5)

Where party seeks to impeach his witness, the question of surprise because of nature of testimony of witness and method of proving it are committed largely to discretion of trial court.

21. Criminal law ⇨829(1)

In murder prosecution, refusal to give all of the 195 instructions requested by defendant was not prejudicial error where court fully, clearly and fairly instructed jury on all points of law material to case.

22. Criminal law ⇨413(1)

In murder prosecution, refusal to permit defendant to show that immediately after the shooting he told his wife the same facts to which he testified at trial was not error.

ADAMS, P. J., dissenting.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

W. C. Reese was convicted of murder in the second degree, and he appeals.

Reversed and remanded for a new trial.

Hugh K. Landram, of Merced, and John J. Taaffe, of San Francisco, for appellant.

Robert Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

PEEK, Justice.

The information herein charged the defendant with the crime of murder. At the conclusion of the trial the jury returned a verdict finding him guilty of murder in the second degree. His motion for a new trial was denied and he was sentenced to imprisonment in the state prison at San Quentin. From the final judgment of conviction and from the order denying the motion for a new trial he has appealed to this court.

In his statement of "Reasons relied upon for the reversal of the judgment and order" defendant has set forth ten grounds of alleged error, in general relating to the sufficiency of the evidence, rulings of the trial court in the admission and rejection of evidence, misconduct of the district attorney, and error in charging the jury.

A resume of the pertinent facts as disclosed by the voluminous record and briefs is as follows:

At the time of the homicide the deceased, Collie Mitchell, and his family, consisting of his wife and four children, resided in the town of Firebaugh in Merced county. Lawrence Mitchell, the eldest child, was employed by defendant as a ranch hand. He roomed and boarded with the family of one of defendant's ranch foremen, H. E. Spurlock, whose dwelling was located on the defendant's ranch. On the afternoon of the fatal shooting the deceased and his brother-in-law Royal Gage drove to the city of Merced and stopped at the bar referred to as Jack's Place where Mitchell had five or six bottles of beer. After about two and one-half or three hours at Jack's Place they drove to Taff's Tavern in the town of Planada, where deceased again ordered beer. When the decedent arrived at Taff's, the defendant was seated at the bar. The two men had been acquainted for approximately five years, during which time Mitchell had worked for defendant on his ranch on two or three different occasions, the last time in 1942. They engaged in conversation during which they discussed the probability that Lawrence would be drafted. There is evidence that deceased

asked appellant to claim farm deferment for the boy but that appellant informed him that was for the draft board to decide. While this conversation was in progress, one J. H. Nancarrow, his wife Beatrice, and his sister-in-law, Mrs. Coye Hall, entered the barroom. Mr. Nancarrow stated that defendant told him that deceased and Gage were looking for trouble and that he, Reese, said "You won't let two of them jump on me, will you?" Nancarrow also testified that after he, the deceased, and the defendant "kidded" about the straw hat the defendant was wearing, he heard deceased say to appellant, "You're sore at me, Cliff," but he did not hear the defendant's reply. Also during their conversation the deceased asked defendant for a job and defendant told him there was no opening. Defendant then asked Nancarrow in behalf of deceased if his employer needed any tractor drivers, to which Nancarrow replied that there might be a place for a scraper man but that deceased declined the job. Nancarrow left the barroom for the lavatory which was located outside of the building. Immediately following his departure he heard the outside door of the tavern close and noticed the defendant and the deceased "probably 12 or 15 feet from him." He heard deceased say to defendant, "You're nothing but a dirty bastard"; the witness Gage testified to similar words by the deceased; that defendant, after he "stood there for a second," replied, "That's all right," then went toward his car and drove off. He further testified that as defendant was going toward his car the deceased said to him, "You'll fire the boy, [Lawrence] go out and fire him," but that defendant made no reply. Nancarrow further stated that decedent, upon returning to the barroom, pounded the bar with his fist and referring to Reese, stated that he had been wanting to "call the son-of-a-bitch for a long time and I sure told him," (Mrs. Nancarrow and Mrs. Hall, in general, testified to the same effect) and added "He'll steal anything he can pick up," and "if it's too heavy for him to pick up, if there is an Oakie or Arkie there he'll have them load it for him." Mr. and Mrs. Taff testified that the deceased, while cursing the defendant, further stated that "he had a score to settle with Reese" and that he was going to "get him". Taff cautioned deceased to stop swearing as ladies were present, whereupon deceased apologized to the ladies, and he and Gage left. Mitchell

and Gage then returned to the Spurlock residence on defendant's ranch to have Lawrence drive them back to Firebaugh. He was unable to drive them, and the two men walked to the Bagwell house, which was approximately 150 feet from the Spurlock dwelling, but Bagwell also was unable to drive them home. While the three men were conversing, Spurlock called to deceased and Gage to come and have supper with them. Gage left first closely followed by Mitchell. According to members of the Spurlock family, the deceased, while preparing for dinner, was in jovial spirits, laughing and joking as was his habit. The shooting occurred shortly thereafter.

According to defendant's testimony, after he left deceased following the incident at Taff's bar in Planada, he drove to the Bagwell dwelling and talked with Bagwell about the ranch work done that day. He remained there two or three minutes without getting out of his car and then drove to his home, about a half mile away. Upon arriving home he asked his wife not to cook their dinner for awhile because he had to see about lining up the work for the next day. He stated the gun used in the shooting was in the car all this time, and that he always kept a gun in the car or truck because of predatory animals on the ranch. He then drove back to the Bagwell place, and when he stopped his car he put the gun, which was in a holster, in his belt. Defendant further stated that at Bagwell's he intended to get a truck to inspect certain portions of the ranch; that in walking toward Bagwell, who was cleaning some jars next to the house, he saw Mitchell at the Spurlock house and called to him, and that as Mitchell approached he spoke to him telling him to "keep off my premises." Mitchell replied that he was going "to whip" the defendant, calling him a "Texas longhorn son-of-a-bitch" and that he, Mitchell, was going to whip Reese "like he told me he would over at Planada." Defendant's reply was that "I told him I had told him once before to keep off my property and am asking him again to keep off there." Mitchell replied that he would "come back again whenever he got ready." After again cursing defendant, Mitchell said, "I can whip you any time and I will whip you every time I see you," and that he was going "to kill me." The defendant further testified that during this conversation Mitchell continued to come toward him; that lying

on a pile of dirt by the cesspool and near the path between the Bagwell and Spurlock houses was an iron pipe; that Mitchell picked up the pipe and carried it in both hands over his right shoulder as he advanced; that the defendant told him to stop but that Mitchell continued toward him; that the defendant then backed up a step or two; that when Mitchell was within five or six feet of him he tried to stop him by shooting into the ground approximately one foot in front of the deceased, but he kept coming; that he was fearful of being killed or injured by Mitchell and shot a second time, again only to stop him and not to injure him any more than was necessary. The bullet passed through the leg approximately six inches above the knee; that Mitchell then dropped the pipe, grabbed his "leg with one hand and I guess his hat with the other", and walked toward the Spurlock home; that defendant then returned to his car and drove home. The second shot severed the femoral artery, from which deceased bled to death.

After leaving the scene of the shooting appellant drove a short distance and put the gun and shells in a vineyard, which he later found for the officers. He then went home, and after a few minutes started for the home of his attorney in Merced. On the way he stopped at Taff's place and talked with Mrs. Taff. He also stopped at the Nancarrows' and talked with Mrs. Nancarrow. Then in the company of his attorney, Mr. Braucht, he went to the home of Mr. H. K. Landram where the case was discussed. While this discussion was in progress Mr. Braucht drove to the ranch to ask Mr. Bagwell if he would come to Mr. Landram's home for an interview, but Bagwell was not at home. The meeting at Mr. Landram's continued until approximately 11 o'clock p. m. when the defendant in the company of his counsel, surrendered to the authorities. Attorney Landram previously had telephoned the authorities that defendant was with him and would surrender himself.

The next witness called in relation to the shooting was Henry Bagwell. Upon direct examination he testified that Reese first came to his home around 6:30 o'clock in the evening and remained about ten minutes. As Reese left, Mitchell and Gage arrived; that Mitchell told him his son would not drive them home because he had been drinking; the deceased then said "I

like to have whipped your boss a few minutes ago over at Planada"; that Spurlock then called and Gage left immediately while Mitchell reiterated what he had previously stated about Reese and added "I can whip him * * * and I will"; that Reese returned in approximately twenty-five minutes; that when he stepped out of his car he walked to within ten or twelve steps of where Bagwell was working and called to Mitchell, whom Bagwell then saw coming from the Spurlock home; that he observed Mitchell as he approached, and in general recounted the conversation between the two men substantially as given by the defendant. He testified deceased had his hat in his left hand and he saw nothing in his right hand. His testimony regarding the actual shooting was that after the first bullet was fired into the ground in front of Mitchell he "kind of stepped back"; that after the second shot Reese went to his car and Mitchell walked toward Spurlock's home; that he did not see the pipe at the time the sheriff first was at the ranch at 8:30 p. m. but that he did see it when the sheriff visited the ranch a second time at approximately 12:30 a. m. that night.

Upon cross-examination Bagwell stated that from the time he heard the first word spoken between the two men until the first shot was fired he did not look up; that he did not know whether Mitchell had picked up anything or not; that he could see Mitchell's left side and not his right side; that the pipe had been near the cesspool for ten days or more; that he saw it there around noon time of the day of the shooting; that someone from the sheriff's office found it near the bell pole that night; that at the time of the shooting the men were three to four feet apart; that Reese backed up before he fired the two shots and that he believed Mitchell to be intoxicated.

The third witness to the shooting was Mrs. Bagwell. When first interviewed by the sheriff and the prosecution, as well as defense counsel, she informed them all that she neither saw nor heard anything at the time of the shooting. However, during the course of the trial she was called by the prosecution and testified that as she was coming from the barn she heard the defendant call the deceased; that his hat was in his left hand; that she could not tell whether deceased's right hand was up or down "or how it was" as he walked

toward the defendant; that there were trees between herself and Mitchell; that the first shot was fired when the parties were about four or five feet apart; that she saw the dust from the first shot and that Mitchell stepped back "just about a step"; that she recognized the pipe which was introduced in evidence as one she had seen "near the cesspool."

On cross-examination she testified that after the shooting she saw the same piece of pipe at the same place near the cesspool. She further testified that about 10 o'clock that evening a car drove up to their home and that a man called "hello" and asked to see Mr. Bagwell; that she informed him he was not home; that it was dark; that she did not see the man, and that he immediately left in his car. This man later was identified as Mr. Braucht, one of defendant's attorneys who had gone to the ranch to get a statement from Mr. Bagwell.

Mr. Landram, also one of defendant's counsel, testified that while he was at the Bagwell home discussing with Mr. Bagwell his statement in relation to the facts surrounding the shooting he mentioned to Mrs. Bagwell that her husband had informed him that she neither had seen nor heard anything in "reference to this matter, is that right?" that in reply to this question Mrs. Bagwell stated, "Yes, if I had been there this thing would not have happened * * *."

The sheriff testified that at approximately the hour of 8:30 o'clock on the evening of the shooting he went to the ranch and at the point where the shooting occurred found the bullets and marked the spots on the ground; that it was dark and he was using a flashlight; that he did not see a pipe at that time; that he returned to the ranch about 12:30 o'clock a.m. and at that time discovered the pipe. Upon cross-examination he testified that at the time of his first examination he did not know a pipe was involved in the case and did not look for one; that it was not until after Reese had surrendered to the district attorney that he had any knowledge concerning a pipe, and that the pipe was found where the defendant said it was.

The bell pole, near which the shooting occurred, was located between the Spurlock and Bagwell houses, and closer to the latter. It was constructed of 4 x 6 timber 12 or 14 feet high, on which a dinner

bell was mounted. A path ran between the two houses and passed the cesspool mentioned at a point approximately 36 feet from the Bagwell house.

[1-4] Defendant's first contention is that as a matter of law the evidence was insufficient to justify the verdict of the jury. As we have noted, the evidence is in sharp conflict as regards the material facts of the case. It is an elementary principle of law that when the facts are reasonably susceptible of two or more inferences the reviewing court is without power to substitute its deductions for those of the jury. In other words a reviewing court must view the evidence in the light most favorable to respondent. Applying this well established rule to the present case we must hold that the evidence was sufficient to support the verdict. However, as was said in the recent case of *People v. Dail*, 22 Cal.2d 642, 650, 140 P.2d 828, 832, "in a close case where the evidence is sharply conflicting, substantial and serious errors vital to defendant that may have resulted in a miscarriage of justice must be regarded as prejudicial and grounds for reversal." *People v. Albertson*, 23 Cal.2d 550, 553, 145 P.2d 7; *People v. Silver*, 16 Cal.2d 714, 723, 108 P.2d 4.

With this recent admonition of the Supreme Court in mind we have exhaustively examined the testimony in regard to defendant's specific charges of error. Not from the standpoint of the weight thereof, as such determination would be outside of the province of this court, but rather from the viewpoint of whether such testimony was sufficient to present issues of fact to the jury for its consideration under proper instructions.

Defendant's second point of alleged error is that the trial court erred in refusing to instruct the jury on his right to evict a trespasser and instructing the jury that such right was not involved in the present case. The attacked instruction is as follows: "I instruct you that you may not consider the defense talked of by the attorneys for the defendant and described by them as the right to evict a trespasser, because the evidence in this case is that the defendant did not shoot deceased because he was trespassing."

[5] It is true the defendant testified that he had no thought of harm to his property when he fired the two shots. However, his testimony and that of other

witnesses does show that he had previously warned Mitchell to keep away from the ranch; that in spite of this warning Mitchell returned; that when defendant, according to his testimony, again told him to stay off the ranch, Mitchell, instead of complying with defendant's orders and leaving the ranch, advanced in a threatening manner, holding a pipe over his shoulder and cursing the defendant and threatening injury. Reese admittedly was upon his own property and admittedly had the right to order the deceased to stay away. "Instructions should not ignore any findings of fact which a jury might reasonably make upon the evidence before them." *People v. Newcomer*, 118 Cal. 263, 50 P. 405, 409.

Viewing the evidence in the present case in the light of such rule it cannot be said that the jury could not reasonably have found that Mitchell was a trespasser upon defendant's land. Of course the jury was not bound to accept such evidence, yet assuming that it did, it then would become necessary to construe the acts of the defendant and the deceased immediately prior to the shooting in accordance with the provisions of section 197 of the Penal Code, which is the contention of the defendant. Such code section, in part, is as follows:

"Homicide is also justifiable when committed by any person in either of the following cases:

"1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,

"2. When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or,

"3. When committed in the lawful defense of such person, * * * when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; * * * such person, * * * must really and in good faith have endeavored to decline any further struggle before the homicide was committed; * * *."

In the early case of *People v. Flanagan*, 60 Cal. 2, 44 Am.Rep. 52, where a com-

parable question was presented to the court for determination, it was said that although "human life can not be taken to prevent a mere trespass upon property. * * * [yet] For the purposes of defense and prevention every one is entitled to use whatever force may be necessary—even to the extent of taking the life of a felonious aggressor (*People v. Payne*, 8 Cal. 341), and a homicide committed under such circumstances is justifiable in law."

The court therein, in construing the words "intent" and "endeavor" as used in the code, further stated that: "Either an intent or endeavor to execute such a design will be sufficient to justify resistance for prevention, in defense of person or property. The law of self-defense is a law of necessity; and that necessity must be real or apparently real. A party acting under it may act upon appearances; and he will be justifiable in acting upon them, even though they turn out to have been false. Whether they were real or apparently real is for the jury, in a criminal case, to decide upon all the circumstances out of which the necessity springs. If from all the evidence in the case they should find that the circumstances were such as to excite the fears of a reasonable man, and that the defendant, acting under the influence of such fears, killed the aggressor to prevent the commission of a felony upon his person or property, he would not be criminally responsible for his death, although the circumstances might be insufficient to prove, by a preponderance of the evidence, that the aggressor was actually about to commit a felony."

In the later case of *People v. Hubbard*, 64 Cal.App. 27, 220 P. 315, 318, the defendant ordered one Cope out of his house; the decedent refused to leave, and the two engaged in a scuffle during which the decedent was fatally shot. The court, in reversing a verdict of conviction, observed that under the defendant's theory of the case the shot was accidental and the defendant had a legal right to evict the decedent from the premises using whatever force might rightfully be used for that purpose, and stated: "It is quite possible that the jurors, because they were not instructed as to his right to eject Cope from the premises and to use all force reasonably necessary to that end, believed that defendant was guilty of a felony in endeavoring to remove Cope by force; and it is quite possible that the verdict of murder in the

second degree was returned because, and solely because, the jury believed that the shot which killed Cope, even if it were fired accidentally and unintentionally, was fired while defendant was committing or attempting to commit a felony. These considerations will show how essential it was that the jury should be fully instructed with respect to defendant's right to eject Cope and to use force if necessary."

[6] Whether Mitchell was a trespasser when at the Spurlock residence, whether he was a trespasser when elsewhere on the ranch as he admittedly was prior to the shooting, whether the appearances of injury to defendant at the hands of the deceased were "real or apparently real", whether the attendant circumstances were such as to "excite the fears of a reasonable man" and whether the defendant acting upon such appearances and fears killed the deceased, were all directly placed in issue by both the prosecution and the defense and were questions of fact for the jury to decide. Or stated another way, as in the Hubbard case, *supra*, the jurors, because they were not properly instructed as to the right of Reese to order Mitchell off the ranch (but rather they were told to the contrary that it was not an element of the case) might conceivably have based their verdict of murder in the second degree solely upon the ground that they believed that the fatal shot was fired while the defendant was committing or attempting to commit a felony.

Under the testimony and circumstances of the present case the question of trespass as well as the question relating to the threats of force and violence accompanying the trespass as made by the decedent directly and indirectly to the defendant, all of which were testified to by various witnesses and likewise argued at length by both the prosecution and defense, became a part of and directly related to defendant's claim of self-defense, and concerning which the defendant was entitled to proper instructions.

[7] Therefore, the failure to instruct the jury properly upon all of such elements of the case became "substantial and serious errors vital to defendant that may have resulted in a miscarriage of justice" (*People v. Dail*, *supra*), and we must conclude that such error was prejudicial to the defendant, and grounds for reversal.

The third contention made on this appeal is that the court erred in giving a so-called "retreat to the wall" instruction, which reads as follows: "No one has a right to kill another in self-defense unless such killing is real or apparently necessary for such defense. Before a person can justify taking the life of a human being on the ground of self defense, he must, when attacked, employ all reasonable means within his power, consistent with his safety, to avoid the danger and avert the necessity for the killing."

Except for the second word which has been changed from "man" to "one" this instruction is identical to the one given in the case of *People v. Maughs*, 149 Cal. 253, 86 P. 187, 190. The Supreme Court therein, after commenting upon the development of the modern rule in California as distinguished from the antiquated "retreat to the wall" doctrine, concluded: "No exposition is necessary to show that the giving of this instruction, which imposed upon the defendant the duty of flight, and forbade him the right to stand his ground, was error of such gravity as to demand a reversal of the case."

In passing upon a similar question this court, in the recent case of *People v. Zuckerman*, 56 Cal.App.2d 366, 132 P.2d 545, 549, cited with approval the *Maughs* case, and stated: "The California courts have definitely rejected the antiquated doctrine that a defendant will be justified in killing his assailant in self-defense only after he has used every possible means of escape by fleeing, even to the extent of 'retreating to the wall,' regardless of whether the imminent peril would justify him as a reasonable person in believing he was about to receive great bodily harm, or that he was likely to be killed if he did not promptly resort to a deadly weapon." Citing *People v. Maughs*, and other cases.

That such rule is well founded in common logic and justice is ably illustrated by the statement of Mr. Justice Henshaw in the *Maughs* case (quoting from *State v. Bartlett*, 170 Mo. 658, 71 S.W. 148, 59 L.R.A. 756), when he observed: "It is true, human life is sacred, but so is human liberty. One is as dear in the eyes of the law as the other, and neither is to give way and surrender its legal status in order that the other may exclusively exist, supposing for a moment such an anomaly to be possible. In other words, the wrongful

and violent acts of one man shall not abolish, or even temporarily suspend, the legal and constitutional rights of his neighbor."

Respondent admits the instruction so attacked to be improper upon the authority of *People v. Zuckerman*, supra, but argues that appellant lost the right to the plea of self-defense by his own aggressive conduct in that he "went gunning" for the decedent. From this the respondent concludes that as the plea was not available to the defendant, the giving of the instruction embodying the discarded "retreat to the wall" rule, was wholly immaterial. In support of this argument respondent quotes at length and strongly relies upon the case of *Laney v. United States*, 54 App.D.C. 56, 294 F. 412, 414.

The defendant therein was convicted of manslaughter. He predicated his case upon self-defense and the trial court instructed the jury upon that subject. Upon appeal the Court of Appeals of the District of Columbia stated it would be unnecessary to consider the assignment of error by the defendant in relation to the law of self-defense (what the alleged error was is not disclosed), since viewing the evidence in the most favorable aspect, self-defense did not enter the case. In the *Laney* case, the defendant, by his own acts after escaping from a race riot, tested his revolver, and returned to the place of the riot, and in the opinion of the court, as a matter of law deliberately sought a quarrel. The court concluded that "if the facts, in the judgment of the court, are not such as to admit of this defense, the issue should not be left to the mere speculation of the jury." However, such statement was later qualified when the court said, "of course, the extent to which a person assailed may go, under a given set of facts involving self-defense, is always a question of fact for the jury", while in a later case, however, *Kinard v. United States*, 68 App.D.C. 250, 96 F.2d 522, 526, the same court which decided the *Laney* case, said: "* * *. It is the function of the jury, under proper instructions, to determine whether either defense [self-defense or killing in heat of passion] is available to the accused under the circumstances of the particular case."

[8,9] Such being the rule, then in the present case the testimony of Reese, that the deceased kept coming toward him even after the first shot and with an iron pipe raised over his right shoulder, was sufficient to raise the issue of self-defense.

[10] For this court to adopt the argument of respondent in opposition to defendant's contention and hold as a matter of law that the defendant was entitled neither to the plea of self-defense nor proper instructions thereon would be to completely disregard the obvious conflicts in the evidence as well as the testimony of the defendant. This we cannot do, for as stated in *People v. Keel*, 91 Cal.App. 599, 604, 267 P. 161, 163: "If the testimony of any witness in the case is sufficient to raise the issue, it should be presented to the jury."

In view of the defendant's testimony in addition to the conflicting testimony concerning the acts of the participants immediately preceding and at the time of the shooting, the question of whether or not the defendant was acting in a reasonable belief of death or injury was a proper question solely for the jury upon proper instructions on self-defense.

Three additional cases are cited by respondent; *People v. Fleming*, 218 Cal. 300, 23 P.2d 28; *People v. Barrett*, 22 Cal.App. 780, 136 P. 520, and *People v. Keys*, 62 Cal.App.2d 903, 145 P.2d 589. In the *Fleming* case the Supreme Court merely held that the uncorroborated testimony of the defendant was overcome by the testimony of all of the other witnesses, and that there was ample evidence to sustain the verdict of the jury, while the decisions in the *Barrett* and *Keys* cases likewise turned upon the questions of the sufficiency of the evidence to justify the verdict of the jury.

In none of the California cases cited was the plea of self-defense denied the defendant even though the record in the last two cases contained substantial evidence that the fatal shots were fired after the deceased had fallen. The phrase "availability of such defense" in the cases last mentioned is not used in a restrictive sense as regards the right of the defendant to such defense, as respondent contends, but rather it refers to the validity of the defense based upon all of the acts of the defendant and the deceased and other pertinent circumstances surrounding the homicide.

As was stated in the case of *People v. Hecker*, 109 Cal. 451, at page 462, 42 P. 307, at page 311, 30 L.R.A. 403: "The acts which a defendant may do and justify under the plea of self-defense depend primarily upon his own conduct, and secondarily upon the conduct of the deceased. There is no fixed rule applicable to every case, though certain general principles, well es-

established, stand forth as guides for the action of men and measures for the jury's determination of their deportment." See also *People v. McCurdy*, 140 Cal.App. 499, 35 P.2d 569; *People v. Mesa*, 121 Cal.App. 345, 8 P.2d 920; *People v. Miller*, 114 Cal. App. 293, 299 P. 742; *People v. Bruno*, 107 Cal.App. 365, 290 P. 610, and *People v. Head*, 105 Cal.App. 331, 288 P. 106.

It is also true, as stated in the *Hecker* case, *supra*: "Self-defense is not available as a plea to a defendant who has sought a quarrel with the design to force a deadly issue, and thus, through his fraud, contrivance, or fault, to create a real or apparent necessity for killing."

However, the court further stated: "One of the questions of primary consideration for the jury was which of the two men was the aggressor at the time of the fatal affray, which of the two first overstepped the boundaries of the law, which of the two first trespassed upon the legal rights of the other,—in short, which of the two by his acts and conduct, first put himself in the wrong; for it is obvious that the determination of this must throw a flood of light upon the other question, second in consideration but first in importance, namely, whether, at the time the defendant first fired, he was acting in self-defense."

If, then, a determination of such question must depend first upon the conduct of the defendant, and secondly upon the conduct of the deceased, reference necessarily must be had to the record. Obviously, therefore, the testimony introduced by the defendant cannot be totally ignored and reference only had to that which was detrimental to him, as does the respondent in its brief. Rather the entire testimony in relation to all of the circumstances attending the homicide (*People v. Hecker*, *supra*), whether introduced by the defense or by the prosecution, must be examined. As previously noted such an examination of the record in the present case discloses a sharp conflict in the evidence. Under such circumstances "the law is well settled that disputed questions as to whether a plea of self-defense is sound or is corroborated are for the jury to determine." *People v. Bruno*, *supra* [107 Cal.App. 365, 290 P. 613], and cases therein cited. See also *People v. Newcomer*, *supra*.

Paraphrasing the statement made by this court in the recent case of *People v. Zuckerman*, *supra*, the testimony of the de-

fendant constituted substantial evidence, and raised an issue as to whether he was reasonably justified in believing, under the circumstances then existing, that he was about to be seriously injured or killed by the decedent, and that it was therefore necessary for him to shoot Mitchell in self-defense. That was an issue which he had a right to have submitted to the jury under proper instructions. In fact such plea was the major issue presented by him at the trial and the testimony in relation thereto raised a proper question for determination by the jury. Under the circumstances as disclosed by the record the trial court properly entertained instructions upon such defense. Unfortunately, however, the instructions so given were improper under the cases cited.

[11] It is true the jury elsewhere was instructed correctly regarding the general principles of law in relation to the plea of self-defense, but that did not overcome the prejudicial effect of the quoted erroneous charge. "The giving of a formal instruction which stated the statutory rule did not cure the error, but instead created a serious conflict, which would normally have the effect of misleading the jury. * * * The result must inevitably have been a confusion in the jurors' minds on a matter vital to the judgment." *People v. Dail*, *supra*. See also *Wells v. Lloyd*, 21 Cal.2d 452, 457, 132 P.2d 471; *Jolley v. Clemens*, 28 Cal.App.2d 55, 73, 82 P.2d 51; *Soda v. Marriott*, 118 Cal.App. 635, 643, 5 P.2d 675; 8 Cal.Jur. 633.

An earlier version of such rule is found in the *Maughs* case, *supra*, when the Supreme Court, in disposing of a like situation, stated: "Nor is it any answer to this objection that the court elsewhere gave a correct instruction upon the subject. The result served but to confuse the jury and to render it impossible to determine whether in their deliberations they followed the law as correctly or as incorrectly set before them. *People v. Campbell*, 30 Cal. 312; *People v. Anderson*, 44 Cal. 65; *People v. Wong Ah Ngow*, 54 Cal. 151, 35 Am.Rep. 69; *People v. Messersmith*, 57 Cal. 575; *People v. Thomson*, 92 Cal. 506, 28 P. 589; *People v. Pearne*, 118 Cal. 154, 50 P. 376."

[12-15] The fourth contention contains two allegations of error, (1) that the trial court erred in failing to instruct the jury that the defendant had a right to have a re-

volver in his possession, and (2) that prejudicial error was committed by failure of the court to instruct the jury as to the standard by which the law gauges the conduct of one suddenly assailed. We find no prejudicial error in either contention. As regards the first, our attention has been directed to no portion of the record where issue was made concerning the ownership or possession of a revolver. The instruction tendered by defendant, although correct as an abstract statement of the law, had no bearing upon the issues under consideration. To justify a reversal for such alleged error it must appear from all of the evidence that an error in this respect resulted in a miscarriage of justice. (2 Cal. Jur. 1026, and cases cited.) As regards the second part of defendant's fourth contention it might be said that the instruction given could well have been broadened to include what defendant has termed the standard of conduct of a reasonable man. However, that is not to say, nor is it necessary, that each instruction embody every fact or element essential to sustain or defeat a particular issue. It is sufficient if the instructions, as a whole, substantially and correctly cover the law applicable to the issues.

[16] Defendant's fifth point is that the court further erred in giving a flight instruction in the absence of any evidence of flight. The record discloses that immediately following the shooting the defendant left the scene and hid the gun and cartridges in a vineyard. Later that same evening he voluntarily surrendered himself to the law enforcement officers. Such evidence of flight is manifestly weak. However, under such circumstances we must repeat what this court recently said in the case of *People v. Sing Chan*, 64 Cal.App. 2d 167, 148 P.2d 81, 84, wherein a similar question was presented: "We are of the opinion that whether defendant fled or not was a matter for the jury to determine."

[17] The sixth contention is that the court erred in permitting the prosecutor to cross-examine defendant in regard to previous physical encounters. Upon direct examination defendant testified that he had a serious heart condition which had been active since entering a sanitarium in 1927, and that excitement or exertion not only could but probably would prove fatal. It is obvious that by such testimony defendant endeavored to show he was physically

handicapped and by reason thereof was further justified in defending himself with a revolver. The defendant having first placed such evidence in the record he cannot be heard to complain of the admission on cross-examination of further evidence. It was proper for the prosecutor to develop by cross-examination that the alleged critical heart condition did not deter appellant from engaging in previous physical encounters with others.

[18] As stated in *People v. Lombard*, 131 Cal.App. 525, 532, 21 P.2d 955, 958: "It is proper in a criminal case to cross-examine a defendant upon any relevant and material matter testified to on his direct examination, for the purpose of showing conduct or statements inconsistent with his direct testimony."

[19,20] Appellant's seventh contention is that error was committed when the prosecution was allowed to impeach their own witness, Bagwell, without any showing of surprise or justification.

On the night of the homicide this witness talked with the prosecutor and the sheriff concerning the case and gave a statement of the facts to them. At the trial he was called and testified as a witness for the state. Upon cross-examination he gave categorical answers to suggestive questions which included statements of fact. The facts embodied in the questions were somewhat different from those he gave to the officers on the night of the homicide but in harmony with a statement which he also gave to defense counsel the morning following. At the conclusion of the cross-examination the district attorney asked permission to cross-examine the witness on the ground of surprise.

We have considered all of the testimony of the witness and we are satisfied that there was reasonable justification for permitting the prosecution to question him relative to former inconsistent statements. The question of surprise and the method of proving it are committed largely to the discretion of the trial court. *Zipperlen v. Southern Pac. Co.*, 7 Cal.App. 206, 93 P. 1049.

The rule is thus stated in 27 Cal.Jur. p. 174, sec. 148: "In addition to the requirement that a witness give material testimony, in order that a party producing a witness may impeach him by proof of inconsistent statements, it must appear that

such party has been misled and taken by surprise."

A reading of the record reveals that the requirements were met. Furthermore, Bagwell having admitted the inconsistent statements, surely no prejudice resulted. 27 Cal.Jur. p. 172, sec. 146, reads: "Improperly allowing or refusing to allow a party to prove the inconsistent statements of his witness is ground for reversal only when prejudice results therefrom."

The defendant's eighth, ninth and tenth assignments of error, respectively, allege misconduct on the part of the district attorney, prejudicial error in the refusal by the trial court to give "all or nearly all of the instructions proposed by the appellant applicable to the law of the case" and refusal by the court to permit the defendant to show that "immediately after the shooting he told his wife the same facts to which he testified at the trial."

We find no merit in such contentions. Nor has counsel shown this court wherein such alleged irregularities resulted in prejudicial error, thereby necessitating a reversal.

[21] The mere fact that all of the one hundred and ninety-five instructions offered by the defendant were not given surely is not a valid ground for reversal. Of the instructions so offered 28 were given as proposed and 4 were given as modified by the court. In addition many others were given at the request of the prosecution. There is no rule compelling a court to give every instruction offered, no matter how repetitious or immaterial.

Except as otherwise mentioned in this opinion, the trial court "fully, clearly and fairly" instructed the jury on all points of law "material to the case and necessary for the information of the jury." (8 Cal.Jur. 307, and cases cited.)

[22] Likewise we find no merit in the objection to the refusal of the court to receive in evidence the obviously self-serving statement of the defendant made to his wife immediately after the homicide. The case cited by the defendant in support of such contention (*People v. Billings*, 34 Cal. App. 549, 168 P. 396) is not in point. In that case it appears that shortly after the alleged crime statements were made by one who was subsequently called as a witness by the prosecution, but who, at the time of making the statements, had no knowledge

that he "was either thought of, or sought for, as a witness." When called to testify such statements were admitted to rebut the inference which the defense sought to deduce that certain evidence given at the trial was of recent fabrication. No comparable situation exists in the present case.

It is very apparent from the transcript of the proceedings that every issue involved in the case was intelligently and strenuously contested, for which counsel are to be commended. But such observation does not signify that we endorse the acrimonious remarks of counsel. However, as the case must be returned on other grounds, no useful purpose would be served by pursuing this particular matter further.

The judgment and order are reversed, and the cause is hereby remanded for a new trial in accordance with the opinion herein expressed.

THOMPSON, J., concurs.

ADAMS, Presiding Justice.

I dissent.

The majority opinion holds that the judgment must be reversed because the trial court gave two instructions which were erroneous. I am of the opinion that there was no error in the giving of one of these instructions, and as to the other, that, while it was erroneous, no miscarriage of justice resulted therefrom. The first of these instructions was that the jury was not to consider "the defense talked of by the attorneys for the defendant and described by them as the right to evict a trespasser, because the evidence in the case is that the defendant did not shoot deceased because he was trespassing."

In support of the instruction and what I have said, I quote from the defendant's own testimony:

"Q. You had no reason to believe that he (deceased) would harm any of your property there, did you? A. No.

"Q. You had no thought of your property at the time you fired the shots, did you? A. No.

"Q. Your main thought, your only thought, was to protect yourself? A. Yes.

"Q. You didn't shoot him because he was on the place and you had told him to stay off, did you? A. No,—I might have. I don't know how to answer that question.

"Q. Well, if he hadn't come at you with the bar, you wouldn't have shot him, would you? A. No.

"Q. So it wasn't because of the mere fact that he was on the property that you owned, that he was shot, was it? A. Well, I was afraid of him.

"Q. Physical fear? A. Yes, sir."

Not only was the foregoing instruction proper because defendant testified that he had no thought of harm to his property when he shot, but the evidence shows without contradiction that at the time defendant returned to the scene of the homicide and, after arming himself with his gun, called the decedent to "Come over a minute", deceased was not trespassing but was where he had a right to be, in the home of the Spurlock family about to dine with them in response to their invitation so to do. While it is true that the Spurlock home was upon the ranch owned by defendant, it could not be seriously contended that a person who was in the home of the Spurlocks by their invitation was a trespasser upon the property of defendant. But even if decedent was upon appellant's premises without the latter's permission and against his will, appellant was not, for that reason, justified in shooting him. There is nothing in the evidence which even faintly suggests that when deceased came to the ranch just prior to the shooting he was contemplating the commission of a felony, nor anything showing that while on the premises he committed a felony. It appears without contradiction that he had come there to return his son's car and to ask his son, who was living with the Spurlocks and working for defendant, to drive deceased and Mr. Gage, his brother-in-law, back to their homes in Firebaugh whence the boy had brought them the morning of the homicide. While section 197 of the Penal Code, cited in the majority opinion, provides that a homicide is justifiable when committed by a person "in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein", where, as here, there was no evidence that deceased intended or endeavored, by violence or surprise or otherwise, to commit a felony, or that he manifestly or at all intended or endeavored, in a violent or

riotous or tumultuous manner, or at all, to enter the habitation of defendant for the purpose of offering violence to any person therein, or otherwise, obviously then, the trial court was fully justified in instructing the jury that they should not consider the defense referred to as the right to evict a trespasser. And in this connection we note also, as another reason why appellant was not entitled to rely upon such a defense, that section 197 of the Penal Code provides that a person relying upon the defense of habitation, property or person to justify a homicide, "if he was the assailant or engaged in mutual combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed." This defendant did not do.

The other instruction, the giving of which is held to constitute reversible error, reads: "No one has a right to kill another in self-defense unless such killing is really or apparently necessary for such defense. Before a person can justify taking the life of a human being on the ground of self-defense, he must, when attacked, employ all reasonable means within his power, consistent with his safety, to avoid the danger and avert the necessity for the killing."

That this instruction was erroneous may be conceded since it was condemned in *People v. Maughs*, 149 Cal. 253, 86 P. 187. But in that case prejudicial error was presumed from the giving of the erroneous instruction. However, since that decision, section 41½ of Article VI of the Constitution has been enacted, which specifically provides that no judgment shall be set aside or new trial granted in any case on the ground of misdirection of the jury, unless, after an examination of the entire cause, *including the evidence*, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

The question before this court is, then, not whether the instruction was erroneous, but whether, upon an examination of the entire case, including the evidence, it resulted in a miscarriage of justice. In *People v. Will*, 79 Cal.App. 101, 248 P. 1078, 1085, a case decided in this district, among other errors complained of was the giving of an instruction regarding the consideration to be given by the jury to the testimony of the defendants. This court there said that a similar instruction given in *People v. Maughs*, supra, had been severely criticized

and that the court had there said that in all future cases where such instruction was given the Supreme Court would hold the giving of it so prejudicial as to call for reversal; but that since the decision in the Maughs case section 4½ of Article VI of the Constitution had been adopted and that "While it was error to give the instruction, the evidence against the appellant is so strong and convincing that it cannot be held that there has been a miscarriage of justice." Also in *People v. Bartol*, 24 Cal. App. 659, 142 P. 510, an instruction similar to the one given in the Will case and condemned in the Maughs case, was relied upon for reversal; but this court said (24 Cal.App. at page 666, 142 P. at page 513) that the situation must be viewed in a different light from that which obtained when the Maughs decision was rendered, citing the foregoing Constitutional provision and *People v. O'Bryan*, 165 Cal. 55, 130 P. 1042. In the latter case the court said that prior to the enactment of the Constitutional provision the limitation of appellate jurisdiction to questions of law precluded reviewing courts from weighing the evidence for the purpose of forming an opinion whether the error had or had not in fact worked injury, and that, having no jurisdiction in matters of fact, appellate courts were bound to apply the doctrine that prejudice was presumed to follow from substantial error; that this had produced unsatisfactory results and that it was to avoid them that the Constitutional provision had been adopted. It went on to say, 165 Cal. at page 65, 130 P. at page 1046: "This much, however, we think may be safely said. Section 4½ of article 6 of our Constitution must be given at least the effect of abrogating the old rule that prejudice is presumed from any error of law. Where error is shown, it is the duty of the court to examine the evidence and ascertain from such examination whether the error did or did not in fact work any injury. The mere fact of error does not make out a prima facie case for reversal which must be overcome by a clear showing that no injury could have resulted."

Also, 165 Cal. at page 66, 130 P. at page 1046: "The final test is the opinion of the appellate court upon the result of the error. No doubt this view requires the court, to some extent, to weigh the evidence, and form conclusions upon its weight—a function which, heretofore, has been reserved for the jury. But it cannot be doubted that the legislators, in proposing the amend-

ment, and the electors, in adopting it, intended to put upon the courts the performance of just that function. We are not substituted for the jury. We are not to determine, as an original inquiry, the question of the defendant's guilt or innocence. But, where the jury has found him guilty, we must, upon a review of the entire record, decide whether, in our judgment, any error committed has led to the verdict which was reached. If it appears to our satisfaction that the result was just, and that it would have been reached if the error had not been committed, a new trial is not to be ordered."

Also see *People v. Brown*, 22 Cal.2d 752, 141 P.2d 1, where the giving of an instruction regarding the consideration to be given the testimony of defendant was held erroneous under the decision in the Maughs case, but the error was held not prejudicial, citing *People v. Bartol*, supra, and stating that the record contained substantial evidence connecting defendant with the homicide, and that the trial court had elsewhere correctly instructed the jury on the principle announced in the challenged instruction.

No presumption of prejudice to a defendant now arises from error or irregularity arising during the course of a criminal trial. On the contrary, we are prohibited from reversing judgments unless it is made to appear affirmatively, to the satisfaction of the court, after an examination of the entire cause, including the evidence, that the error resulted in a miscarriage of justice. *People v. Lapara*, 181 Cal. 66, 72, 183 P. 545; *People v. Watts*, 198 Cal. 776, 793, 247 P. 884; *People v. Mareck*, 17 Cal.App.2d 278, 282, 61 P.2d 972; *People v. De La Roi*, 23 Cal.2d 692, 146 P.2d 225; *People v. Cooper*, 36 Cal.App.2d 6, 13, 14, 96 P.2d 1012; *People v. Cowan*, 38 Cal.App.2d 231, 246, 101 P.2d 125; *People v. Ratterman*, 38 Cal.App.2d 598, 601, 101 P.2d 750; *People v. Wilt*, 40 Cal.App.2d 124, 128, 104 P.2d 387; *People v. Harrman*, 40 Cal.App.2d 487, 493, 104 P.2d 1063; *People v. Soules*, 41 Cal.App.2d 298, 313, 314, 106 P.2d 639; *People v. Pearson*, 41 Cal.App.2d 614, 621, 107 P.2d 463; *People v. Hernandez*, 47 Cal.App.2d 132, 134, 117 P.2d 394; *People v. Hopper*, 55 Cal.App.2d 335, 343, 130 P.2d 798; *People v. Hopkins*, 57 Cal.App.2d 382, 387, 134 P.2d 299; *People v. Russell*, 59 Cal.App.2d 660, 664, 139 P.2d 661; *People v. Keys*, 62 Cal.App.2d —, 145 P.2d 589;

People v. Mount, 30 Cal.App.2d 286, 290, 86 P.2d 132; People v. Neumen, 35 Cal.App. 2d 82, 87, 94 P.2d 611; People v. Watson, 35 Cal.App.2d 587, 590, 96 P.2d 374; People v. Hammer, 74 Cal.App. 345, 348, 240 P. 56; 2 Cal.Jur. 1008.

It is intimated, if not directly stated in the majority opinion, that defendant's plea of self-defense was denied to him. Such, however, is not the case. At defendant's request the trial court gave eleven instructions on self-defense as follows:

"You are instructed that a homicide is not always unlawful. A homicide may be entirely lawful and when a homicide is committed in self-defense, it is entirely lawful."

"You are instructed that the law of California does not compel a person to flee an attack, and seek safety in flight, but may stand his ground and defend himself, and, under some circumstances, may even pursue and slay his assailants."

"If you find that the deceased was the aggressor and if you further find that the defendant as a reasonable man was justified in believing himself to be in imminent danger of serious bodily injury or death at the hands of the deceased, then there is nothing further for you to consider, but you must return a verdict of not guilty."

"You are further instructed that the defendant in the exercise of the right of self-defense,—if you find the circumstances justified the defendant in exercising such right, was entitled to act upon the appearances as they presented themselves to the defendant at the time the defendant was assaulted by the deceased if you so found, and if those appearances justified the defendant in believing as a reasonable man that he was in danger of the infliction of serious physical injury upon him by the deceased, the defendant had a right to repel such assault by the use of all necessary force, even to the point of taking the life of the deceased."

"The jury may take into consideration the evidence of the defendant's knowledge, if any, at the time of the homicide of previous assaults, if any, made by the deceased on other persons in determining the condition or state of mind of the defendant at the time of the homicide, and whether such knowledge, if any, of the defendant, together with the other circumstances in evidence, as you find them, would

reasonably have caused the defendant to shoot the deceased while the defendant was acting in self-defense."

"I instruct you that where one person threatens another with physical violence, and has the apparent ability to carry out such threats, the person threatened has the right to command the other to desist from carrying out such threats, and to draw or exhibit a revolver or other deadly weapon for the purpose of compelling the other to desist from violence."

"The defendant was entitled to act upon appearances and if the language and conduct of the deceased was such as to induce in the mind of a reasonable man under all the circumstances existing, and viewed from the standpoint of the defendant, a belief that he was about to be attacked and that serious bodily injury was about to be inflicted upon him by the deceased, it does not matter if such danger was real or was only apparent; and if the defendant acted in self-defense from real and honest convictions as to the character of the danger, induced by the existence of reasonable circumstances, you should find him not guilty, even though he was mistaken as to the extent of the danger."

"If you find from the evidence that the deceased was unarmed and threatened an assault and intended to commit a battery upon the defendant with the fists of him, the deceased, and if you also find from the evidence that the defendant at the time in question and theretofore was suffering from a heart ailment as the result of which the defendant was not in the same physical condition to withstand an assault and battery as would be a person without such heart ailment, the physical condition mentioned of the defendant would give the defendant the right which healthier persons might not possess of resorting to a deadly weapon, to-wit, a revolver, for his protection against such an assault and battery."

"One person may kill another upon a sudden quarrel or in the heat of passion and the killing may be entirely lawful. In this connection, you are instructed that if a person has the right under all of the circumstances of the case to shoot another in self-defense the exercise of this right does not make the act unlawful or constitute it a crime merely because it was done in a sudden quarrel or in the heat of passion. A shooting or a killing done in self-defense is entirely lawful whether or not it

is done in a sudden quarrel or in the heat of passion."

"Homicide is the killing of a human being. All homicides are not criminal, that is, one person may kill another person and not be guilty of any crime under our law, as where such killing was done in the lawful exercise of the right of self-defense. A homicide may be either lawful or unlawful. It is only unlawful homicides that are made crimes by our laws."

"If you have a reasonable doubt as to whether the defendant acted in self-defense, you must find him not guilty."

The foregoing instructions emphasized by repetition and elaboration the rules of law most favorable to appellant, and it is obvious that the jury were fully and fairly instructed as to defendant's right of self-defense; and while these instructions to some extent conflict with the one complained of as constituting prejudicial error, it was said in *Wells v. Lloyd*, 21 Cal.2d 452, 458, 459, 132 P.2d 471, that it does not follow that the giving of conflicting instructions will always mislead the jury and warrant a reversal; that in reviewing instructions an appellate court must read the charge as a whole and give the instructions a reasonable construction from the standpoint of their probable effect upon the jury. Also see *Barsha v. Metro-Goldwyn-Mayer*, 32 Cal.App.2d 556, 565, 90 P.2d 371; *Passarelli v. Souza*, 37 Cal. App.2d 1, 5, 98 P.2d 809.

The majority opinion in this case cites *People v. Zuckerman*, 56 Cal.App.2d 366, 132 P.2d 545, 549, as comparable to the case before us. But the instruction held erroneous in that case went much farther than the one here under attack. It read:

"The defendant is not necessarily justified, because he actually believed that he was in imminent danger. When the danger is only apparent, and not actual and real, the question is: Would a reasonable man, under all the circumstances, be justified in such belief? If so, the defendant will be so justified if he in fact had such belief.

"If this was defendant's position, it was his right to repel the aggression and fully protect himself from such apparent danger. *If he could have withdrawn from the danger, it was his duty to retreat. Between his duty to flee and his right to kill, he must flee; or, as the books have it, must retreat to the wall, but by this is not meant*

that a party must always flee, or even attempt flight. The circumstances of the attack may be such, the weapon if any, with which he is menaced of such a character that retreat might well increase his peril. By 'retreating to the wall' is only meant that the party must have availed himself of any apparent and reasonable avenues of escape by which his danger might be averted, and the necessity of slaying his assailant avoided." (Emphasis added.)

In the instruction given in the case before us the jury were not told that if defendant could have withdrawn from the danger it was his duty to retreat, that between his duty to flee and his right to kill he must flee, that is, "retreat to the wall"; here they were merely told that he must "employ all reasonable means within his power, consistent with his safety, to avoid the danger and avert the necessity for the killing". And if, as appellant contends, he shot in defense of his habitation, the foregoing language is not substantially different from the provision of section 197 of the Penal Code, *supra*. By the giving of the other instructions above quoted, the jury were fully instructed that if the circumstances justified the defendant in believing as a reasonable man that he was in danger, he had a right to stand his ground and defend himself, and to repel assault by use of all necessary force even to the taking of the life of his assailant; they were even told that if they found that deceased was the aggressor and that defendant as a reasonable man was justified in believing himself to be in imminent danger of injury or death at the hands of deceased, there was nothing further for them to consider, and they must return a verdict of not guilty.

The Zuckerman case is further distinguishable in that in that case certain instructions requested by defendant, which correctly stated the law as to the right of one assailed to stand his ground, were refused. Also there, the facts of the case are quite different from the facts in the case before us. Here the evidence shows conclusively that defendant, himself, created the situation that resulted in the killing. Knowing that deceased was at the Spurlock house, he went from the Bagwell house to his own residence, advised his wife to delay dinner, returned to the Bagwell house, took his gun from his car and put it in his belt, called to deceased to come to him from the Spurlock house, and, as de-

ceased complied, invited a conflict by asking: "Can you whip me here?" This evidence plainly indicates that appellant was the aggressor; and while he testified that he was in fear of deceased, his conduct belies such statement.

Since the enactment of Article VI, section 4½, of the Constitution it has become, not only the right, but the duty of an appellate court, in reviewing instructions, to read the charge as a whole, to give the instructions a reasonable construction from the standpoint of the jury, and to determine therefrom, and from the evidence in the case, whether it is probable that in the absence of the erroneous instruction the jury would not have returned the verdict, and, therefore, a miscarriage of justice, within the meaning of the constitutional provision, has resulted. As was said in *People v. Rogers*, 22 Cal.2d 787, 807, 141 P.2d 722, 732, "The question for an appellate court under these circumstances is whether, considering the entire record, the challenged instruction may have prejudiced the convicted person's rights. Const., art. VI, sec. 4½. If it is probable that in the absence of a misleading instruction the jury would not have returned the verdict complained of, then there has been a miscarriage of justice within the meaning of the constitutional provision."

In my opinion the evidence of defendant's guilt is clear and convincing and, in view of the evidence and the entire charge of the court, no different verdict would have resulted had the erroneous instruction not been given. Generally speaking there is little conflict in the evidence. While defendant testified that as deceased approached him he held a piece of pipe in both hands, this is contradicted by both Bagwell and his wife, who testified that they saw no object in decedent's hands except his hat. It was daylight at the time of the shooting and Mrs. Bagwell stated she saw decedent as he was coming from the Spurlock house after defendant called him. She further testified that the piece of pipe in question was at the cesspool, some distance away from the shooting, after the tragedy occurred, and that it had been there for ten days before. The shooting occurred at about 7:00 o'clock in the evening and at 8:30 o'clock the sheriff was on the scene to investigate. With the aid of Mr. Bagwell and a flashlight he searched the ground where the shooting occurred, located the two bullet holes, recovered one

of the bullets and marked the bullet holes. He also traced the blood from the place of the shooting to the Spurlock house, a distance of about 150 feet. He saw many different objects around the premises but neither he nor either of the Bagwells saw the piece of pipe near the scene of the shooting. Later, about 12:30 o'clock, the sheriff returned to the scene to recover the other bullet, and on this second visit he saw a piece of pipe "one step" from the bell pole where deceased was shot. Though both Mr. and Mrs. Bagwell were eye-witnesses to the tragedy, neither of them saw any pipe in the immediate vicinity of the shooting. Doubtless if deceased had dropped the piece of pipe when he was shot, as defendant testified, the sheriff or Mr. Bagwell would have seen it at the place of the shooting when the 8:30 p. m. search was made and the bullet holes found. It was 3 feet long and 1½ inches in diameter so that it could not have been easily overlooked. By their verdict of murder of the second degree it is clear that the jurors concluded the deceased did not carry a piece of pipe as claimed by defendant.

Defendant also discredited his testimony that deceased advanced toward him with the piece of pipe held in both hands up to his right shoulder, when he testified that, when he fired the second shot, deceased "stopped and dropped the pipe and grabbed his leg with one hand and I guess his hat with the other." It is not reasonable to believe that decedent thus carried the pipe in both hands and yet had his hat in either hand. Furthermore the testimony as to the conversation between the two men at the time of the shooting is not consistent with defendant's contention that he shot in self-defense. It was as follows:

"Defendant: Can you whip me here?"

"Deceased: I still can if you'll come out in the road, you big Texas longhorn son-of-a-bitch, you're just a coward.

"Defendant: I asked you not to come on my premises any more.

"Deceased: I'll come to Spurlock's as long as Lawrence [his son] works there.

"Defendant: I'll see whether you come."

Defendant immediately followed with two shots fired in rapid succession when the men were about 5 or 6 feet apart. When the first shot was fired decedent stepped backward, and after the second said: "Don't shoot me any more, Reese," and retreated to the Spurlock house. If

deceased had the piece of pipe as defendant claims, there would have been no occasion for his asking defendant to "come out in the road"; and if defendant fired because of fear of bodily harm he would not have said, "I'll see whether you come." Furthermore, the conduct of defendant after the shooting is not consistent with a shooting solely in self-defense. Immediately after the shooting he drove a short distance away and put the gun and shells in a vineyard. He then went to his home where he remained a few minutes during which he tried to telephone to his attorney, Mr. Preston, at Merced. Failing to contact Mr. Preston he telephoned to and made an appointment with Mr. Braucht, Mr. Preston's partner. On his way to Merced he stopped at Harry Taff's, saw Mrs. Taff, talked with her about a minute, then he went on and stopped at Mr. Nancarrow's and saw and talked with Mrs. Nancarrow. Mr. Nancarrow was not at home. (The Taffs and the Nancarrows subsequently were witnesses for the defense and had been in the barroom during the incident at Planada.) Appellant then went to the home of attorney Braucht and together they went to the home of attorney Hugh Landrum where the shooting was discussed. While this discussion was going on attorney Braucht drove 12 or 15 miles to the Bagwell home to procure Mr. Bagwell to come to attorney Landram's home for an interview, but Mr. Bagwell was not at home. The meeting at the home of attorney Landram continued from about 8:30 to about 11:00 o'clock p. m. when defendant, accompanied by counsel, surrendered to the public authorities.

The evidence is uncontradicted that the decedent and appellant had met about an hour before the shooting in the barroom at Planada, about four miles from defendant's ranch, and there had engaged in a conversation and some heated words; that defendant left the barroom and went outside followed by deceased, who called the defendant a vile name but made no gesture toward physical violence. From Planada defendant went to the Bagwell house and after talking with Bagwell, went to his own residence, about a half mile away, there told his wife to delay cooking the meat, went back to Bagwell's and from there called to deceased at the Spurlock house, about 150 feet away, to come to him. According to the testimony of the members of the Spurlock family, when called out of

their house by defendant, deceased was about to dine with them and was in jovial spirits, laughing and joking "as usual". Twice the defendant was in his own home and away from the deceased and yet he chose to arm himself and to invite the deceased into an affray by saying: "Can you whip me here?" As was said by this court in *People v. Fitch*, 28 Cal.App.2d 31, 39, 81 P.2d 1019, 1023, "The jury was warranted in concluding that if the defendant was really afraid of bodily harm at the hands of the deceased, he might easily have avoided a conflict by remaining at his home." There had been a cooling-off period of about an hour between the incident at Planada and the actual shooting, during which deceased showed no signs of rancor. Had defendant refrained from inviting deceased to fight, no tragedy would have occurred.

There is further reason why this court should affirm the judgment in this case, and that is, that the contentions here made were fully presented to and argued before the trial court on motion for a new trial, which was denied. In *Lafargue v. United Railroads*, 183 Cal. 720, 192 P. 538, and in *Hulburd v. Worthington*, 57 Cal.App.2d 477, 134 P.2d 832, in passing upon the question of whether error had resulted in a miscarriage of justice so as to justify reversal where a new trial had been denied by the lower court, it was said that a trial court is in a much better position than an appellate court to determine whether the verdict of a jury was probably due to errors at the trial, and its conclusion in the matter should not be disturbed unless, under all the circumstances appearing, it was clearly wrong. Here the trial court heard the witnesses and observed their manner of testifying. It was in a much better position than this court can be, to determine whether the testimony of appellant that he was afraid of decedent and killed him in self-defense was convincing and credible. Had that court been of the opinion that there was a miscarriage of justice we must assume that it would have granted a new trial.

I am convinced that the verdict of the jury was just and that had the instruction complained of not been given, no different result would have followed, that the evidence fully sustains the verdict, and that it has not been made affirmatively to appear that there has been a miscarriage of justice. The judgment should be affirmed.

65 Cal.App.2d Supp. 823

WRENN v. SUTTON.
Civ. A 5799.

Appellate Department, Superior Court,
Los Angeles County, California.
July 7, 1944.

1. Landlord and tenant ⇨278½
War ⇨4

A complaint, in an unlawful detainer proceeding, which does not show service on a tenant of a notice sufficient to comply with the O. P. A. rent regulation, fails to state a cause of action. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

2. Landlord and tenant ⇨278½
War ⇨4

In order to comply with O. P. A. rent regulations requiring notice to tenant to vacate or surrender possession of housing accommodations, to state the ground under which landlord relies for removal or eviction of tenant, a notice must state all the elements necessary under the regulation to constitute a ground for removal, and, if it omits any of such elements, it is insufficient. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

3. Landlord and tenant ⇨278½
War ⇨4

Notice given tenant to terminate month to month tenancy stating that owner sought in good faith to recover possession of housing accommodations for immediate use and occupancy as a dwelling for himself, but failing to state that he owned or acquired an enforceable right to buy or right to possession of accommodations prior to effective date of O. P. A. rent regulation, was insufficient as a foundation for proceeding to remove the tenant. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

4. Courts ⇨92

A decision cannot be regarded as authority for a legal proposition, which upon the facts of the case might have been, but in fact was not, raised or decided.

Appeal from Municipal Court of Los Angeles; Ray Brockmann, Judge.

Unlawful detainer proceeding by Richmond A. Wrenn against Beverly Sutton to recover possession of certain housing ac-

commodations occupied by defendant as tenant. Judgment for defendant, and plaintiff appeals.

Affirmed.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Hugh Culler, of Los Angeles, for respondent.

SHAW, Presiding Judge.

This is an appeal by the plaintiff from a judgment entered after the sustaining of a demurrer to the complaint in an unlawful detainer proceeding by which plaintiff seeks to recover the possession of certain housing accommodations occupied by defendant as his tenant.

[1,2] The only question presented by the appeal is whether the notice which, the complaint alleges, the plaintiff gave to defendant to terminate her month-to-month tenancy is sufficient for that purpose. That it complies with the provisions of California law is not disputed, but defendant contends that it does not satisfy the requirements of the O. P. A. Rent Regulation for Housing (8 Fed. Register 7322) issued pursuant to the Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq. We have already held that a complaint in unlawful detainer which does not show the service on the tenant of a notice sufficient to comply with that regulation fails to state a cause of action. *Lester v. Isaac*, Cal.Super.1944, 146 P.2d 524.

The regulation above mentioned provides, in section 6(d) (1), that: "Every notice to a tenant to vacate or surrender possession of housing accommodations shall state the ground under this section upon which the landlord relies for removal or eviction of the tenant." In order to comply with this requirement, a notice must state all the elements necessary, under the regulation, to constitute a ground for removal of a tenant and if it omits any of these elements it is insufficient. (*Lester v. Isaac*, supra.)

What, then, are the grounds referred to in the above quoted part of the regulation, and what constitute their elements? They are, of course, to be found in section 6, from which the quotation is taken. This section begins in subsection (a) with the provision that, "So long as the tenant continues to pay the rent to which the landlord is entitled, no tenant shall be removed from any housing accommodations, * * *

unless." Then follow six numbered paragraphs, interconnected by the conjunction "or", each of which sets forth a set of facts, conditions or events. The plaintiff here is undertaking to proceed under the sixth of these paragraphs, which reads as follows: "(6) The landlord owned, or acquired an enforceable right to buy or the right to possession of, the housing accommodations prior to the effective date of regulation (or prior to October 20, 1942 where the effective date of regulation is prior to that date, or prior to November 6, 1942 for housing accommodations within the Hastings Defense-Rental Area), and seeks in good faith to recover possession of such accommodations for immediate use and occupancy as a dwelling for himself. If a tenant has been removed or evicted under this paragraph (a) (6) from housing accommodations, the landlord shall file a written report on a form provided therefor before renting the accommodations or any part thereof during a period of six months after such removal or eviction."

[3] The notice given by the plaintiff here stated sufficiently that he sought in good faith to recover possession of the housing accommodations for immediate use and occupancy as a dwelling for himself, but it entirely failed to state that he owned or acquired an enforceable right to buy or the right to the possession of the housing accommodations prior to the effective date of regulation (which in this Defense-Rental Area was November 1, 1942). It is contended by defendant that such ownership or right to buy or possess is an essential part of the ground for removal provided by paragraph (a) (6), and that a notice failing to state the facts in that respect does not comply with the regulation and affords no foundation for a proceeding to remove the tenant. We think this contention must be sustained.

The regulation obviously regards each of the numbered paragraphs of subsection (a) of section 6 as setting forth a ground or grounds for the removal of a tenant. Subsection (b), which immediately follows them, begins by stating, "No tenant shall be removed or evicted on grounds other than those stated above unless," etc. Some of these paragraphs provide for more than one ground, and in such case only one of them need be stated in the notice, but paragraph (6) cannot be construed to state more than one ground. The provision regarding the landlord's duty after the re-

moval of the tenant cannot, of course, be a part of the ground for removing him, but both of the conditions stated in the remainder of the paragraph, that is, the time of acquisition of the landlord's rights and his desire in good faith for self occupancy etc., must concur in order to entitle him to proceed under the paragraph, and both of them together constitute the ground for removal which must be stated in the notice. None of the other paragraphs of subsection (a) says anything about the time of acquisition of the landlord's right or title, so that fact cannot be regarded as a common thread running through the whole pattern; it is something distinct and exclusive to paragraph (6), and we see no reason for holding that it is not to be regarded as a part of the ground of removal thereby provided.

On the other hand, reason does appear for so regarding it. The notice given by the landlord is for the information both of the tenant and of the area rent office, to which by section 6(d) (1) a copy of it must be given within twenty-four hours after its service on the tenant. It is to be noted that section 6(b) (1) and section 6(b) (2) of the regulation provide a mode by which the landlord may remove his tenant if the landlord acquired his rights after the date fixed by section 6(a) (6), *supra*. In such a case, the landlord must obtain a certificate from the administrator, authorizing him to proceed, and the paragraphs above cited set forth in detail the conditions under which such a certificate may be issued. The possession of such a certificate by the landlord is doubtless one of the "grounds" referred to in section 6(d) (1). Since, as held in *Jones v. Shields*, Cal.Super.1944, 146 P.2d 735, such a certificate is conclusive in a proceeding to remove the tenant, the ground on which the landlord relies and which he must therefore state in the notice would seem to be in such a case merely the issuance to him of a proper certificate, and, possibly, that he acquired his right or title after the date fixed by the regulation; the existence of conditions necessary to authorize its issuance need not be stated. The tenant on whom a notice is served must determine for himself whether it is well founded and should be obeyed, and the area rent office must likewise determine for itself whether the landlord is proceeding regularly and whether to appear in court, as it often does, and oppose him. Each would be considerably hampered in mak-

ing such determination, without a statement in the notice, of the time when the landlord's rights had been acquired, so that they might know whether the landlord can proceed without a certificate.

[4] There is language in Bumgarner v. Orton, Cal.Super.1944, 146 P.2d 67, and Lester v. Isaac, supra, Cal.Super. 146 P.2d 524, which possibly suggests to hasty readers, but does not state, that the ground of removal under section 6(a) (6) of the regulation is merely the landlord's desire in good faith to recover possession of the housing accommodations for his own use, etc., and that the date of acquisition of his right or title does not constitute a part of that ground, and it is argued here that the notice in the Bumgarner case (which is not set forth in the opinion) is in fact no better than that now before us. But no such point as is now made was presented to us or considered in either of those cases, and we had no intent to decide it and did not decide it. A decision cannot be regarded as authority for a legal proposition which upon the facts of the case might have been, but in fact, was not raised or decided.

The judgment is affirmed, respondent to recover her costs of appeal.

FOX, J., and KINCAID, Judge pro tem, concur.



65 Cal.App.2d Supp. 828

**WILLARD H. GEORGE, Limited, v.
BARNETT et al.**
Civ. A. 5747.

Superior Court, Appellate Department,
Los Angeles County, California.

July 25, 1944.

1. Appeal and error ☞1010(1)

Trial court's finding of facts supported by evidence is binding on superior court.

2. Execution ☞41 Trusts ☞81(4)

Where conditional sales contract of new automobile was signed by claimant's mother in claimant's presence, and automobile was registered in name of claimant's mother as owner as a matter of con-

venience only and claimant made all payments and regarded automobile as hers and had no intention of making a gift to her mother, a resulting trust arose in claimant's favor so as to defeat execution levied on automobile against mother by mother's creditor. Vehicle Code §§ 140, 141, 186, St.1935, pp. 108, 118.

3. Trusts ☞86

Presumption that ownership of personalty is intended to be in person furnishing funds for its purchase is rebuttable where property is conveyed to different person by showing that it was intended for different person.

4. Trusts ☞86

The fact that person furnishing consideration for purchase of automobile was daughter of person to whom automobile was transferred did not give rise to any rebutting inference that daughter intended to make gift to mother as it would if relationship were reversed.

5. Execution ☞145

Plaintiff could not acquire by levy of execution on automobile any greater rights than defendant had therein.

6. Automobiles ☞19

The rights of daughter to ownership of automobile by purchase thereof and payment of purchase price were not forfeited because of subsequent registration of automobile in name of mother for convenience only without intention to transfer title to the mother since registration might have been revoked had true facts of ownership been known. Vehicle Code, §§ 175, 186, St. 1935, pp. 115, 118.

Appeal from Municipal Court of City of Los Angeles; John J. Ford, Judge.

Action by Willard H. George, Limited, a corporation, against Anna Laura Barnett, etc. Plaintiff recovered a judgment and caused execution to be levied upon an automobile. Maxine Lowe filed a third party claim. From a judgment for the third party claimant, plaintiff appeals.

Affirmed.

Meserve, Mumper & Hughes and John A. White, all of Los Angeles, for appellants.

D. W. Cozad, Tripp, Calloway, Sampson & Dryden, and DeWitt Morgan Manning, all of Los Angeles, for respondent.

SHAW, Presiding Judge.

This is an appeal by the plaintiff from a judgment given under section 689 of the Code of Civil Procedure in favor of the third party claimant after a levy of execution. The property levied upon, a 1942 model automobile, was bought from a dealer in November 1941, on a conditional sale contract, was then registered with the State Vehicle Department in the name of the claimant's mother, who is the defendant against whom the execution runs, and remained so registered at the time of the levy.

The plaintiff contends that the registration of the automobile as above stated makes it subject to the levy, either because the claimant did not obtain a transfer of the car and its registration to her in the manner provided by the Vehicle Code, section 186, St.1935, p. 118, or because the registration of the car to her mother instead of herself was not in conformity to the Vehicle Code provisions regarding new registrations and was therefore void.

Section 175 of the Vehicle Code, St.1935, p. 115, which provides how a transfer of a registered vehicle shall be made, and section 186 which declares such a transfer ineffective unless made and completed by a change of registration in the manner so provided, are limited by their own terms to vehicles registered under the Vehicle Code. They do not apply at all to a vehicle not so registered, and there is no provision of the Vehicle Code which applies to or limits the acquisition or transfer of ownership in a new, unregistered vehicle until it is driven or moved upon a highway with some part of it in contact with the highway. Sections 140 and 141 of the Vehicle Code, St.1935, p. 108, which provide for and require the original registration of motor vehicles, do not operate upon a vehicle unless it is so driven or moved. Prior to that time the same rules apply as in case of other personal property generally.

[1] In this case it does not definitely appear from the record that the automobile was new and unregistered at the time of its purchase, although it is quite likely that a 1942 model car bought in November 1941 was then in that condition. However, the parties agree here that the automobile was in that condition when bought, so we accept this as one of the facts of the case. It further appears that the conditional sale contract was signed by the defendant in

claimant's presence, and that with claimant's knowledge and consent the car was registered in the name of defendant as owner and Universal Credit Company as legal owner, but this was done as a matter of convenience, and claimant made all payments upon the purchase price of the car, regarded it as hers and had no intention of making a gift of it to defendant. The testimony showing these facts was accepted by the trial court as true and we are bound by its decision.

[2-4] On the facts above stated, as soon as the contract of sale was signed a resulting trust arose in favor of the third-party claimant, whereby she became the beneficial owner of all rights appearing to be in defendant by reason of the contract. *Goes v. Perry*, 1941, 18 Cal.2d 373, 379, 115 P.2d 441; *Kirk White & Co. v. Bieg-Hoffine Co.*, 1935, 6 Cal.App.2d 188, 191, 44 P.2d 439; *Thompson v. Bank of California*, 1906, 4 Cal.App. 660, 667, 88 P. 987. The presumption arising from the furnishing of the funds for the purchase by claimant is subject to rebuttal by evidence showing a gift was intended (25 Cal.Jur. 191), but the relationship between the parties here (claimant being the daughter of defendant) does not give rise to any rebutting inference (65 Cor.Jur. 416) as it would if the relationship were reversed. *Quinn v. Reilly*, 1926, 198 Cal. 465, 468, 245 P. 1091; *Altramano v. Swan*, 1942, 20 Cal.2d 622, 628, 128 P.2d 353; *Gomez v. Cecena*, 1940, 15 Cal.2d 363, 367, 101 P.2d 477. Moreover, if there were such an inference it would also be rebuttable, and the trial court's implied finding that there was no gift is supported by claimant's testimony to that effect.

[5] The plaintiff was therefore not entitled to levy on this car to enforce its judgment against the defendant, since it could acquire by the levy no greater rights than the defendant actually had. *Kinnison v. Guaranty Liquidating Corp.*, 1941, 18 Cal.2d 256, 263, 115 P.2d 450; *Jensen v. Hugh Evans & Co.*, 1941, 18 Cal.2d 290, 301, 115 P.2d 471; *Kirk White & Co. v. Bieg-Hoffine Co.*, supra; *Carpenter v. Devitt*, 1942, 49 Cal.App.2d 473, 475, 122 P.2d 79. An exception to this rule would exist if plaintiff had extended credit to defendant in reliance on her ownership of the car (*Sidney v. Wilson*, 1924, 67 Cal.App. 282, 291, 227 P. 672), but the record negatives that possibility.

[6] The rights of the third-party claimant, which lawfully attached upon the purchase of the car, were not forfeited or taken away because of the subsequent registration of the car in the name of another. That registration may have been improperly made and subject to revocation by the Vehicle Department (V.C. sec. 233, St.1935, p. 124), and it might have been refused when applied for, if the true facts as to ownership had been known (V.C. secs. 148, 149, St.1935, p. 110); but while such revocation or refusal would preclude the operation of the car upon the highways

(V.C. sec. 140), there is nothing in the code or elsewhere in the law that would alter the property rights of the parties by reason of such revocation or refusal. The Vehicle Code contains no provision similar to that found in the Torrens Title Law affecting real property whereby the certificate of registration is made conclusive on the title to the registered property.

The judgment is affirmed, respondent to recover costs of appeal.

FOX, J., and KINCAID, Judge pro tem., concur.

24 Cal.2d 601

PEOPLE v. JONES.

Cr. 4503.

Supreme Court of California.

Aug. 1, 1944.

Rehearing Denied Aug. 24, 1944.

1. Homicide $\hookrightarrow$ 229

Robbery $\hookrightarrow$ 24(3)

Evidence, aside from purported confession, was insufficient to identify defendant as one of two persons who allegedly committed a robbery and murder. Pen. Code, § 190.

2. Criminal law $\hookrightarrow$ 517(1)

Before a confession is admissible, it must be shown by the prosecution that it is voluntary and made without any previous inducement or means of any intimidation or threat.

3. Criminal law $\hookrightarrow$ 736(2)

The admissibility of a confession is preliminarily a question for trial court.

4. Criminal law $\hookrightarrow$ 531

Before a confession is admitted there must be evidence from which it is possible to determine that the confession was voluntarily made.

5. Criminal law $\hookrightarrow$ 1158(4)

While the weight of the evidence addressed to the circumstances surrounding the obtaining of a confession is to be determined preliminarily by the trial court, the circumstances constituting improper influences that would exclude a confession present questions of law reviewable by appellate court.

6. Criminal law $\hookrightarrow$ 519(2)

Where defendant is subjected to threats or violence and within a few days thereafter he makes a confession, it may not be introduced in evidence unless it clearly appears that such improper treatment did not cause him to confess.

7. Criminal law $\hookrightarrow$ 531(1)

Where defendant makes a confession due to threats and violence and a few days later makes another confession, there is a presumption that the influence of the prior improper treatment continues to operate on the mind of defendant and that the subsequent confession is the result of the same influence which rendered the prior confession inadmissible, and burden is upon prosecution to clearly establish the contrary.

8. Criminal law $\hookrightarrow$ 519(2)

Where a defendant makes a confession as the result of threats and violence, the determination of extent of the influence persisting at time subsequent confession is made rests upon attendant circumstances, and the inquiry is whether considering the age and intelligence of defendant the nature and degree of influence, and the time intervening between confessions, it can be said that defendant was not induced to confess by reason of the pressure which motivated him to make the first statement, or was not influenced so to do by reason of the entire confession itself.

9. Criminal law $\hookrightarrow$ 519(2)

Where a 17-year-old negro was arrested and without the aid or advice of friend or counsel was thereafter questioned and rudely beaten, although urging his innocence of murder charge, until a confession was obtained and a few days later a subsequent confession was made to other officers upon further questioning, the subsequent confession was improperly admitted in evidence as presumptively involuntary in the absence of evidence clearly establishing the contrary.

In Bank.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Preston Samuel Jones was convicted under an information charging murder, conspiracy to commit robbery, and robbery, and he appeals.

Reversed.

Henry W. Hache, of San Diego, for appellant.

Robert W. Kenny, Atty. Gen., Ralph W. Scott, Deputy Atty. Gen., and Thomas Whelan, Dist. Atty., and H. P. Mack, Deputy Dist. Atty., both of San Diego, for respondent.

GIBSON, Chief Justice.

Defendant Jones and Charles Ivan Baa were jointly tried and convicted under an information charging murder, conspiracy to commit robbery, and robbery. A judgment imposing the death penalty on Baa was affirmed in *People v. Baa*, Cal.Sup., 150 P.2d 1. Defendant being only seventeen years of age at the time of the commission of the offenses was sentenced to life imprisonment. See Pen.Code, § 190.

Tom Din Toy, a Chinese, was robbed and shot about 1:30 o'clock on the morning of October 5, 1942, as he entered the hallway of the Service Hotel in San Diego. Two men were seen to follow Toy into the hallway of the hotel, and immediately thereafter a shot was heard and two men ran from the hotel into the street. Baa was taken into custody as he attempted to hide from the police under an automobile parked near the hotel entrance. The other man escaped. Baa was identified by Toy and by a hotel clerk as the man who did the shooting. He was also identified by a sergeant of the United States Marine Corps and two police officers as one of the men who ran from the hotel immediately after the shot was fired.

Defendant was arrested approximately one month later in the city of Los Angeles where he lived. None of the witnesses who identified Baa as being at the scene of the shooting was able to identify defendant. One of the officers who saw the two men run from the hotel entrance, and who immediately took Baa into custody, said he could not identify defendant as the second man and that to his knowledge the first time he ever saw defendant was in the courtroom. He added that the man being pursued and fired at by his fellow officer seemed to "stagger," "slip" or "drop" in a position as though hit. It was not shown that defendant ever suffered a gunshot wound. The second officer testified he pursued and fired three times at the escaping man, who fell as he turned the corner. He also was unable to identify defendant as the man he pursued. A chambermaid in the hotel where Baa had a room said he lived there with a man known as "Little Willie"—who was not the defendant.

The uncontradicted evidence, including the testimony of Baa, is that Baa and his companion followed Toy across the street to the Service Hotel immediately before the shooting. The Dew Drop Inn, a restaurant, was located diagonally across the street from the Service Hotel. Mrs. Fanny Batts, one of the owners of the Dew Drop Inn, called by the prosecution, testified that a minute or two before the shooting she saw two men standing in a doorway near her restaurant and across the street from the Service Hotel. One of these men she positively identified as Baa, and she testified that his companion "was a Filipino or Mexican." (Defendant is

a Negro.) The witness was not asked any further questions on direct examination concerning Baa's companion, and it does not appear that before giving her testimony she knew defendant was a Negro. On cross-examination she was asked if it was a Negro with Baa and she replied, "It wasn't a Negro." Defendant was requested to stand and the witness was asked if he was the man she saw with Baa. She answered "Absolutely not * * * It wasn't him."

Dan Wysinger, a Negro boy, who was taken into custody by the police in connection with the investigation of the crime, testified that he had known defendant for some time, and that on Sunday evening, about three hours before the shooting, he saw defendant with Baa and another man walking together. The witness asked defendant where he was going and defendant said he was going "to knock over, to knock out a job" and that he "would have to get some money before daylight in the morning."

DeHart Box, a friend of Wysinger called by the prosecution, testified that he saw and talked to defendant at the Dew Drop Inn about fifteen minutes before the shooting. Defendant told Box "he had won \$86 and was going home." Box stated that he and defendant left the Dew Drop Inn together, that as they came out he saw a person who looked like Charles Baa standing near the entrance to the restaurant, and that "he was just standing there. He didn't speak or say anything." Defendant and Box walked down the street together and stopped at a near-by poolroom where they parted. About ten minutes later Box heard a shot. The witness was confused as to times and places, and his testimony, which is conflicting, is here stated most favorably to the prosecution.

[1] The foregoing evidence is clearly insufficient to establish that defendant was guilty of any of the offenses charged. The only other evidence connecting defendant with the crime was an oral confession which Officer Wells of the San Diego Police Department testified defendant freely and voluntarily made to him on November 7, 1942, at police headquarters in San Diego. Prior to the admission of the purported confession, the trial judge received evidence of the circumstances relating thereto. At the conclusion of this evidence, Officer Wells was permitted to testify, over the objection of defendant, to the oral con-

fession which he stated defendant made to him. The following is a recital in substance of the testimony of defendant given on voir dire examination and as a witness in his own behalf:

In 1942, defendant was living in Los Angeles where he was employed as a shipping clerk by the California Walnut Growers Association at \$59 a week. At the same time he worked at night as assistant manager of the Red Cap Shoe Shine Stands with locations in Hollywood and Los Angeles, for which he received a guaranteed compensation of \$30 a week. On Friday, October 2, 1942, he cashed his pay check from the association and left for San Diego to visit his sister. He stayed at her house Friday night. On the night of Sunday, October 4th, defendant went with a party of friends to the "P.D.Q." café, which is in the general neighborhood of Fourth and Market Streets in San Diego. The party arrived about 11:30 p. m. and remained until about 2:30 o'clock the next morning. While they were still at the café, policemen entered and questioned everyone, including defendant, about the shooting of a Chinese earlier that night. (Defendant was corroborated as to his presence at the "P.D.Q." at the time of the shooting by a member of his party and the owner of the café.) The party went from the café to an all-night theater where they remained until 5:00 o'clock in the morning. Defendant returned to Los Angeles Monday afternoon, October 5th. He was arrested in Los Angeles on November 1, 1942, and taken to the police station where he was questioned by Officers Slager and Tetrich of the Los Angeles police. They asked defendant if he was implicated in any crime committed in San Diego. He told them he was not. The officers insisted that he was and tried to make him say so. When defendant declared he did not know anything about it, they "beat up on" him. Slager used a blackjack and Tetrich hit him with his fists. He was beaten twice a day for four days. On November 4th, Slager and Tetrich took defendant to a room in the Hall of Records and had started to beat him as they had before, when Officer Blucher of San Diego came into the room with several Los Angeles officers. Blucher told him that some people had seen him in San Diego near the place where the Chinese was shot, that one of the boys involved was caught and one of them escaped, and that he was being accused. Defendant

told him he might as well tell them he "had been with the man that shot Abraham Lincoln" as to tell him he had been involved in anything of that sort. Tetrich was standing on one side of him and Slager was on the other side with a blackjack in his hand. Slager said, "You know you were in San Diego and implicated in what happened there," to which defendant replied, "Man, I don't know nothing about that." Slager hit him in the stomach about three times and he fell to the floor in a cramped position, whereupon Slager and Tetrich started kicking him all over and calling him names. One of them kicked him in the groin and when he got up Slager started hitting him on the head with a blackjack. Defendant said he was crying and was afraid, and didn't know what was going on, but that he had to say something as he did not want any more beatings, so he told them he was the boy that ran away. The officers then took him into another room where there was a typist and, in answer to questions, he repeated the same story Officer Blucher had told him. On November 5th, he was taken to San Diego. When he arrived at the jail he was treated by a doctor for the groin injury and sent to the County Hospital for further treatment. On November 7th, Officers Blucher and Wells took him from the jail to a room for questioning. They did not put handcuffs on him, and when they left the jail Officer Wells told him to run "so he could shoot" him. Neither Wells nor Blucher struck him. When he was brought into the room he was shaking, and Blucher told him to start talking or they would give him the same treatment he had received in Los Angeles. Officer Wells had something written on a piece of paper and he asked him to sign it. Wells told defendant that someone had seen him, and if he would sign the paper he would "get off light"—but he did not sign it. He was told two or three times if he did not talk he would get the gas chamber. Defendant further testified he did not make any statement but declared that whatever he said to Wells and Blucher was stated under fear that he would be subjected to the same treatment he had received in Los Angeles. Defendant declared he did not know Baa and had no connection with the shooting or anyone involved in it. (Defendant's testimony in this regard was corroborated by Baa, who, at the trial, repeated the story he told officers within a few minutes after his arrest, that one Jim Stewart, of whom he gave a

detailed description, was his companion at the time the crime was committed. He testified that although he had seen defendant on a few occasions he had never known his name or talked to him. He denied that defendant was with him when Toy was shot or was in any way connected with the crime. Willie Davis, who roomed with Baa, and who was also charged with the murder of Toy, testified he had never seen defendant before his court appearance.)

Officer Blucher of San Diego testified that he saw defendant at the homicide bureau in Los Angeles on November 4th. Later on the same day, he was present while defendant was being questioned by Los Angeles police officers. The questioning continued for about thirty minutes, during which time he was present five or ten minutes. He testified he saw Tetrich slap defendant two or three times in the face and strike him two or three times in the stomach, and that "at that time [he] was called out of the room." Blucher did not see anyone kick defendant, and did not see a blackjack. When Blucher returned to the room defendant was talking about the crime, and appeared frightened. Defendant was then taken to another room where he made a statement in the presence of a stenographer, in which he confessed being implicated in the shooting. Defendant was brought to San Diego on November 5th. On November 7th, Blucher took defendant from the jail for questioning by Wells. Blucher testified that no threats or promises were made and there was no reference to the treatment defendant had received in Los Angeles. He added that defendant did not appear to be frightened, and that he freely and voluntarily gave a statement in which he admitted being implicated in the commission of the offenses charged.

Officer Wells examined defendant on November 7th at police headquarters in San Diego in the presence of Blucher. He testified that defendant answered questions freely and voluntarily, giving an account of his movements while in San Diego between October 1st and 5th. Wells made notes of what was said as the questioning proceeded, and some time thereafter he dictated the story related to him by defendant and then destroyed the original notes. He recited in great detail the story which he said was told to him by defendant, in which defendant assertedly admitted that he was present with Baa when Toy was

robbed and shot, and that he was the boy that fled from the scene of the crime. At the time Wells conducted this examination he had been informed by Blucher of the treatment defendant had received at the hands of the Los Angeles police, and he had a copy of an unsigned statement said to have been made by defendant in Los Angeles. He testified, however, he did not mention the Los Angeles confession until after defendant told his story, and referred to it then only for the purpose of calling the attention of defendant to certain statements therein which were inconsistent with the story he had just related. Wells further stated that he did not ask defendant to sign anything. He testified that no threats or promises were made to defendant, and that he did not tell defendant to run so he could shoot him.

[2-5] The uncontradicted evidence establishes beyond any question that the statement made by defendant to the police in Los Angeles on November 4th was not free and voluntary. Undoubtedly because of the circumstances under which it was made, it was not offered in evidence. Therefore, the question for determination here is whether or not, under all the circumstances, the San Diego statement made three days later was properly admitted in evidence. Before a confession is admissible it must be shown by the prosecution that it was voluntary, and made without any previous inducement or by reason of any intimidation or threat. *People v. Rogers*, 22 Cal.2d 787, 804, 141 P.2d 722; *People v. Loper*, 159 Cal. 6, 14, 112 P. 720, Ann.Cas.1912B, 1193; *People v. Siemsen*, 153 Cal. 387, 394, 95 P. 863; *People v. Miller*, 135 Cal. 69, 71, 67 P. 12; The admissibility of a confession is preliminarily a question for the trial court to determine. *People v. Lisenba*, 14 Cal.2d 403, 421, 94 P.2d 569; *People v. Ferdinand*, 194 Cal. 555, 567, 229 P. 341; *People v. Loper*, supra, 159 Cal. 17, 112 P. 720, Ann.Cas.1912B, 1193; *People v. Miller*, supra, 135 Cal. 71, 67 P. 12; *People v. Dye*, 119 Cal.App. 262, 270, 6 P.2d 313; 2 Wharton's Criminal Evidence, p. 981, § 594. But before a confession is admitted there must be evidence from which it is possible to determine that the confession was voluntarily made. *People v. Dye*, supra, 119 Cal.App. 270, 6 P.2d 313. While the weight of the evidence addressed to the circumstances surrounding the obtaining of a confession is to be determined preliminarily by the

trial court, the circumstances constituting improper influences that would exclude a confession present questions of law, reviewable by an appellate court. Cf. *People v. Loper*, supra, 159 Cal. 18, 112 P. 720, Ann.Cas.1912B, 1193; *People v. Dye*, supra, 119 Cal.App. 270, 6 P.2d 313; *Davis v. State*, 90 Fla. 317, 105 So. 843, 844; *Ashcraft v. State of Tennessee*, May 1944, 322 U.S. 143, 64 S.Ct. 921, 926, 88 L.Ed. 1192.

[6-8] If a defendant is subjected to threats or violence and within a few days thereafter he makes a confession, it may not be introduced in evidence unless it clearly appears that such improper treatment did not cause him to confess. In a situation such as here presented, there is a presumption that the influence of the prior improper treatment continues to operate on the mind of the defendant and that the subsequent confession is the result of the same influence which rendered the prior confession inadmissible, and the burden is upon the prosecution to clearly establish the contrary. *People v. Johnson*, 41 Cal. 452, 435; *People v. Loper*, 159 Cal. 6, 15, 112 P. 720, Ann.Cas.1912B, 1193; *People v. Dye*, 119 Cal.App. 262, 270, 6 P.2d 313; *Lang v. State*, 178 Wis. 114, 189 N.W. 558, 24 A.L.R. 690, 22 C.J.S., Criminal Law, p. 1461, § 835; 24 A.L.R. 690, 695; 2 Wharton's Criminal Evidence, p. 998, § 601. The determination of the extent of the influence persisting at the time the subsequent confession is made rests, of course, upon attendant circumstances, and the inquiry is whether, considering the age and intelligence of the defendant, the nature and degree of the influence, and the time intervening between the confessions, it can be said that defendant was not induced to confess by reason of the pressure which motivated him to make the first statement, or was not influenced so to do by reason of the prior confession itself.

In *Lisenba v. People*, 314 U.S. 219, page 240, 62 S.Ct. 280, page 292, 86 L.Ed. 166, (Id., 14 Cal.2d 403, 94 P.2d 569), the confession was held not to have been induced by the prior improper conduct of the police for the reasons summarized by the United States Supreme Court, as follows: Defendant "said that the interrogation [by the police] would never have drawn an admission from him had his confederate not made a statement; he admits that no threats, promises, or acts of physical violence were offered him during this ques-

tioning or for eleven days preceding it. Counsel had been afforded full opportunity to see him and had advised him."

[9] Without resolving any of the conflicts in the evidence, the admitted or uncontradicted facts show that defendant, a 17-year-old Negro boy, was arrested on November 1st in Los Angeles and, without the aid or advice of friend or counsel, was thereafter questioned and brutally beaten by the police twice a day for three days. During this period he consistently urged his innocence. On the fourth day he was again cruelly beaten and kicked until, unable to endure the torture any longer, he said he "was the boy that run away" because he did not want any more beatings. Following such brutal treatment, defendant was taken to San Diego by Officer Blucher, who had participated to some extent in the unlawful inquisition in Los Angeles. Defendant was then subjected to further questioning by Blucher and Officer Wells at San Diego. Again defendant assertedly admitted his participation in the robbery and shooting of Toy. While both officers denied holding out any inducements or making any threats to defendant in San Diego, under all of the circumstances, the entire situation—shown in part by defendant's uncontradicted testimony and in part by admissions of the police—is so inherently coercive that its very existence is irreconcilable with the possession of the mental freedom essential to a valid confession. Moreover, it does not appear that the San Diego police cautioned defendant that his previous confession could not be used against him. For want of such information defendant might have concluded that he could not make his case worse than he already had made it and, under this impression, might have made the statements testified to by Officer Wells. See *Flamme v. State*, 171 Wis. 501, 177 N. W. 596, 598; 2 Wharton's Criminal Evidence, p. 998, § 601. We conclude, therefore, from facts which are not in conflict, that the San Diego confession was not voluntary and that it was improperly admitted in evidence.

The officers who secured the purported confession may have been sincere in their belief that defendant was guilty, and that the end justified the means. Law enforcement officers must understand, however, that a person suspected of crime has rights which must be respected, and that undue advantage must not be taken of his fears,

hopes or weakness. For more than a century and a half the mistreatment of persons in custody has been condemned by our courts and there is no better settled rule than that confessions must be voluntary to be admissible in evidence. As stated by the Supreme Court in *Ashcraft v. State of Tennessee*, May 1944, 322 U.S. 143, 64 S. Ct. 921, 927, 88 L.Ed. 1192: "The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government."

The judgment and order denying a new trial are reversed.

SHENK, CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.



24 Cal.2d 584

BIANCO v. INDUSTRIAL ACCIDENT COMMISSION et al.
S. F. 16975.

Supreme Court of California.

July 25, 1944.

Rehearing Denied Aug. 21, 1944.

1. Workmen's compensation ⚙️1274

A proceeding to recover death benefits under the Compensation Act is timely if brought within one year after death regardless of date of injury and even if commenced more than one year after date of death where injury occurs within two years next preceding commencement of such proceeding. St.1937, p. 295, § 5406(a) (1).

2. Workmen's compensation ⚙️1274

Where injury causing death also caused disability which continued until

death and for which a disability payment was awarded, a proceeding for death benefits would not be barred if brought within one year from date of death, regardless of date of injury and more than one year from death if injury occurred within less than 188 weeks before the death, assuming a 52-week year. St.1937, p. 295, § 5406(a) (2).

3. Workmen's compensation ⚙️1274

The provision that a compensation proceeding for death benefits "may be commenced" within certain periods is permissive and indicates legislative intent that applicant is to have the longer period rather than being restricted to the shorter one. St.1937, p. 295, § 5406.

4. Statutes ⚙️197

The word "and" may sometimes be interpreted as "or" to carry out the intention of the Legislature in drafting a statute.

See Words and Phrases, Permanent Edition, for all other definitions of "And" and "Or".

5. Workmen's compensation ⚙️1274

The purpose of Compensation Act sections pertaining to death benefits is to give a right to death benefits and not to cut off that right before it accrues. St.1937, pp. 295, 296, §§ 5404, 5406, 5409.

6. Workmen's compensation ⚙️1269

The Compensation Act section requiring liberal construction with the purpose of extending benefits for the protection of persons injured in the course of their employment is to be applied when the issue is the interpretation of limitation provisions. St.1937, pp. 265, 295, §§ 3202, 5406.

7. Workmen's compensation ⚙️52

Where a provision of Compensation Act is susceptible of an interpretation either beneficial or detrimental to an injured workman or his beneficiaries, the construction beneficial to such workman or his beneficiaries must be adopted. St. 1937, p. 265, § 3202; Const. art. 20, § 21.

8. Workmen's compensation ⚙️1274

The Compensation Act provision pertaining to limitations will not be construed as denying recovery of death benefits when workman's death occurs more than two years after injury in view of requirements for liberal construction and in view of fact that death benefits are part of scheme of

compensation. St.1937, pp. 265, 295, §§ 3202, 5406; Const. art. 20, § 21.

9. Workmen's compensation ⇨1274

The right of a dependent of a workman to a death benefit is independent of and severable from workman's claim for disability compensation, and does not arise until death of workman and may not be cut off before it arises. St.1937, p. 295, § 5406; Const. art. 20, § 21.

10. Workmen's compensation ⇨1269

In order to preserve beneficial purposes of workmen's compensation, the provisions on limitation should not be construed in a manner which will result in the right being lost before it accrues unless language of such provisions clearly compels such interpretation. St.1937, p. 295, § 5406.

11. Workmen's compensation ⇨1274

The legislative history of Compensation Act sections limiting period for commencement of proceeding for collection of death benefits by an injured workman's beneficiary disclosed legislative intent that proceeding may be commenced either one year after death or two years after injury, whichever fixes period at the later date. St.1937, p. 295, § 5406.

EDMONDS, J., and GIBSON, C. J., dissenting.

In Bank.

Proceedings on petition by Adelina Bianco for a writ of review to review an award of the Industrial Accident Commission denying petitioner's claim for compensation for the death of her husband, Domenic Emile Bianco, opposed by Gladding, McBean & Co., employer, and others.

Award annulled with directions.

Prior opinion, 142 P.2d 73.

Sefton & Quattrin, Seibert L. Sefton, and Louis T. Kruger, all of San Francisco, for petitioner.

Everett A. Corten, Fred G. Goldsworthy, Keith & Creede, Charles Mayer, W. N. Mullen, Donald J. Gallagher, and Edmund J. Thomas, Jr., all of San Francisco, for respondents.

CARTER, Justice.

It is claimed that Domenic Emile Bianco, an employee of Gladding, McBean & Com-

pany, died on June 11, 1941, from silicosis contracted in the course of his employment. The respondent commission found that he suffered the "injury" silicosis in April, 1939, and inasmuch as Bianco's dependent did not file her claim until December 1, 1941, the claim was barred because not filed within two years after the injury in April, 1939.

The pertinent provisions of law with regard to limitations are as follows:

"The periods within [which] *may* be commenced proceedings for the collection of the death benefit * * * are as follows:

"(a) One year from the date of death, and in any event within—

"(1) Two years from the date of injury, except as otherwise provided in this section.

"(2) 240 weeks from the date of injury, where the injury causing death also caused disability which continued to the date of death and for which a disability payment has been made, or agreed to be made, or proceedings for its collection had been instituted within the time limits set forth in section 5405.

"(b) Two years from the date of injury, in cases described in section 5405(b)." (Italics added.) Labor Code, § 5406.

Subdivision (b) of the foregoing has no application here because that refers to section 5405(b) which involves cases where there is an agreement for a release or compromise. Subdivision (a)(2) does not factually apply for the events there mentioned did not occur. The foregoing section establishes a limitation of time and does not extinguish the right: "The running of the period of limitations prescribed by this chapter is an affirmative defense and operates to bar the remedy and not to extinguish the right of the employee. Such defense may be waived. Failure to present such defense prior to the submission of the cause for decision is a sufficient waiver." Labor Code, § 5409. And section 5404 of the Labor Code provides that: "Unless compensation is paid or an agreement for its payment made within the time limited in this chapter for the institution of proceedings for its collection, the right to institute such proceedings is barred." This provision gives expression to the same thought by specifying that the remedy to enforce the right is barred rather than that the right itself is extinguished.

[1-5] In our opinion the most reasonable construction of section 5406(a)(1) is that the proceeding for a death benefit may be commenced either one year after death or two years after the injury, whichever fixes the period at the later date. Under such an interpretation a proceeding to recover a death benefit would be timely if brought within one year after the death regardless of the date of injury, and even if commenced more than one year after the date of death where the injury occurred within two years next preceding the commencement of said proceeding. Likewise, a case falling within section 5406(a)(2) would not be barred if brought within one year from the date of death regardless of the date of the injury and more than one year from death if the injury occurred within less than 188 weeks before the death, assuming a 52 week year. The language of section 5406 is that the proceeding *may* be commenced within certain periods. The phrasing is permissive and affirmative which clearly indicates that the applicant is to have the longer period rather than being restricted to a shorter one. That thought is expressed by the use of the word "and" preceding the phrase "in any event." If the word "but" had been used rather than "and" the reference to a two-year period after the injury would be a limitation. If the word "or" had been used there it would be beyond question. If "and" be given its ordinary meaning of "as well as" or "in addition to," the section might be paraphrased to read: "The proceeding may be commenced within one year from the date of death as well as, (in addition to) in any event, (that is, regardless of the date of death) within two years from the date of injury."

Moreover, the word "and" may sometimes be interpreted as "or" to carry out the intention of the Legislature in drafting a statute. See *People v. Pool*, 27 Cal. 572; *Washburn v. Lyons*, 97 Cal. 314, 315, 32 P. 310; *Diggins v. Hartshorne*, 108 Cal. 154, 41 P. 283; *McNutt v. City of Los Angeles*, 187 Cal. 245, 201 P. 592; *Santos v. Dondero*, 11 Cal.App.2d 720, 54 P.2d 764. The evident purpose of the statute here involved is to give a right to death benefits and not to cut off that right before it accrues.

[6,7] There are additional persuasive reasons which support the foregoing construction even assuming that it is possible

to construe it to mean that the proceeding must be commenced within two years from the date of the injury, although the death may not have occurred within that time. First, the workmen's compensation laws must be given a liberal construction to the end that the beneficial features thereof shall not be lost to employees. That rule is declared as follows: "The provisions of Division IV and Division V of this code shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." Labor Code, § 3202. See, also, 27 Cal.Jur. 259 et seq. And that rule is applied where the issue is the interpretation of the limitation provisions of the act. See *Ocean A. & G. Corp., Ltd., v. Industrial Acc. Comm.*, 90 Cal.App. 725, 266 P. 556; *Harris v. Industrial Acc. Comm.*, 204 Cal. 432, 268 P. 902. Specifically, "Where, as here, a provision of the act is susceptible of an interpretation either beneficial or detrimental to an injured employee, we are called upon, under the provisions of section 69, to adopt the construction beneficial to such employee." *Liptak v. Industrial Acc. Comm.*, 200 Cal. 39, 42, 251 P. 635, 636. In *Department of Motor Vehicles v. Industrial Acc. Comm.*, 14 Cal.2d 189, 93 P. 2d 131, the issue was whether section 4804 of the Labor Code which provided that "no disability indemnity shall be paid to said member [of the highway patrol] concurrently with wages or salary payments" prevented permanent disability payments to a patrolman suffering permanent disability but still working and being paid a salary, in light of other provisions of the act which allowed disability payments generally. The court held it did not have such effect, stating at page 192 of 14 Cal.2d, at page 133 of 93 P.2d:

"Petitioner claims that inasmuch as this employee was a member of the state highway patrol it finds such prohibition in section 4804 of the Labor Code, which, it urges, prevents an award to a state highway patrolman concurrent with the payment of salary. *The effect of this contention would, in fact, go to the extent of preventing a highway patrolman, under any circumstances, receiving a permanent disability industrial award.*

"* * * In construing this section, petitioner contends that 'no disability indemnity' unequivocally means compensation for

either temporary or permanent disability, and that to sustain the award would defeat the sole purpose of this section.

"The point is not without merit, but, having in mind the direct admonition of section 3202 of the Labor Code that 'the provisions of Division IV (which includes the sections here under consideration) and Division V of this code shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment', and *the evident purpose of the law to protect and compensate those members of the highway patrol whose principal duties consist of active law enforcement*, we should adopt, if possible, *that construction of section 4804 which would enable the injured officer to receive the benefits of the act rather than accept a literal construction which would tend to deprive him of all disability indemnity, and not only render meaningless the language of section 4803, but also provide a rule for highway officers different from that applicable to others.*" (Italics added.)

Similarly, in the instant case the statute undeniably provides for death benefits and such benefits are a part of the scheme of compensation as is further evinced by the Constitution where it is stated: "The Legislature is hereby expressly vested with plenary power, * * * to create, and enforce a complete system of workmen's compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability, *and their dependents for death incurred or sustained by the said workmen in the course of their employment*, irrespective of the fault of any party." Const., art. XX, § 21. Likewise, in the instant case that right would be lost before it ever arose if the above-mentioned possible construction were given.

[8-10] Second, if a construction is given to the provision which will deny recovery where the death occurs more than two years after the injury, the right of the dependent would be barred before it accrued. That result is contrary to the principle of liberal interpretation and to the intent expressed by section 5409, heretofore quoted, which declares that the limitation provisions are affirmative defenses and do not extinguish the right. That the right would be lost before it accrued under such

interpretation is clear. The right of a dependent to a death benefit is a right independent of and severable from the employee's claim for disability compensation. See *Glavich v. Industrial Acc. Comm.*, 44 Cal.App.2d 517, 112 P.2d 774. While it may be that the dependents, or others interested, may, under appropriate circumstances, claim compensation on behalf of the employee during his life (see Labor Code, §§ 4903, 5501; *Pacific E. I. Co. v. Industrial Acc. Comm.*, 10 Cal.2d 567, 75 P.2d 1058; *Independence Indem. Co. v. Industrial Acc. Comm.*, 2 Cal.2d 397, 41 P.2d 320; *Northwestern R. Co. v. Industrial Acc. Comm.*, 184 Cal. 484, 194 P. 31), and thus toll the running of the statute, yet it cannot be doubted that the claim for a death benefit does not arise until the death of the employee, and it may be cut off before it arises if that interpretation be accepted. Moreover, as far as appears, the conditions specified in section 4903 of the Labor Code, under which a wife may claim compensation, namely, desertion or neglect by the husband of his wife, are not present in this case. In order that the beneficial purposes of the Workmen's Compensation Law may not be destroyed, the provisions on limitation should not be interpreted in a manner which will result in the right being lost before it accrues unless the language of such provisions clearly compels such interpretation. See *Burke v. Industrial Commission*, 368 Ill. 554, 15 N.E.2d 305, 119 A.L.R. 1152; *Hoy v. T. S. Grayson Lumber Co.*, 15 La.App. 176, 130 So. 651; *Hovey v. General Const. Co.*, 242 Mich. 84, 218 N.W. 768.

[11] Third, the history of the limitation provisions indicates that the present law should be given the second construction. The first Workmen's Compensation Act provided that if no payment of compensation was made or notice given within a year after the accident the claim for compensation was barred and in case of permanent disability the accident must have been the proximate cause of the death within fifteen years. Stats.1911, p. 796, §§ 8, 10. The act in effect before the adoption of the Labor Code in 1937 (Stats.1937, p. 185) read: "Proceedings for the collection of the death benefit provided by subsection (c) of said section 9 *must* be commenced within one year from the date of death, and in any event within two hundred forty weeks from the date of the injury, and *can only be maintained when it appears that*

death ensued within one year from the date of the injury, or that the injury causing death also caused disability which continued to the date of the death and for which a disability payment was made, or an agreement for its payment made, or proceedings for its collection commenced within the time limited for the commencement of proceedings for the recovery of the disability payment." (*Italics added.*) Stats. 1917, p. 831, § 11, Deering's Gen.Laws, 1931, Act 4749. Under that statute it is expressly provided that a death benefit cannot be recovered unless the death occurred within one year from the date of the injury except where the disability continued from injury to death and compensation had been paid, agreed to be paid or proceedings therefor commenced. In other words, the proceedings *must* be commenced within one year from death and even before if 240 weeks from the date of injury has elapsed, with the further limitation that the death must have occurred within one year after the injury except in the special circumstances above mentioned. The change in the wording of the Labor Code is apparent and states the matter in quite different form. There is no restriction of death occurring within one year after the injury and the periods fixed are the ones within which the dependent may commence the proceeding.

There may be some merit in the contention that the foregoing construction of section 5406 is fraught with some dangers in respect to fraudulent and stale claims made by dependents long after the injury which ultimately causes death has occurred. If such should be the result, we believe that this is a matter for the Legislature, and it must be remembered that in such cases the burden is upon the applicant to prove that death was caused by an injury received in the course of employment.

Respondents rely upon *Glavich v. Industrial Acc. Comm.*, 44 Cal.App.2d 517, 112 P.2d 774. That case is contrary to the views herein expressed, but apparently the court did not take into consideration the factors discussed herein. It is therefore disapproved. It is of interest to note that the point involved in the instant case was not presented to this court on petition for hearing in the *Glavich* case. An award had been made denying a death benefit to the employee's widow and minor children on the ground that their claim was barred.

The District Court of Appeal affirmed the part of the award denying recovery to the widow but annulled the part denying an award to the children. The widow did not petition this court for a hearing.

For the foregoing reasons the award is annulled and the respondent commission is directed to take such further proceedings as may be appropriate in conformity with the views herein expressed.

SHENK, CURTIS, TRAYNOR, and
SCHAUER, JJ., concur.

EDMONDS, Justice (dissenting).

Contrary to the conclusions of my associates, I plainly see in section 5406 of the Labor Code a legislative intention to fix two years from the date of an injury as the maximum time within which a claim for a death benefit may be filed unless "the injury causing death also caused disability which continued to the date of death and for which a disability payment has been made, or agreed to be made." By its terms the section provides that "proceedings for the collection of the death benefit" may be commenced within "one year from the date of death" except, "in any event," the proceedings may be commenced within "two years from the date of injury" or "240 weeks from the date of injury" under the conditions specified. The qualifying phrase "in any event" unquestionably limits the specified time of "one year from the date of death," and may be defined as synonymous with the expression "under all or any circumstances." As said in the leading case of *Edwards v. Laird*, 22 Cal.App. 398, 134 P. 365, 366, the phrase means "no matter what else may be" or "whatever may happen."

By stating that "the evident purpose of the statute here involved is to give a right to death benefits," the majority opinion disregards the general rule that "statutes of limitations do not confer any right of action but are enacted to restrict the period within which the right, otherwise unlimited, might be asserted." 37 C.J. 684. Implicit in the terms of section 5406 is recognition of the other provisions allowing dependents of a workman killed in industrial accident a death benefit. In compensation law it is generally recognized that "the purpose of the statute of limitations is to force an early submission of the claim to the Commission so that all vexatious prob-

lems * * * may be determined while all the facts are fresh in the minds of the various witnesses." Campbell, Workmen's Compensation, vol. 1, 1935, p. 829. This court, in the case of Ehrhart v. Industrial Acc. Comm., 172 Cal. 621, 158 P. 193, 194, Ann.Cas.1917E, 465, recognized that the object of the periods of limitation provided in the Workmen's Compensation Act was to insure "prompt inquiry regarding the injuries in all their details by the commission. * * *" Accord, Rose v. Petaluma & Santa R. R. Co., 64 Cal.App. 213, 221 P. 406.

The section of the Labor Code limiting the time within which may be commenced proceedings for compensation indicate a purpose to insure a prompt hearing of the circumstances surrounding an industrial accident. The employer must be notified of any compensation claim (including medical, disability or death benefits) within thirty days from the date of injury, Labor Code, §§ 5400, 5401, 5402, unless the failure to give such notice does not mislead or prejudice the employer, Labor Code, § 5403. Proceedings for the collection of compensation by an employee during his lifetime must be commenced within six months from the date of injury although two years is allowed where the employer has acknowledged liability. Labor Code, § 5405. By the decision in the present case, a dependent may commence proceedings for the death benefit at any time, be it twenty or thirty years from the date of injury, as long as it is within one year from the date of death. That the occasion of the injury, rather than the date of death, should be determinative of the commencement of the running of the statute is obvious. By the lapse of time, an employer may be unable to produce evidence of the facts concerning an accident, and where labor turnover is substantial, as under present day conditions, the prejudicial effect of striking down the bar of the statute is particularly pronounced.

Moreover, to consider the date of death, regardless of the time of the injury, as the effective date fixed by the section renders meaningless its other provisions. By that construction, the proceeding may be commenced within one year from the date of death, *in any event*. To reach that result requires that the qualifying phrase "in any event" be read as preceding the words "one year from the date of death" which is

the language which they limit, and I see no reasonable basis for the conclusion that the sole function of the provisos (a)(1) and (a)(2) of section 5406 is to extend beyond one year from the date of death the period within which the action may be commenced. Rather than imputing to the Legislature an intent not to attach meaning to all the provisions of said statute, consonant with a reasonable plan of limitations, it is the function of this court, where the meaning is clear and reasonable, to give effect to the intent expressed.

Notwithstanding the statutory language, Justice CARTER justifies his position by reasoning that, as interpreted by the commission, section 5406 would compel an employee to die within two years from the date of injury as a condition precedent to the recovery of a death benefit. That is an incomplete statement. The Legislature has plainly said that if a death benefit is demanded on account of an injury for which payment on account of disability has been made, or agreed to be made, or claimed in a proceeding instituted within the applicable time, then the dependent shall have 240 weeks from the date of injury within which to file his claim. Measured by the time allowed in other states, 240 weeks almost five years, is a very liberal period. Dragicevic v. State Industrial Acc. Comm., 112 Or. 569, 230 P. 354 (one year); Martini v. Kemmerer Coal Co., 38 Wyo. 172, 265 P. 707 (twelve months); Frary v. Roxana Petroleum Corp., 135 Kan. 216, 9 P.2d 652 (six months); Ohio Oil Co. v. Industrial Comm., 293 Ill. 461, 127 N.E. 743 (six months); Vukovich v. St. Louis, R. M. & P. Co., 40 N.M. 374, 60 P.2d 356 (one year); Lusczy v. Seaboard By-Products Co., 101 N.J.L. 170, 127 A. 212 (one year). But the Legislature also provided that as to an injury for which the workman did not seek compensation, the time allowed to his dependent to file a claim for a death benefit should be limited to one year from the date of death. Very obviously, the Legislature concluded that if the injury was not such as to lead to any disability for which the workman claimed compensation, then regardless of the time of the resulting death, the dependent should be limited to two years from the date of the injury within which to file a proceeding for a benefit. Certainly there is a very reasonable basis for specifying a time within which one may claim a death benefit on account

of an injury which did not result in disability different from that fixed for one for which compensation was asked or received.

For these reasons I believe that the statute should be interpreted accordingly. In *Glavich v. Industrial Acc. Comm.*, 44 Cal. App.2d 517, 112 P.2d 774, the District Court of Appeal reached that conclusion and since that decision, the Legislature has met without amending the statute, a circumstance which indicates that the construction placed upon it carries out the intended purpose.

GIBSON, C. J., concurs.

Rehearing denied; GIBSON, C. J., and EDMONDS, J., dissenting.



65 Cal.App.2d 462

PEOPLE v. RAYOL.

Cr. 3803.

District Court of Appeal, Second District,
Division 3, California.

Aug. 9, 1944.

1. Criminal law ☞829(15)

Neither the statement in an instruction that defendant's guilt must be established beyond reasonable doubt, nor statement that, as between two opposing reasonable inferences, the inference consistent with innocence must be preferred to the one tending to show guilt, satisfies defendant's right to have jury instructed that where circumstantial evidence is relied on by the people it must be irreconcilable with theory of innocence to furnish sound basis for conviction.

2. Criminal law ☞784(1)

Where evidence on issue whether defendant "knowingly" participated in act of sex perversion was circumstantial, refusing instruction that, to convict, jury must be satisfied that facts proved were such as to be inconsistent with any other rational conclusion than defendant's guilt and that, if there was any single fact proved by preponderance of evidence inconsistent with her guilt, it was sufficient to raise reasonable doubt and jury should acquit, was error. Pen.Code, § 288a.

3. Criminal law ☞814(17)

The fact that two police officers who testified for people were eyewitnesses when alleged acts of sex perversion were perpetrated did not deprive defendant of right to instructions on circumstantial evidence, where question of whether defendant was a knowing participant in such acts, in view of her alleged intoxicated condition, rested entirely on "circumstantial evidence", which are inferences to be drawn from facts proved. Code Civ.Proc. §§ 1831, 1832.

See Words and Phrases, Permanent Edition, for all other definitions of "Circumstantial Evidence".

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Katherine Rayol was convicted of violating Penal Code, § 288a, relating to sex perversions, and she appeals.

Reversed.

Frederic H. Vercoe, Public Defender, and William B. Neeley, Deputy Public Defender, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

FOX, Justice pro tem.

Defendant was charged by an information with a violation of section 288a of the Penal Code. A jury trial resulted in a verdict of guilty. She appeals from the order denying her motion for a new trial.

At about six o'clock in the evening of October 19, 1943, defendant went to a certain cafe and cocktail bar in the city of Los Angeles. When she went there she had twenty-five dollars. During the evening she spent it all but one dollar, buying drinks for herself and the service men who came up to the bar. She left there in a taxi at twelve o'clock with an Army officer whose face she had slapped earlier in the evening because he had said something dirty to her. One of the waitresses testified that she observed defendant sitting at the end of the bar from 9:30 until 12:00 o'clock and that she constantly had a drink in front of her. It was stipulated that two other employees, if called as witnesses, would testify that they observed defendant before the place closed and that she was "very drunk." She was taken by the Army officer to his hotel room. There, police officers who had fol-

lowed them to the hotel, observed from an adjoining roof the Army officer commit upon the person of defendant the acts outlawed by section 288a, Penal Code. Defendant testified she had a faint memory of leaving the bar but no recollection of meeting the Army officer nor of slapping his face while at the bar. Aside from a hazy memory of some men dressing her and being in a car, she said she remembered nothing that occurred from the time she left the bar until she awoke in Lincoln Heights jail.

Defendant's position is that she was completely unaware of the acts committed on her by the Army officer—that she was not a conscious, willing, participant in the acts which occurred in his hotel room. This theory of defendant's case was presented to the jury in an instruction that they should find defendant not guilty unless they were convinced by the evidence beyond a reasonable doubt that the defendant "knowingly" participated in the unlawful act. But, defendant argues, the jury had to depend entirely on circumstantial evidence to determine whether or not she "knowingly" participated in the act and they were inadequately instructed on this phase of the case. This contention is well taken.

The following instructions as to circumstantial evidence were given.

"There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct evidence, which is the direct testimony of any eyewitness to a transaction, and the other is circumstantial evidence, which includes all evidence other than that of an eyewitness. Such evidence may consist of any acts, declarations or circumstances admitted in evidence tending to prove the crime charged or tending to connect the defendant with the commission of the crime.

"If upon consideration of the whole case you are satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendant, you should so find, irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence. The law makes no distinction between circumstantial evidence and direct evidence in the degree of proof required for conviction but only requires that the jury shall be satisfied beyond a reasonable doubt by evidence of either the one character or the other, or both."

"If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.

"You will notice that, in this instruction, this rule of law is made applicable to cases in which there are two opposing interpretations, each of which appears to you to be reasonable.

"This rule of law does not apply in a case where there are two opposing constructions sought to be placed upon the evidence, one of which appears to you to be reasonable and the other to you appears to be unreasonable.

"In the latter case it would be your duty, under the law, to adopt the reasonable construction and reject the one which, in your judgment, appears to be unreasonable."

[1,2] These instructions are identical with those considered by this court in *People v. Hatchett*, 1944, 63 Cal.App.2d 144, 146 P.2d 469. They were there fully analyzed, and their insufficiency, where the conviction rests on circumstantial evidence, logically demonstrated. In holding that these instructions were not a sufficient statement of the law on this subject, Mr. Justice Shinn said (63 Cal.App.2d at page 155, 146 P.2d at page 474): "To the legally trained mind the doctrine of reasonable doubt has a scope much broader than would be easily understood by inexperienced jurors. The rule under which circumstantial evidence is to be weighed is not one which would be suggested to the lay mind by instructions that doubts are to be resolved in favor of the accused. This is sufficiently proved by the fact that through long experience it has become an established practice in the courts to state the rule in distinct and specific form, to serve as an easily understood and safe guide for juries in weighing the sufficiency of circumstantial evidence. Simplicity in the statement of legal principles adds greatly to their efficacy; statements of abstract principles which leave the jury in doubt as to their proper application tend toward confusion. Neither the statement in an instruction that the guilt of the defendant

must be established beyond a reasonable doubt, nor the statement that as between two opposing reasonable inferences the one which is consistent with innocence must be preferred to the one tending to show guilt, satisfies the right of the defendant to have the jury instructed that where circumstantial evidence is relied upon by the People it must be irreconcilable with the theory of innocence in order to furnish a sound basis for conviction." In order to satisfy this "right of the defendant" the court should have given (with, perhaps, some slight modification) the following instruction proposed by her counsel: "With respect to circumstantial evidence the jury must not only be satisfied beyond a reasonable doubt that all the circumstances proved are consistent with the defendant having committed the act, but they must also be satisfied that the facts are such as to be inconsistent with any other rational conclusion than that the defendant is the guilty person. If there is any one single fact proved to the satisfaction of the jury by a preponderance of the evidence, which is inconsistent with the defendant's guilt, this is sufficient to raise a reasonable doubt and the jury should acquit the defendant." See opinion of the Supreme Court in denying a hearing in *People v. Heuss*, 1928, 95 Cal.App. 680, 684, 273 P. 583; *People v. McClain*, 1931, 115 Cal.App. 505, 510-512, 1 P.2d 1085; *People v. Kinowaki*, 1939, 39 Cal.App.2d 376, 380, 103 P.2d 203.

[3] Counsel for the People seek to minimize the part circumstantial evidence played in the conviction of defendant. They point out that "two police officers looked on while the alleged immoral act was being perpetrated. There was no circumstantial evidence there," they say. Of course the evidence of the police officers as to the physical acts that occurred between the defendant and the Army officer was direct evidence, but the question of whether the defendant was or was not a knowing participant in those acts rested entirely on circumstantial evidence—inferences to be drawn from the facts proved. Code Civ.Proc. §§ 1831, 1832; *Morton v. Manhattan Lunch Co.*, 1940, 41 Cal.App.2d 70, 72, 106 P.2d 212; *Hatfield v. Levy Brothers*, 1941, 18 Cal.2d 798, 805, 117 P.2d 841. A portion of the police officers' testimony as to what happened between these parties in the hotel room is such that the jury might reasonably have drawn the

inference that the defendant was not a knowing participant in the alleged immoral act, but a mere automaton.

The order denying defendant's motion for a new trial is reversed.

DESMOND, P. J., and PARKER WOOD, J., concur.



65 Cal.App.2d 487

CAMICIA et al. v. CAMICIA et al.

Civ. 7072.

District Court of Appeal, Third District,
California.

Aug. 14, 1944.

1. Appeal and error ⇐1009(3)

Whether partition of realty made by referees was fair and equitable was a question of fact and where it was submitted to trial court on conflicting testimony and upon inspection of premises made by trial judge, judgment partitioning property pursuant to division made by referees must be affirmed.

2. Appeal and error ⇐1009(3)

In partition action appellate court will not ordinarily consider sufficiency of the evidence to sustain findings of trial court but such findings will be taken as conclusive where evidence is conflicting and there is sufficient evidence to sustain them.

3. Partition ⇐94(3)

In partition action, the view of the premises made by trial judge constituted independent evidence which enabled judge to verify referees' report.

4. Appeal and error ⇐931(1)

Where trial court was authorized by stipulation of parties to consult with referees appointed to partition realty and get their reasons for making division recommended in report and court thereafter entered judgment partitioning property pursuant to divisions made by referees, referees' reasons for making such division would be presumed to have satisfied trial

court that division was fair and equitable under the circumstance.

5. Partition $\S$ 94(3)

Where no error appears on face of report of commissioners in partition action, none will be presumed and report should not be set aside unless party excepting thereto shows such a state of facts as will make alleged error affirmatively and clearly appear.

Appeal from Superior Court, Amador County; A. L. Pierovich, Judge.

Action by Louis J. Camicia and another against Antone J. Camicia and another to partition realty. From a judgment confirming the report of referees and partitioning the property pursuant to division made by the referees, plaintiffs appeal.

Judgment affirmed.

Joseph A. Brown, of San Francisco, for appellants.

Snyder & Snyder, of Jackson, for respondents.

ADAMS, Presiding Justice.

This action was brought by plaintiffs to secure the partition of certain property owned by plaintiffs and defendants as tenants in common. Trial by jury was waived.

Pursuant to stipulation of the parties the trial court made and entered an interlocutory decree which adjudged that the two plaintiffs, husband and wife, were the owners of an undivided one-fourth interest each, in the property in controversy, and that defendant Antone J. Camicia was the owner of an undivided one-half interest therein, and appointed three referees to make partition. Thereafter said referees made their report in which they alleged that they had divided the property according to the respective rights of the parties "quality and quantity relatively considered, as nearly as could be without prejudice to the rights and interests of the said parties, into two equal parts * * *." Plaintiffs then moved the trial court to modify or set aside the report of the referees, contending that the division was not fair or just. This motion was denied, and a motion made by defendants to confirm the referees' report was granted. A decree confirming said report, and partitioning the property pursuant to the division made by the referees, followed. Plaintiffs have

appealed on the sole ground that the division is not fair and equitable under the undisputed evidence.

The record shows that in support of their contention that the report of the referees was unfair and inequitable plaintiff Louis J. Camicia testified that in his opinion defendants had been allotted more than a fair share of the property according to the nature of the land and the values which he put upon it; also that the division made by the referees would necessitate the erection of a fence by plaintiffs in order to separate the lands allotted to them from those allotted to defendants should it become desirable for plaintiffs to use their portion for the pasturage of livestock, and that the erection of such fence along a portion of the division line would be impossible because of the swampy nature of the area it must traverse. Defendants, in support of the report, called the county surveyor who stated that he had made an analysis of the land involved in the action and had assisted the referees in arriving at their conclusions. In support of his motion to confirm, defendant Antone J. Camicia testified as to the quality and value of the various portions of the land, the purport of his testimony being that plaintiffs had received a fair and just division. Counsel for the parties then stipulated that the trial court might call the referees and get their reasons for making the division reported by them; also that the court should view the premises.

Thereafter the court twice inspected the premises, going over same on one occasion with the county surveyor. It then made and entered its decree finding that the referees had divided the property "according to the respective rights of the parties * * * quality and quantity relatively considered, as nearly as could be without prejudice to the rights and interests of said parties," and confirming their report.

[1, 2] In view of the foregoing we are of the opinion that the judgment of the trial court must be affirmed. Whether the division made by the referees was fair and equitable was a question of fact submitted to the trial court on the conflicting testimony of the parties presented on their respective motions, and upon the inspections made by the trial judge. As in other cases, an appellate court, in a partition suit, will not ordinarily consider the sufficiency of the evidence to sustain the findings of the trial court, but such findings will be taken

as conclusive where the evidence is conflicting and there is sufficient evidence to sustain them.

In *Capuccio v. Caire*, 207 Cal. 200, at page 211, 277 P. 475, at page 479, 73 A.L.R. 8, which also involved a motion to modify the report of referees in a partition suit, the court said: "The appellants herein do not challenge in any respect the ability of said referees, or of any one of their number, nor do they question the integrity and good faith of said referees in the slightest regard. Their whole contention upon this appeal is the contention that said referees might have made in certain respects a more just and equitable division of certain portions of said properties than they appear to have done, and might have provided for more acceptable means of ingress and egress to the property or of roadways extending across the same and making accessible the somewhat infrequent harbors thereon. These, however, were all matters which were primarily the function of the trial court to determine upon the hearing of the report of said referees, and they were each and all presented to the trial court for such determination at the time of such hearing. There is no showing on this appeal of any abuse of discretion on the part of said court in determining these matters adversely to the views of the appellants herein upon the hearing of said motion, and, this being so, it would seem to be clear that a review of the decision of said court upon the matters involved in said motion upon the conflicting evidence presented before it at the hearing thereon will not be undertaken by this court upon this appeal."

[3, 4] The view of the premises made by the trial judge constituted independent evidence which enabled him to verify the report of the referees (*Otey v. Carmel Sanitary Dist.*, 219 Cal. 310, 312, 313, 26 P.2d 308; *Rose v. State of California*, 19 Cal.2d 713, 733, 734, 123 P.2d 505); and on appeal such evidence must be presumed to support the judgment. *Stacey v. Hayes*, 31 Cal.App.2d 422, 424, 88 P.2d 165; *Anderson v. State of California*, 61 Cal.App.2d 140, 145, 142 P.2d 88, and cases there cited. Also, as above stated, the trial court was authorized by the stipulation of the parties to consult with the referees and get their reasons for making the division recommended in their report; and, assuming that this was done, their reasons will be presumed to have satisfied the trial court that the

division was fair and equitable under the circumstances.

[5] In *Seale v. Greer*, 1 Cal.Unrep.Cas. 423, 424, the court said that where no error appears on the face of the report of commissioners in a partition action, none will be presumed; and that the report ought not to be set aside unless a party excepting to it shows such a state of facts as will make alleged error affirmatively and clearly appear.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.



65 Cal.App.2d 467

MATMOR OLIVE CO. v. DU BOIS.

Civ. 3323.

District Court of Appeal, Fourth District,
California.

Aug. 11, 1944.

1. Sales ⇐202(1)

Under contract providing for delivery of olives "upon the trees", that title should pass to buyer only as payment was made for particular deliveries, and that buyer assumed the risk of loss after olives were picked, risk of loss of olives which were dropped from trees by natural causes fell on seller.

2. Costs ⇐32(5)

Where buyer of olives suing to recover from seller the balance of advance payment was awarded \$6,723.75, and seller on his cross-complaint for buyer's failure to pick a sufficient amount of olives was awarded \$5,004.13, seller was not entitled to his costs on theory that he was the "successful party".

See Words and Phrases, Permanent Edition, for all other definitions of "Successful Party".

3. Costs ⇐155

Defendant was entitled to reimbursement for money paid to clerk as costs of

transfer of plaintiff's actions from another county.

4. Judgment $\S$ 256(1)

Findings that buyer was to pay for olives on seller's trees, that there were 300 tons of olives when contract was signed, that because of natural causes 200 tons were to be accounted for, and that buyer paid for 165.525 tons, warranted judgment against buyer for 34.475 tons of olives which were left on the trees or dropped by buyer and not saved by him.

5. Appeal and error $\S$ 1011(1)

A finding based on conflicting evidence will not be disturbed.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Actions by the Matmor Olive Company against E. B. Du Bois to recover the balance of an advance payment made by plaintiff to defendant, and to recover damages on ground that defendant had interfered with plaintiff's pickers of olives purchased from defendant. From a judgment, plaintiff and defendant appeal.

Modified and, as modified, affirmed.

H. M. Dunham, of Fresno, and Wright, Thomas & Dorman, of San Diego, for plaintiff.

Luce, Forward, Lee & Kunzel, of San Diego, for defendant.

BARNARD, Presiding Justice.

On November 11, 1941, the plaintiff agreed to purchase a crop of olives, estimated at 300 tons, growing on land owned by the defendant in San Diego County. The plaintiff, whose place of business was in Tulare County, agreed to pick the olives at its own expense, to begin picking about December 1, 1941, to complete the same within 60 days, and to pay \$135 per ton for the olives "on the trees." The plaintiff paid to the defendant in advance \$15,000, being \$50 a ton on the estimated crop, and it was agreed that as each ton of olives was delivered \$50 from this advance payment should be applied thereon and the balance of \$85 should be paid through an arrangement made with a bank. It was agreed that when the entire crop was picked any part of this \$15,000 which had not been thus applied should be repaid to the plaintiff.

The plaintiff began picking on December 7, 1941, and ceased operations shortly prior to February 15, 1942. It picked and removed 165.525 tons of olives which were fully paid for in the manner agreed upon.

The plaintiff brought an action in Tulare County in the form of a common count to recover the balance of the \$15,000 advance payment, since only about 165 tons had been taken. It also filed another action in that county seeking damages on the ground that the defendant had interfered with its pickers. On motion of the defendant these two actions were transferred to San Diego County.

The defendant then answered the first of these actions denying that he owed anything to the plaintiff and setting up, as a plea in abatement, that two separate actions growing out of the same contract had been filed for the purpose of vexing and annoying him. He also answered the second action denying the allegations of the complaint, setting up the same plea in abatement, and including a so-called "counterclaim," which was in fact a cross-complaint, in which he set forth the contract of November 11, 1941, alleged that the plaintiff had failed to pick and pay for some 135 tons of olives which it had agreed to take, and further alleged that the plaintiff was indebted to him in the amount of \$350 as rental for certain ladders. He prayed for a judgment for \$18,241.00 for the first of these items and \$350 for the second item.

The two actions were consolidated for trial over the objection of the defendant, although he had pleaded in each that they had been improperly separated. After a first trial a new trial was granted on stipulation of the parties, and the action was again tried before a different judge. The plaintiff abandoned its cause of action for damages and stipulated that the defendant was entitled to \$350 as rental for the ladders. The court found that the plaintiff had picked and taken 165.525 tons of olives which had been fully paid for in accordance with the agreement; that when the contract was entered into there were not less than 300 tons of olives on the trees; that "enough were dropped to the ground by wind in a storm that occurred on December 23, 1941, or from other natural causes without the fault of the plaintiff, so that of such original 300 tons or thereabouts, * * * there remained only 200

tons to be accounted for"; that of said 200 tons 165.525 tons were removed and paid for; that the remaining 34.475 tons were either left on the trees or dropped by the pickers and not picked up; that the agreed price for these 34.475 tons amounted to \$4654.13; and that the defendant became entitled to this sum and to \$350 for the ladders, a total of \$5004.13. It was then found that the plaintiff was entitled to \$6723.75 as the unused balance of the original payment of \$15,000, and that the plaintiff was entitled to a judgment for the difference, or \$1719.62. Judgment was entered accordingly and the plaintiff and the defendant have each appealed therefrom.

On his appeal the defendant contends that he was entitled to be paid for an additional 100 tons of olives, and that the judgment is inconsistent with and unsupported by the findings since it was found that 100 tons of olives were lost by reason of a storm on December 23, 1941, or from other natural causes, and since it appears that this loss occurred while the plaintiff was in possession of the groves and picking the crop. It is argued that the court erroneously concluded and held that title to the lost olives had not passed to the purchaser; that although one paragraph seems to declare that both possession and title were to remain in the seller, the contract as a whole discloses a different intention since the buyer agreed to pick all of the olives on the trees and since title was reserved only for the purpose of protecting the seller from any default of the buyer; and that it must be held as a matter of law that the contract, viewed as a whole, provided that the buyer must pay for 300 tons of olives regardless of what happened to them. The defendant relies on such cases as *Firebaugh v. Thomas*, 137 Cal.App. 709, 31 P.2d 425; *Miller v. Hunt, Hatch & Co.*, *Theodore Krumm, Inc.*, 35 Cal.App.2d 639, 47 Cal.App. 768, 191 P. 75; *Brietengross v.* 96 P.2d 370. Those cases are not controlling here. They involved either contracts or facts showing that title had passed to the purchasers, or that they had assumed the risk of loss.

[1] Briefly summarized, the contract here in question provides: "The seller agrees to sell and the buyer agrees to buy" a crop of olives "upon the terms and conditions expressed herein." Delivery of the crop and all thereof "shall be upon the trees in the grove" and the buyer is to

pay all expenses of every kind. The buyer is to pick the crop commencing about December 1, 1941, and not later than December 5, 1941. The seller may have the olives weighed at the ranch or at a public scale. Certain trees are to be picked by hand and the crop on others may be harvested with light switches. The crop is estimated at 300 tons and the buyer is to pay \$135 per ton "on the trees." The contract then provides: "Payment shall be made of the amount set forth above, per ton, for all olives, before they leave the possession of seller, * * * such payment to be made not later than the time when the weight of each shipment is ascertained. Title to all olives shall remain in the seller and shall pass to the buyer only when such payment is made for each shipment. The buyer hereby assumes all risk of loss of damage to the fruit from any cause whatever, after such fruit has been picked from the trees."

The contract was clearly executory and provided for the delivery and acceptance only of such olives as were picked or removed from the trees. It provided for delivery and acceptance at the time of picking and upon weighing the olives, and it is specifically provided that title shall remain in the seller and shall pass to the buyer only as payment is made for particular deliveries, and that the buyer assumes the risk of loss after the fruit has been picked from the trees. This clearly indicates that the risk of loss up to the time the fruit is picked from the trees shall fall upon the seller. Not only is the interpretation placed upon the contract by the trial court a reasonable one but no other interpretation was justified by the language of the agreement.

[2] The defendant further contends that he should have been awarded his costs in the trial court. He misconstrues one statement in the judgment and argues therefrom that the judgment is inconsistent with the findings and conclusions of law. In brief, it is argued that if the judgment had been consistent with the findings and conclusions of law it would have awarded the defendant on his two counterclaims a total of \$5004.13 and would have allowed the plaintiff \$1719.62, with the result that there would have been a balance in favor of the defendant of \$3284.51, making him the successful party. The contention is without merit. Under any proper construction of the language used in the find-

ings and judgment the necessary result is an allowance to the plaintiff of \$6723.75 and one to the defendant of \$5004.13, with a balance of \$1719.62 in favor of the plaintiff. In this regard, the defendant was not entitled to his costs.

[3] It is also contended that the defendant was entitled to reimbursement for \$16 paid by him to the clerk as costs of transfer of the actions from Tulare County to San Diego County. This should have been repaid to the defendant but was not, and seems to have been overlooked. The judgment in favor of the plaintiff should be modified by deducting \$16 therefrom.

[4] On its appeal the plaintiff contends that the judgment which, in effect, allows the defendant payment for 34.475 tons of olives is based on findings which go beyond the issues as framed by the pleadings and which are inconsistent with other findings and is, therefore, erroneous. The argument in this connection is that it was alleged in the defendant's cross-complaint that at the time picking operations were begun there were 250 tons of olives on the trees and 50 tons upon the ground under the trees; that the plaintiff was obligated to purchase only olives that were on the trees; that the court found that 100 tons had fallen from natural causes without the fault of the plaintiff; and that the plaintiff has picked and paid for 165.525 tons. It is then argued that in using the figure of 300 tons as being on the trees at the time when the contract was signed, the court ignored the pleadings which showed that only 250 tons were to be accounted for, that 265 tons were accounted for in the amounts taken and paid for by the plaintiff and the 100 tons dropped to the ground, and that it follows that there could not have been about 34 tons with which the plaintiff was charged.

Not only was the allegation in the cross-complaint, to which we have referred, denied by the plaintiff, but it clearly appears that the court did not find that 100 tons of olives had dropped after picking operations were begun. The court found that there were not less than 300 tons of olives on the trees when the contract was signed, that enough dropped in a storm on December 23, 1941, or from other natural causes, so that of the original 300 tons there remained only about

200 tons to be accounted for. If we assume that 50 tons dropped before picking commenced then only 50 tons dropped thereafter. In any event, it was found that only 200 tons remained to be accounted for and the findings as a whole are perfectly consistent with and support the judgment.

[5] It is further urged that the evidence is insufficient to support the finding that 34.475 tons of olives were left on the trees by plaintiff's figures or dropped and not saved by them. A portion of the evidence is relied on in this connection. Assuming that this portion supports the plaintiff's position, the most that can be said is that it is in conflict with other portions of the evidence. A careful examination of the record discloses ample support for the finding in question.

The judgment in favor of the plaintiff for \$1719.62 is modified by deducting \$16 therefrom and as thus modified and reduced to \$1703.62 the judgment is affirmed. Each party to pay his own costs on appeal.

GRIFFIN, J., concurs.



65 Cal.App.2d Supp. 632

**BOLAND v. CECIL, Director of
Agriculture, et al.**
Civ. A. 5688.

Appellate Department, Superior Court,
Los Angeles County, California.
July 27, 1944.

I. Licenses ¶19(3)

Owner of approximately one-half acre, on which he kept various kinds of livestock, who slaughtered a cow for consumption by himself and family, intending to dispose of excess portions to persons in his locality, came within provision exempting property owner or ranchman slaughtering cattle in small numbers from slaughtering license requirements. St.1937, p. 2457, § 356.

2. Animals ⇨15

Owner of approximately one-half acre on which various kinds of livestock were raised and kept was a "livestock producer", within meaning of provision exempting from inspection requirements of meat laws livestock producers who slaughter animals from their own herds on their own premises for their own consumption. St.1941, p. 2214, § 307.

See Words and Phrases, Permanent Edition, for all other definitions of "Livestock Producer".

3. Animals ⇨15

Under provisions of meat laws, exempting from inspection requirements a producer who slaughters on his own premises an animal which is a part of "his own herd", the quoted phrase must be given a more strict construction in consonance with efforts to protect public health than would be generally given to the term. St. 1941, p. 2214, § 307.

4. Animals ⇨15

To exempt a producer, who slaughters on his own premises an animal which is a part of his "own herd", from the inspection provisions of the meat laws, the animal slaughtered must have been in producer's possession subject to his observation for such length of time that producer could certify that the animal was healthy and that its meat was fit for human consumption St.1941, p. 2214, § 307.

See Words and Phrases, Permanent Edition, for all other definitions of "Own Herd".

5. Animals ⇨15

Where cow slaughtered by livestock producer on his own premises was one purchased about 35 days previously, during which time the producer cared for the cow on seller's premises except for five days when it was cared for on producer's premises, such cow was a part of producer's "own herd", within meaning of provision exempting from inspection provisions of meat laws a producer who slaughters on his own premises an animal which is part of his own herd. St.1941, p. 2214, § 307.

6. Officers ⇨116

Whenever an officer seizes property unlawfully, even though under color of his office, an action for damages may be maintained against him, and if acting in behalf

of a principal, also against the principal, the same as though the damages were inflicted by private individuals.

7. Parties ⇨71

Where it is doubtful in what capacity a party sues or is sued, reference may be had to the entire complaint.

8. Officers ⇨119

In action to recover possession of meat seized by state meat inspectors, where language of complaint showed that defendants were being sued in their official capacity and not as individuals, any judgment against them could only be rendered in their official capacity and not as individuals.

9. States ⇨191(2)

Although the general rule that a state cannot be sued without its consent cannot be evaded by instituting action against state officials or agencies when the real claim is against the state, for such rule to apply the relief asked must involve some direct or substantial interest of the state.

10. States ⇨191(2)

Where the relief sought in action against state director of agriculture and meat inspectors was the return of meat allegedly wrongfully taken by state officials acting in their official capacity, the action was not such as to involve some direct or substantial interest of the state and was not an "action against the state", which had not consented to be sued.

See Words and Phrases, Permanent Edition, for all other definitions of "Action against the State".

11. States ⇨191(2)

That a state will be affected by a suit against officers will not prevent maintenance of the suit, but the test is in a consideration of the relief sought and if sought against the state the suit is not maintainable, but if sought against state officers it is maintainable.

12. States ⇨212

Where plaintiff elected to sue defendant state officers in their official capacities only, to recover possession of meat seized by defendants, plaintiff was limited in his recovery to judgment for possession of the meat, and the alternative judgment for value thereof and for damages for detention could not be upheld.

13. States ⇐215

Costs are not recoverable against the state in the absence of express statutory authorization. Code Civ.Proc. § 1028.

14. States ⇐215

Where plaintiff recovered judgment in action against state officers for possession of beef seized by officers, which action was in effect an action against the state, the statute allowing costs against the state on the same basis as any other party was applicable. Code Civ.Proc. § 1028.

SHAW, P. J., dissenting.

Appeal from Municipal Court of Los Angeles; Ida May Adams, Judge.

Action by R. W. Boland against W. J. Cecil, Director of Agriculture of the State of California, and others to recover 685 pounds of meat or the value thereof. From a judgment for plaintiff, the defendants appeal.

Judgment modified and as modified affirmed.

Robert W. Kenny, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for appellants.

Lewis D. Collings and Amos Friedman, both of Los Angeles, for respondent.

KINCAID, Judge pro tem.

For some three years prior to April 3, 1943, plaintiff lived on and owned real property in El Monte, California, consisting of approximately one-half acre. He kept various kinds of livestock thereon. On April 2, 1943, he slaughtered a cow on said premises. He was not a licensed slaughterer (Sections 346-347, Agricultural Code, St.1939, p. 1735, St.1941, p. 1726), and the animal was not slaughtered under "inspection" (Section 305, Agricultural Code, St.1941, p. 2438), as is required in counties having over 28,000 population, as does Los Angeles County. Nor did that part of the meat from said cow which plaintiff had in his "possession for sale * * * bear the 'Inspected and passed' stamp of * * *" inspection (Section 305). It was seized on April 3, 1943, by officials of the Department of Agriculture, who claimed to be acting under the provisions of Section 311.1, Agricultural Code, St.1937, p. 2403, and the meat was and now is stored in a freezing locker. The defend-

ant Webb, against whom default judgment was taken and who is not a party to this appeal, operates said locker.

Plaintiff contended, and the trial court found from the evidence, that the meat from the animal so slaughtered was intended by plaintiff to be consumed by himself and family, and that excess portions thereof not so consumed were intended by him to be disposed of to persons in his locality, pursuant to the provisions of Sections 307 and 356, Agricultural Code, St. 1941, p. 2214, St.1937, p. 2457; that, at the time of such seizure, no part of such meat had been sold or delivered to any third person, and, while no tags or sales memoranda had been affixed thereto, the plaintiff intended to affix same to such portions of the meat as might be disposed of by him in his locality.

Plaintiff takes the position, and the trial court seems to have held with him, that he was privileged to slaughter the said cow under the circumstances and conditions above set forth, pursuant to the exceptions contained in the said Sections 307 and 356, and that his case falls within the provisions of both said sections. The pertinent parts of Section 307 are as follows: "Nothing in this article [restricts or] prohibits: (a) [Slaughter by live stock producer.] A live stock producer from slaughtering animals on his own premises that are a part of his own herd for his own consumption or from disposing of the carcasses and products of those animals thus slaughtered; provided, they can be identified as such, and are sound, healthful, wholesome, and fit for human food, and are disposed of in his locality; when cattle, sheep, swine or goats are sold by said producer in the vicinity where produced and slaughtered there shall be attached to said meat or meat products a statement giving substantially the following: [Certificate.] I hereby certify that the uninspected meat (or meat products as the case may be) to which this certificate is attached is from animals slaughtered by the undersigned, a farmer, on his farm and that at this date it is sound, healthful, wholesome, and fit for human food." Section 356 reads: "Any owner of property, or a ranchman located on a definite property as a tenant, lessee or purchaser under contract may slaughter cattle in small numbers on said premises for his own consumption, and may sell or give away a portion of the meat thereof except to a peddler, retailer, hotel,

restaurant, or any person offering the same for public consumption. When such person sells the meat thereof, he shall give to the buyer, and the buyer shall receive, a sales tag or sales memorandum, showing the names of the seller and buyer, the date of sale, and the quantity sold. The buyer shall retain said tag or memorandum for ninety days and exhibit it upon request of any agent of the department or any peace officer."

A casual reading of these sections might well lead to the belief that they are practically similar, and are exceptions to the same code requirements, with Section 356 being so much broader as to render Section 307 useless. A more careful study of them reveals marked dissimilarities, and that they do not necessarily conflict.

[1] Section 307 is contained in Article 1 of Division 3, Chapter 1, of the Agricultural Code, and deals exclusively with the subject of "Meat Inspection" of slaughtered animals. It constitutes an exception to the necessity of compliance with the inspection of meat laws as in said Article 1 otherwise provided. Section 356 is contained in Article 3 of said division and chapter, and, while said article is entitled "Marks and Brands," its contents are not limited to that subject, as certain provisions thereof deal with the matter of the licensing and regulating of slaughtering of animals. Section 346 requires a license to slaughter a bovine animal, and Section 356 is an exception to such slaughtering license requirement. The evidence supports the court's finding that plaintiff has brought himself within the provisions of Section 356.

Even though one who is a resident of a county of over 28,000 in population complies in every particular with Section 356, thus bringing himself within the exemption from the requirement of having a slaughtering license, he, nevertheless, would violate the provisions of Article 1, requiring an inspection of the meat, unless he is a "live stock producer." Only the latter are exempted from inspection regulations under Section 307, and the plaintiff can claim the benefit thereof only if the evidence in the case supports the court's finding that he is a livestock producer, and that his case is otherwise within Section 307.

[2] "Livestock" is defined by Webster's New International Dictionary, 2d Ed., as

"Domestic animals used or raised on a farm, especially those kept for profit." "Producer" is defined as "One who produces, brings forth, or generates." Section 307 does not limit itself to cattle as does Section 356, but includes all animals that are a part of the livestock producer's own herd. Viewing the evidence, as we must, most favorably in support of the finding that plaintiff is a livestock producer, the record discloses that plaintiff had, for several years prior to April 2, 1943, been raising chickens, rabbits, pigs, sheep, ducks and cattle on his premises. On April 2, 1943, in addition to other types of animals and fowls, he had on said premises twelve head of cattle, including two calves and seven heifers; that, while two calves had been born on his place, he bought many day-old calves and raised them there. The defendant Greenan testified that on April 3, 1943, the occasion of his first visit to plaintiff's place, he saw thereon a milk cow, a number of calves, five or more heifers, pigs, a sheep, and a horse. From the foregoing, even though other conflicting evidence was before the court, we cannot say that there was not sufficient evidence upon which the trial judge could properly base a finding that plaintiff was a livestock producer.

Another prerequisite to the application of the exemption from inspection regulations under Section 307 is that the animals so slaughtered by the producer on his own premises "are a part of his own herd." Therefore, the plaintiff herein can claim the benefit of such section only in the event the evidence in the case supports the court's finding that the cow in question was a part of his own herd at the time it was killed. "Herd" is defined as "A number of beasts assembled together; * * * more than a few, of cattle, sheep, horses, or other animals of the larger sorts, assembled and kept together as one drove and under one care and management." 39 C.J.S., Herd, p. 891. To become a part of one's own herd, then, would only require that the animal be owned by the herd owner and be mingled and kept with the other animals in one drove and under individual care and management. As a general proposition, it would seem that, in order to become a part of a herd, no particular period of time must elapse before an animal can be considered as included in such herd. Nor is it necessary, in order to be so included,

that the animal be either born on the producer's premises or kept there any particular length of time.

[3] When construed, however, with the exemption from inspection provisions of Section 307, the legislature must have intended that the phrase "a part of his own herd" be given a more strict construction in consonance with its efforts to protect public health. The very purpose of requiring the inspection of meat prior to its disposition is to protect public health. The exception in favor of a producer, wherein under certain conditions he may, in lieu of such inspection, substitute his own certificate as to the healthfulness and wholesomeness of such meat slaughtered by him, was not intended by the legislature as a means of weakening this protection to the public. As an exception to the general statutory requirement, it must be strictly construed. *Merchants Nat. Bank v. Cont. Nat. Bank*, 1929, 98 Cal.App. 523, 533, 277 P. 354; *In re Goddard*, 1937, 24 Cal.App. 2d 132, 140, 74 P.2d 818; *Spokane & I. E. R. Co. v. United States*, 1915, 241 U.S. 344, 36 S.Ct. 668, 60 L.Ed. 1037, 1041. The experience of the producer and his personal knowledge of the animals making up his herd were expected to place him in a position wherein he would know, and could truthfully and safely certify that the animal so slaughtered by him was in fact healthy and its meat fit for human consumption. In order for such producer to gain a personal knowledge of a particular animal whereby he could safely certify it under the foregoing provisions, such animal must have been in his possession, and subject to his observation for at least a reasonable period of time. Only then could such animal be deemed to have become a part of his herd under said Section 307. If this were not the case, the owner of a herd could buy an animal, mingle it with such herd for one day, slaughter it, and then sell most of it to others. Those who received it would be almost entirely lacking in protection from its possible unwholesomeness. We cannot assume that the legislature intended any such relaxation of the meat inspection laws as would thus take place.

As to what is such a reasonable period of time during which such animal must have been in the producer's possession and subject to his observation is a question of fact to be determined by all of the sur-

rounding circumstances. The length of such period would vary with changing conditions. The experience of the producer, his constant or infrequent inspections, the number of animals making up his herd, and the age and kind of such animals are elements to be considered in arriving at such a determination.

[4, 5] By its express finding that the cow in question was a part of the producer's own herd at the time it was killed, and that it was slaughtered in compliance with Section 307, the trial court must be deemed to have considered this question of fact and to have resolved the same in favor of plaintiff. Viewing the evidence most favorably in support of such finding, the record discloses that such cow had been purchased by plaintiff from Dolan's Dairy thirty-five days before she was slaughtered; that for the first thirty days of such period he had kept the cow on the premises of Dolan's Dairy and he brought her to his place five days before April 2, 1943, the date when she was killed; that he visited her twice a day for the purpose of feeding her during such thirty-day period, and fed her at his place during the remaining five days. He established her age to be between seven and nine years, and he bought her for a milk cow, believing her to be carrying a calf. He decided to slaughter her for meat when he found she was barren of calf. He knew that she came from and had been a part of a dairy herd of Dolan's Dairy and that such herd was regularly inspected under the state laws requiring periodical tuberculosis tests; that such cow had been a part of Dolan's herd for almost a year prior to her purchase by plaintiff; that plaintiff had been attending his herd on his premises for some two years; that he knew flukes, tapeworms, parasites and cysts when he saw them and knew when an animal was healthy or unhealthy. This evidence is sufficient to support the inferential finding that the cow in question had been in the producer's possession and subject to his observation for a sufficient length of time, and that his experience was such as to enable him to ascertain that the animal was healthy and that it could be properly slaughtered under the provisions of Section 307 without endangering public health. Such a cow would be deemed to be "produced" by the producer for the purposes of Section 307 without requiring her to have been born to

his ownership or to have been raised or fattened by him for any particular or definite time.

[6] Whenever an officer seizes property unlawfully, even though under color of his office, an action for damages may be maintained against him, and if acting in behalf of a principal, also against the principal, the same as though the damages were inflicted by private individuals. *Silva v. MacAuley*, 1933, 135 Cal.App. 249, 257, 26 P.2d 887, 27 P.2d 791. In the within case, there is some question as to whether the complaint charges the defendants, or the judgment is against them, in their official capacity or in their individual capacity, or both. The title to the complaint names as defendants "W. J. Cecil, Director of Agriculture of the State of California, Dr. E. B. Foster, John G. Greenan, Leslie L. Webb" and "Does." In the body of the complaint is found: "That the defendant, W. J. Cecil, is the Director of Agriculture of the State of California. That the defendant, Dr. E. B. Foster, is Meat Inspector of the Division of Animal Industry of the Department of Agriculture of the State of California. That the defendant, John G. Greenan, is Assistant Meat Inspector of the Division of Animal Industry of the Department of Agriculture of the State of California." The judgment decrees that plaintiff recover of and from the defendants, "W. J. Cecil, Director of Agriculture of the State of California, Dr. E. B. Foster, Supervising Veterinary Meat Inspector of the Department of Agriculture of the State of California, John G. Greenan, Assistant Meat Inspector of the Department of Agriculture of the State of California, and Leslie L. Webb and each of them, possession of the following described property, to-wit, six hundred eighty-five pounds (685#) of beef; and in case possession of said property cannot be had, then its value, which is fixed at the sum of Three Hundred Forty-three (\$343.00) Dollars, and in either case the sum of Sixty-one and 85/100 (\$61.85) Dollars as damages for its detention, together with his costs herein incurred in the sum of \$95.25."

[7, 8] "Where it is doubtful in what capacity a party sues or is sued, reference may be had to the entire complaint." 47 C.J. 176; *Henry v. Willett*, 1922, 60 Cal. App. 244, 212 P. 698. While the title to the complaint names the official title of only the defendant Cecil, the language of such pleading itself leaves no doubt that

the defendants are each charged in his official capacity only with the tort of illegally seizing and retaining the property in question. The defendants, as individuals, are not parties to the suit (*Reed v. Molony*, 1940, 38 Cal.App.2d 405, 411, 101 P. 2d 175), and the judgment is against them only in their official capacity and not individually.

[9-11] The principle is fundamental that the state may not be sued without its consent. 23 Cal.Jur. 578; 59 C.J. 307. While the general rule that a state cannot be sued without its consent cannot be evaded by the instituting of an action against state officials or agencies when the real claim is against the state itself, for such "rule to apply the relief asked must involve some direct or substantial interest of the state, as a distinct entity, apart from the mere interest a state may have in the welfare of its citizens or the vindication of its laws." 59 C.J. 308. The relief here sought, at least to the extent of demanding the return of plaintiff's meat which was wrongfully taken by the defendant state officials, acting in their official capacity, is not such as to "involve some direct or substantial interest of the state." As was said in the case of *Louisville & N. R. Co. v. Bosworth*, D.C., 209 F. 380, 401, 402, and referred to in 59 C.J. 308, § 78(a): "The fact that a state will be affected by a suit against state officers is not a consideration against the maintainability of the suit. * * * the better test * * * is to be found in a consideration of the relief sought therein. If the relief sought is relief against the state, it is not maintainable. * * * If, however, the sole relief sought is relief against the state officers, it is maintainable. Such it is if it seeks * * * recovery of possession of property wrongfully withheld * * *."

[12] In so far as the plaintiff's suit seeks to recover from the state officers the possession of his wrongfully-taken and withheld meat, the action is maintainable. Having elected to sue the defendant state officers in their official capacity only, and not in their individual capacity, plaintiff is limited in his possible recovery herein to a judgment for possession of the meat. The alternative judgment for the value thereof, and for damages for its detention, cannot be upheld. This is not a case in which liability can attach to the state for such monetary judgment. Under the judgment rendered, no execution for the value

or for damages for the detention could issue or be levied against the defendants in their individual capacity. Any such levy would of necessity be directed against the State Treasury.

[13,14] It would be error to award court costs against the state in the absence of an express statutory enactment authorizing the same. *People v. One Plymouth*, 1937, 21 Cal.App.2d 715, 69 P.2d 1011; *People v. One 1937 Plymouth*, 1940, 40 Cal. App.2d 38, 104 P.2d 372; *Connecticut Gen'l Life Ins. Co. v. State*, 1941, 47 Cal. App.2d 88, 117 P.2d 377. The legislature made such an enactment in 1943 allowing costs against the state, when it is a party, on the same basis as any other party, with the proviso that when so awarded they shall be paid out of the appropriation for the support of the agency on whose behalf the state appeared. Code of Civil Procedure, § 1028. Since we are holding, in effect, that this is a suit against the state, such statute is here applicable.

Whether or not the plaintiff was raising or producing livestock on his premises, in violation of a county zoning ordinance, was immaterial to the issues presented. The trial court properly sustained an objection to the offer of proof of such evidence.

The judgment is modified by striking out "and in case possession of said property cannot be had, then its value, which is fixed at the sum of Three Hundred Forty-three (\$343.00) Dollars, and in either case the sum of Sixty-One and 85/100 (\$61.85) Dollars as damages for its detention," and as so modified, the judgment is affirmed. Neither side to recover costs on appeal.

FOX, J., concurs.

SHAW, Presiding Judge (dissenting).

I dissent.

I concur in all the foregoing opinion except its holding that the cow in question was a part of plaintiff's "own herd." I think some further limitation should be put upon the meaning of the phrase "a part of his own herd," as used in Section 307 of the Agricultural Code. If it requires merely the presence of the animal on the producer's premises and under his observation

for a reasonable time to become familiar with it, the finding that such a time had elapsed in this case when the cow was slaughtered is probably supported by the evidence. But on reading Section 307 with its evident purpose to protect the public in mind, and looking for some more definite statement in explanation of the term "his own herd," I find that only a "live stock producer" is entitled to the exemption from inspection provided by subdivision (a). It is reasonable to suppose that such producer is related to "his own herd" as a producer, and not otherwise. Carrying out this idea is the provision later in subdivision (a) that "when cattle, sheep, swine or goats are sold by said producer in the vicinity where produced and slaughtered there shall be attached to said meat or meat products a statement" certifying that they are wholesome. Since this statement is the only assurance the purchaser has of the quality of the meat sold under subdivision (a) of Section 307, and there is no limitation upon the quantity or proportion of any individual animal slaughtered by the producer "for his own consumption" that he may sell, this provision for a statement must be intended as a limitation on the right to sell and it is to be construed as a part of the proviso appearing in this subdivision. That proviso permits the producer to dispose of his excess meat only "in his locality"; and in view of the whole framework of the section I conclude that the phrase "in the vicinity where produced and slaughtered" is intended to be a restatement of the same idea in other words, so that the right of sale may be exercised only in the vicinity where the animals are produced, which must also be the locality of the producer. Subdivision (a) of Section 307 is not well drawn, and legislative attention might well be turned to its improvement; but taking it as it is, and attempting to make a consistent and reasonable construction of its various provisions I cannot believe that it was intended to sanction what plaintiff appears to have done. It appears to me that, on a proper construction of the statute, a livestock producer may sell, under subdivision (a) of Section 307, only cattle which he has produced, and that the cow in question here was not produced by plaintiff.

65 Cal.App.2d Supp. 854

PEOPLE v. DEL MAR CORPORATION.
Civ. A. 5719.Appellate Department, Superior Court,
Los Angeles County, California.

July 29, 1944.

Gaming ⚡58

Where corporation conducting Bingo game provided employees with about \$500 in War Savings Stamps and \$100 in money for payment of prizes to winners and prizes varied from \$2 to \$10 according to number of players participating in game, under statute authorizing forfeiture of all money and property "offered for distribution" in violation of gaming law, forfeiture was not limited to stamps and money which made up particular prize that was being played for at moment officers made seizure, but other stamps and money in room in possession of operators of game were subject to forfeiture. Pen.Code, § 325.

See Words and Phrases, Permanent Edition, for all other definitions of "Offered for Distribution".

KINCAID, Justice pro tem., dissenting.

Appeal by plaintiff from a judgment and order denying motion for a new trial made by the Municipal Court of the City of Los Angeles, William M. Byrne, Judge. Reversed.

Action by the People of the State of California against Del Mar Corporation for forfeiture of war savings stamps and money provided for conducting lottery game known as Bingo. From the judgment and from an order denying a motion for new trial, the People appeal.

Reversed and remanded for a new trial.

Fred N. Howser, District Attorney, and Russell M. Broker and J. J. Sullivan, Deputy District Attorneys, all of Los Angeles, for appellant.

Victor Ford Collins, by Arnold M. Canan, both of Los Angeles, for respondent.

FOX, Judge.

The defendant Del Mar Corporation was conducting a game known as Bingo in a room on the fourth floor of a building in the City of Santa Monica. It was stipulated that the game as played constituted

a lottery under the law of this state. The property to be thus distributed was War Savings Stamps and money.

It was also stipulated that the room where the game was being played was equipped with chairs, tables, wheels, counter, cards, and discs, sufficient in number to accommodate 96 players; that during the progress of the game some of the players were seated on chairs at a long rectangular counter and others were seated at small tables on the outer edge of the room; that an electrically operated wheel was located near the wall of one end of the room; that said wheel was approximately 6 feet in diameter; that on the face of the wheel around its outer circumference arranged promiscuously and not consecutively appeared the numbers from 1 to 75, inclusive; that certain cards, which had upon their face 24 numerals selected promiscuously from among the numerals 1 to 75, inclusive, arranged in five rows of five numerals each, except that the middle space in the middle row was left blank, were provided for the players upon their paying the required consideration; and that the play of the game proceeded by an operator (employed by defendant) starting the wheel revolving, which continued spinning until it came to rest at random, then indicating by an electric light one of the numerals upon the face of the wheel. It also appeared that there was a loud speaker in the corner of the room and a microphone near the control board, and an indicator board at one end of the room, about 4 feet by 20 feet, where the number on which the wheel stopped would be shown. This room was about 40 feet by 60 feet. The game was operated by three employees of defendant. One employee operated the wheel and the other two collected the money from the players and distributed the prizes. It further appears that the game was in progress night after night, as well as at least during some of the afternoons, and for periods of several consecutive hours. The management always provided the operators with about \$500 in War Savings Stamps and \$100 in money. It took only seven or eight minutes to go through the necessary routine to determine who was entitled to a particular prize. The prizes varied from \$2 to \$10 according to the number of players participating in the game. They were paid in War Savings Stamps, or when a prize was split between several persons in such manner that the

denominations of Stamps on hand would not equal each person's share, money was paid for the difference.

During the progress of the game deputies from the Sheriff's office seized the Stamps and money which had been provided by the defendant corporation for carrying on the game and which were then in the possession of the employees who were operating it. This action was then brought in the name of the people under section 325, Penal Code, to have said Stamps and money forfeited to the state. The material part of this Penal Code section reads as follows: "All moneys and property *offered for sale or distribution* in violation of any of the provisions of this chapter are forfeited to the state, * * *" (Italics added.) The code sections which make Bingo a lottery are in the same chapter of the Penal Code as section 325. The trial court rendered judgment for the defendant corporation. The plaintiff has appealed.

Counsel for defendant corporation argue that only the Stamps and money which made up the particular prize that was being played for at the moment the seizure by the officers took place were forfeited; that the other Stamps and money there in the room in the possession of the operators of the game were not subject to forfeiture. This latter conclusion is based on the theory that such Stamps and money were not "offered for * * * distribution." This theory and the conclusion based thereon are not sound.

In *Asher v. Johnson*, 1938, 26 Cal.App.2d 403, 404, pages 411, 412, 79 P.2d 457, 461, the court, in discussing Tango (which in purpose, though not in technique, appears to be at least a first cousin of Bingo), observed that: "*It may not be reasonably said the game terminates when an unlucky victim plays five balls and losses. It is evident from the large receipts that the games continue.*" (Emphasis added.) In like manner it is evident from the spaciousness of defendant's quarters, the elaborateness with which they are equipped, the mechanical and electrical devices provided, the number of employees, the amount of money and War Savings Stamps provided for each session of play, the length and regularity of the sessions—in fact, from defendant's entire set-up—that the game does not terminate when the winner of a particular prize has been determined.

If, however, it may be said that the determination of the player entitled to a particular prize constitutes a game, it is obvious that all the elaborate and expensive set-up was not gotten together for the purpose of playing just a single game. It of course contemplates a repetition of the routine so long as the place stays open and there are sufficient participating patrons, and a resumption of it when the place reopens the next afternoon or evening, and so on ad infinitum. It represents a business enterprise just as much as a grocery store does. The equipment here corresponds to the counters, showcases, scales, etc., of the grocery store. The War Savings Stamps and money constitute the stock-in-trade just as the cans on the grocer's shelves constitute part of his stock-in-trade. Each can of merchandise is being offered for sale by the grocer even while it is still on his shelves. The goods are offered for sale without an over act or solicitation on his part. *State v. Dunbar*, 1886, 13 Or. 591, 11 P. 298, 57 Am.Rep. 33; *People v. Lewis*, 1910, 138 App.Div. 673, 122 N.Y.S. 1025. Likewise here the Stamps and money in the gaming room were being offered for distribution as prizes. True, they might not all be thus distributed because there might not be enough patrons playing long enough to accomplish this result. But the Stamps and money were nevertheless offered for distribution just as much as the unsold cans have been offered for sale during the day when the grocer closes his store at night.

The employees of defendant corporation thoroughly understood that at least the War Savings Stamps were a part of their stock-in-trade for distribution. Jeanne Chevalier (one of such employees) testified on cross-examination as follows:

"Q. These stamps that you brought up there were to be used by you in paying off winners of these games? A. That's right, yes.

"Q. You brought them [the War Savings Stamps] up there for the purpose of distributing them to winners? A. That's right, yes, I did.

"Q. Of this Bingo game, did you not? A. Yes."

It is suggested that under such an interpretation of the code section (325, Penal Code) the money downstairs in defendant's safe would be subject to seizure and forfeiture. This of course is not true. Such

funds would not have been appropriated to the game and, not being at the place where the game was being played, would not be a part of the stock-in-trade and consequently would not be offered for distribution as prizes. Such funds would be like the crates of canned goods the grocer still has in the warehouse. They have not yet become a part of his stock and so are not being offered for sale.

To hold that only the stamps and money that are to be given as a prize at the conclusion of one of these seven or eight minute routine operations is all that is being offered is to ignore the physical set-up and the practical operation of this game.

The judgment and order denying a motion for a new trial are reversed and the case is remanded for a new trial, appellant to recover its costs on appeal.

SHAW, P. J., concurs.

KINCAID, Justice pro tem. (dissenting).
I dissent.

The trial court has impliedly found that the money and War Savings Stamps confiscated by plaintiff from the possession of defendant were *not offered for sale or distribution*, as required by section 325, Penal Code, as a basis for its forfeiture. Viewing the evidence, as we must, most favorably in support of the judgment, we find that the bulk of the War Savings Stamps and money in question was contained in a metal box which was kept behind a glassed off compartment of the gaming room where bookkeeping was conducted. The winners of each game, the prize for which was from \$2 to \$10 in Stamps depending upon the number of players and

the amount played, were paid off in Stamps from the pockets of aprons worn by the attendants. The only Stamps or money offered for sale or distribution were the actual prizes put up for each game. Such attendants would replenish their aprons with Stamps from the box when necessary.

The evidence further shows that Stamps from the box were sold to patrons, club members and employees aside from the gaming; that \$100 of the money in question was supplied by the auditor to make change and that the box was kept in the club safe downstairs when the games were not in session. Such evidence is sufficient to support the court's implied finding that the Stamps and money in question were not offered for sale or distribution as required by section 325, Penal Code.

It is well settled that " * * * a statute imposing a forfeiture should be construed strictly, and in a manner as favorable to the person whose property is to be seized as is consistent with the fair principles of interpretation. The courts will usually give such a construction to statutes providing for forfeiture as will be consistent with justice and the dictates of natural reason." *People v. One 1939 Plymouth 6 Coupe*, 1940, 41 Cal.App.2d 559, 562, 107 P.2d 266, 267. The instant case is not within the rule laid down in the case of *Schur v. Johnson*, 1934, 2 Cal.App.2d 680, 683, 38 P.2d 844, 846, nor is the trial court's holding violative of the principle there enunciated that "Courts will not lend their aid to transactions founded on illegal contracts or acts in violation of law." See *Niccoli v. McClelland*, 1937, 21 Cal.App.2d Supp. 759, 765, 65 P.2d 853; *Asher v. Johnson*, 1938, 26 Cal.App.2d 403, 410, 79 P.2d 457.

24 Cal.2d 595

In re NAFTZGER'S ESTATE.

WEISS et al. v. NAFTZGER et al.
L. A. 18824.

Supreme Court of California.

Aug. 1, 1944.

Rehearing Denied Aug. 24, 1944.

1. Executors and administrators ⚡375

The statute granting authority to the probate court either to accept an increased bid of 10 per cent. for sale of decedent's property made in open court and forthwith confirmed the sale to the bidder, or if the court's discretion so dictates to order a new sale, does not contemplate that such bid in open court must include, in addition to the specified 10 per cent. increase, the expenses of a new sale. Probate Code, § 785.

2. Executors and administrators ⚡375

Under statute requiring sale of decedent's property to be confirmed to bidder to whom it has been sold by executor unless it appears that a sum exceeding such bid at least 10 per cent. exclusive of expenses of a new sale may be obtained and empowering court to order a new sale in such case, the term "new sale" refers to a new and independent proceeding of which notice must be given and a new sale in all respects conducted as if no previous sale had taken place, and, if court does not order such "new sale" but acts in the other alternative and confirms forthwith in the initial sale proceeding, the sale to a new bidder on bid made in open court, the new bidder is not required to increase his bid by amount of expenses of a "new sale". Probate Code, § 785.

See Words and Phrases, Permanent Edition, for all other definitions of "New Sale".

3. Executors and administrators ⚡375

Upon hearing of petition for confirmation of sale of realty by executor in probate court, sale to a new bidder upon bid made in open court in the initial proceeding is not a "new sale" within statute requiring sale of decedent's property by executor to be confirmed unless it appears that sum exceeding such bid at least 10 per cent. exclusive of the expenses of a new sale may be obtained. Probate Code, §§ 760, 761, 785.

4. Executors and administrators ⚡375

Upon hearing of petition for confirmation of sale of realty by executor, su-

perior court sitting in probate should be permitted to exercise a wise discretion in determining whether to confirm a sale by another bidder on a bid made in open court of exactly 10 per cent. more in amount than that named in the return exclusive of expenses of new sale or to order a new sale. Probate Code, § 785.

In Bank.

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Proceeding in the matter of Louise Naftzger, deceased. Fred E. Naftzger, executor of the estate of Louise Naftzger, deceased, petitioned for approval of the sale of the real property to Lawrence A. Weiss and others for \$11,500, and Beth M. Preninger made a written bid of \$12,650 in open court for the property. From an order confirming a sale of the property to Beth M. Preninger and from an order refusing to set aside such confirmation order, Lawrence A. Weiss and others appeal.

Orders affirmed.

Prior opinion 144 P.2d 614.

Ernest C. Griffith, of Los Angeles, for appellants.

L. S. B. Ritchie, of Los Angeles, for respondents.

SCHAUER, Justice.

This appeal presents the question of whether on the hearing of a petition to confirm a sale of real property of a decedent's estate the probate court is authorized by section 785 of the Probate Code (hereinafter quoted) to confirm a sale to a new bidder for a price which is "ten per cent more in amount than that named in the return [petition]" but is not 10 per cent more than such amount plus expenses of sale. We have concluded that such increased price may properly be accepted and the sale to the new bidder forthwith confirmed.

Respondent Fred E. Naftzger, as the duly appointed and qualified executor of the last will and testament of Louise E. Naftzger, deceased, and pursuant to authority granted by such will, sold to contestants-appellants, at private sale, for the sum of \$11,500 cash, certain real property of the estate. A petition for confirmation of the sale, reciting that "No broker's commission is payable on said sale," was duly filed with the superior court, sitting in probate, and

at the hearing upon such petition respondent Beth M. Preninger (to whom the designation "respondent" will hereinafter refer) made a written bid in open court for the property. The bid offered \$12,650 cash (exactly 10 per cent more than the original bid) and stated that "The name of real estate agent procuring within bid, and to whom commission is to be paid, according to law, if confirmed by court to within bidder is as follows: Geo. S. Preninger." The court accepted such bid, confirmed the sale to respondent, and ordered the payment of a commission of \$345 to the real estate agent named in the bid.

Thereafter appellants petitioned the probate court to set aside the order of confirmation. From an order denying such petition and from the order confirming the sale to respondent this appeal is taken.

Determination of the limits within which the probate court has discretion to act under the circumstances outlined above rests on the construction to be placed upon the provisions of section 785 of the Probate Code. That section reads as follows: "Upon the hearing the court must examine into the necessity for the sale, or the advantage, benefit and interest of the estate in having the sale made, and must examine the return and witnesses in relation to the sale; and if it appears to the court that good reason existed for the sale, that the sale was legally made and fairly conducted, and complied with the requirements of the previous section, that the sum bid is not disproportionate to the value, and it does not appear that a sum exceeding such bid at least ten per cent exclusive of the expenses of a new sale may be obtained, the court shall make an order confirming the sale and directing conveyances to be executed; otherwise it shall vacate the sale and direct another to be had, of which notice must be given and the sale in all respects conducted as if no previous sale had taken place. But if a written offer of ten per cent more in amount than that named in the return is made to the court by a responsible person, and the bid complies with all provisions of the law, it is in the discretion of the court to accept such offer and confirm the sale to such person or to order a new sale."

Appellants contend, in effect, that the last sentence of the quoted section must be understood as merely providing an alternative procedure for a factual situation already governed by the preceding sentence and not

as authorizing a special procedure peculiar to a *different or excepted* situation. In other words, it is appellants' contention that the last sentence should be interpreted as though it read: "But if a written offer of *at least* ten per cent more in amount than that named in the return, *exclusive of the expenses of a new sale* [we assume that appellants intend to include the meaning: *exclusive of any expense on confirmation of sale to the new bidder in the original sale proceeding*] is made to the court by a responsible person and the bid complies with all provisions of the law, it is in the discretion of the court to accept such offer and confirm the sale [to such person] or [to] order a new sale"; that the phrase "expenses of a new sale" (which we assume is intended to include "expenses on confirmation of sale to new bidder") must be "read into" the last sentence of the section to "avoid a conflict between such last sentence and the one which immediately precedes it, governing the probate court's powers and duties"; and that inasmuch as the bid which respondent made in open court at the time of the hearing on the petition for confirmation of sale was a "bare ten per cent above the amount of appellants' bid, and expressly provided for the payment of real estate agent's commissions" the probate court erred in accepting such bid and confirming the sale to respondent.

Respondent, on the other hand, asserts, in effect, that the last sentence of section 785 operates to add a special procedure for a certain factual situation which is specifically defined therein and which is not included in the first sentence. If the language of the first sentence could be construed to include such situation then the last sentence constitutes an exception or proviso to the first. In any event, contends respondent, the unambiguous language of the last sentence gives the probate court the authority, in its discretion, to accept a bid of at least 10 per cent more in amount than that named in the return or to order *a new sale*, and the requirement that the expenses of a new sale be included in any increased bid applies only in case the court vacates the entire sale and directs "another to be had, of which notice must be given and the sale in all respects conducted as if no previous sale had taken place."

No case has been cited to us and we have discovered none in which the precise point here involved has been heretofore

ruled upon by an appellate court of this state. Each party to this appeal argues that certain language which appears in *Re Estate of Flaherty* (1924), 69 Cal.App. 429, 231 P. 591, supports his position here. There, however, disregarding all question of the expenses of sale, the bid made in open court fell short of being 10 per cent more in amount than that named in the return. Therefore the remarks of the District Court of Appeal in directing the trial court to confirm the sale to the bidder named in the return can have no persuasive force for or against either party here; the situations materially differ. Nor can it be said that the factual situation upon which the court acted in *Re Pearsons' Estate* (1893), 98 Cal. 603, 613, 33 P. 451, or in *Re Estate of Reed* (1906), 3 Cal.App. 142, 85 P. 155, is analogous to that in the instant case.

[1] We are of the opinion, however, that the section under consideration should be read and interpreted exactly as it is written. The second sentence thereof begins with the word "But," which word, it has been said, "indicates that what follows is an exception to that which has gone before, and that, therefore, what is said before the word does not control that which follows it; that it is an appropriate term to indicate the intention of those who use it to limit or restrain the sense or effect of something which had before been said, or to indicate a proviso, condition, or qualification. * * * The word has been held synonymous with, or equivalent to, 'except,' and 'provided.' * * *" (12 C.J.S., But, pp. 858, 859.) So construing the use of the word here, it appears that the authority granted the probate court either to accept an increased bid of 10 per cent made in open court and forthwith confirm the sale to the bidder or, if the court's discretion so dictates, "to order a new sale," does not contemplate that such bid in open court must include in addition to the specified 10 per cent increase, "the expenses of a new sale."

[2,3] The term "new sale" is apparently used in the quoted statute as referring to a new and independent proceeding "of which notice must be given and the [new] sale in all respects conducted as if no previous sale had taken place." (Prob.Code, § 785.) If the court does not order such

"new sale" but acts in the other alternative and confirms forthwith in the initial sale proceeding the sale to the new bidder there is apparent no sound basis for requiring the new bidder to increase his bid by the amount of the expenses of a "new sale" which is not going to occur. The sale to the new bidder confirmed in the initial proceeding apparently is not a "new sale" within the contemplation of the code section. It is perhaps significant, in this connection, that provision is made in section 761 of the Probate Code for division of a real estate agent's commission between an agent who, in reliance on a written contract of employment (Prob.Code, § 760), has secured the bid named in the return and another agent who secures an increased bid which is made and accepted in open court, but there is no requirement that additional commission payable by reason of the increased bid must be added to the amount of such bid.

[4] We are of the view that the probate court should be permitted "the exercise of a wise discretion" (see *In re Estate of Griffith* (1900), 127 Cal. 543, 544, 59 P. 988; see also, *Gossman v. Gossman* (1942), 52 Cal.App.2d 184, 194, 195, 126 P.2d 178) in determining whether to confirm a sale on a bid made in open court of barely 10 per cent more in amount than that named in the return, or to order a new sale. We perceive no sufficient reason for reading into the second sentence of section 785 the requirement that to "ten per cent more in amount than that named in the return"—which amount "named in the return" in the contemplation of the statute may be subject to the payment of commissions and other expenses—there be added some assumed amount equal to the expenses of "a new sale" which is not to take place or an amount equal to an expense which may be incident on confirmation of the sale in the original proceedings to the new bidder. (See *In re Estate of Bradley* (1914), 168 Cal. 655, 660, 144 P. 136.) The statute itself does not specify such requirement; we shall not add it.

For the reasons above stated the orders appealed from are affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

24 Cal.2d 654**ASH v. MORTENSEN et al.****L. A. 18842.****Supreme Court of California.****Aug. 11, 1944.****Rehearing Denied Sept. 5, 1944.****1. Damages ⇨34**

Where one sustains injuries as result of negligence of tort-feasor and exercises due care in securing services of a physician and his injuries are aggravated by physician's negligence, original tort-feasor's act is proximate cause of damages flowing from subsequent negligent medical treatment.

2. Action ⇨53(2)

Plaintiff injured in automobile accident could sue motorist for damages resulting from such injury alone and could separately sue physicians for additional injury resulting from malpractice in treating such injury, and the order of bringing such actions would be immaterial.

3. Judgment ⇨590(2, 3)

In action against physicians for aggravation of injury sustained in automobile accident because of physicians' malpractice in treating such injury, plea of former recovery from motorist involved consideration of what plaintiff did in fact recover in her previous action against motorist rather than what she could have recovered therein.

4. Release ⇨29(3)

The common-law rule of unity of discharge of one tort-feasor by release of another tort-feasor is based on the concept of unity of cause of action against joint tort-feasors and does not apply to independent tort-feasors whose separate acts cause injuries to same party.

5. Release ⇨27

The rule that release of original wrongdoer causing personal injury releases attending doctor from liability for malpractice in treating such injury, applied in some jurisdictions and reached by treating the independent wrongdoers as joint tort-feasors, does not apply in California.

6. Release ⇨29(3)

A release of a cause of action against one wrongdoer is not a release of a separate cause of action against another independent wrongdoer.

7. Release ⇨27

The action of plaintiff, injured in an automobile accident, in releasing motorist from liability after motorist paid part of judgment recovered against him did not discharge cause of action against physicians for malpractice in treating injury sustained in such action.

8. Release ⇨27

A release of original wrongdoer whose negligence in driving automobile caused injury should release an attending physician from liability for aggravation of the injury by malpractice if there has been full compensation for both injuries, but not otherwise.

9. Release ⇨27

Where plaintiff recovered \$15,000 judgment against motorist for injuries sustained in automobile accident and, on payment of a little over third of such judgment plaintiff released motorist from liability, plaintiff could recover from physicians for malpractice in treating the injury, there being no evidence that until plaintiff received an amount in excess of amount of such judgment she would be compensated twice for same injury.

10. Release ⇨29(3)

The presumption sometimes indulged that payment of any sum in consideration of release of one of several joint or independent concurrent tort-feasors has been made and accepted as full compensation for the injury where claim based thereon constitutes an unliquidated tort demand, cannot be indulged where claim embraces separate injuries caused by independent successive tort-feasors and is liquidated by a judgment against original tort-feasor.

11. Judgment ⇨585(3), 590(2)

The jury's award of damages in action against motorist for injuries is not res judicata as to physicians whose alleged malpractice in treating the injury aggravated such injury, and such physicians have right to show what damages, if any, were actually suffered by alleged malpractice and to have jury's award in action against them restricted to the difference between such damage and any sum already received by plaintiff from motorist as compensation therefor.

12. Release ⇨57(1)

Where plaintiff, after recovering judgment against motorist for injuries in auto-

mobile accident and after receiving payment of a little over one third thereof, satisfied judgment of record and released motorist from further liability, and in subsequent action against physicians for malpractice in treating such injury, physicians successfully objected to plaintiff's attempt to introduce evidence of nature and extent of the separate injuries caused by the successive wrongdoers, record did not show that recovery of judgment against physicians would amount to a double recovery.

In Bank.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action by Edith M. Ash against W. S. Mortensen and another for malpractice. Judgment for defendants, and plaintiff appeals.

Reversed.

Prior opinion, 140 P.2d 437.

Anne O'Keefe and Ralph C. Curren, both of Los Angeles, for appellant.

Chase, Barnes & Chase and Wm. M. Rains, all of Los Angeles, for respondents.

GIBSON, Chief Justice.

Plaintiff was injured in an automobile accident and received medical and surgical treatment necessitated thereby. In 1940 she sued Robert Wubben, the negligent motorist, and recovered judgment in the sum of \$15,000. Upon payment by Wubben of \$5,753.22 the judgment was satisfied of record and plaintiff signed a document releasing him from further liability.

In August, 1941, plaintiff brought the present malpractice action against W. S. Mortensen and W. L. Mortensen, the doctors who treated her injuries. Among other things, it was alleged that defendants negligently treated a fracture of the femur bones by failing to secure them in position, and that, notwithstanding the fact that an X-ray picture showed the bones were out of position, defendants failed to reset them and knowingly permitted them to heal in improper alignment as a result of which plaintiff's legs were shortened and bowed and their use practically lost to her for life.

In their answers defendants set up the affirmative defense that the judgment, satisfaction of record and release in the first action against Wubben operated to

discharge any liability on their part. The issues thus tendered by the answers were separately tried, and the court concluded that the facts pleaded constituted a complete defense to this action. Accordingly, judgment was entered in favor of each defendant, with costs, and this appeal followed.

Plaintiff urges that under general principles of tort law the release of Wubben in consideration of part payment of the judgment against him does not bar this malpractice action against defendants who allegedly were negligent in treating the injuries inflicted by Wubben. Defendants, on the other hand, contend that since a person should not be twice compensated for the same injury and since plaintiff could have recovered compensation for damages resulting from the alleged malpractice in the action against Wubben, the release of Wubben and the satisfaction of the judgment in that action are a complete defense to this action.

[1-3] It is settled that where one who has suffered personal injuries by reason of the tortious act of another exercises due care in securing the services of a doctor and his injuries are aggravated by the negligence of such doctor, the law regards the act of the original wrongdoer as a proximate cause of the damages flowing from the subsequent negligent medical treatment and holds him liable therefor. *Dewhurst v. Leopold*, 194 Cal. 424, 433, 229 P. 30; Rest., Torts, § 457; *McCormick*, Damages, p. 272; note, 39 A.L.R. 1268. But the fact that plaintiff could have obtained full compensation for all damages in the action against Wubben, the original wrongdoer, does not establish that she has been so compensated. The independent and successive acts of Wubben and defendant doctors, differing in time and place of commission as well as in nature, produced two separate injuries and gave rise to two distinct causes of action. Plaintiff was at liberty to sue Wubben for damages resulting from the original injury alone, and to sue defendants for damages resulting from the additional injury or aggravation, in separate actions; and the order in which such actions might be brought would be immaterial. See *Parkell v. Fitzporter*, 301 Mo. 217, 256 S.W. 239, 243, 29 A.L.R. 1305; Rest., Torts, § 879, Illus. 3. The plea of former recovery, therefore, involves a consideration of what the injured party did in fact recover in her action against the origi-

nal wrongdoer rather than what she could have recovered therein. *Wheat v. Carter*, 79 N.H. 150, 106 A. 602; *Parkell v. Fitzporter*, 301 Mo. 217, 256 S.W. 239, 29 A.L.R. 1305, *supra*; *Staehlin v. Hochdoerfer*, Mo.Sup. 235 S.W. 1060; *cf. Smith v. Coleman*, 46 Cal.App.2d 507, 116 P.2d 133; *Viita v. Dolan* (*Viita v. Fleming*), 132 Minn. 128, 155 N.W. 1077, 1080, L.R.A. 1916D, 644, Ann.Cas.1917E, 678.

[4, 5] Defendants insist, however, that without regard to the evidence introduced in the action against Wubben, and thus without regard to the nature and extent of the recovery therein, the release of Wubben from all liability operated to discharge them from liability for any negligent aggravation of the original injury. In their view, the amount of damages sustained by plaintiff, the sum received as consideration for the release, and the relation between the two, the intention of the parties, and the fact that Wubben and defendant doctors are independent rather than joint wrongdoers, are immaterial. In other words, defendants seek to substitute a rule of law for the factual defense of double recovery. The rule contended for has been adopted in a number of jurisdictions. *Feinstone v. Allison Hospital*, 106 Fla. 302, 143 So. 251; *Paris v. Crittenden*, 142 Kan. 296, 46 P.2d 633; *Smith v. Mann*, 184 Minn. 485, 239 N.W. 223; *Adams v. DeYoe*, 166 A. 485, 11 N.J. Misc. 319; *Milks v. McIver*, 264 N.Y. 267, 190 N.E. 487; *Tanner v. Espey*, 128 Ohio 82, 190 N.E. 229; *Thompson v. Fox*, 326 Pa. 209, 192 A. 107, 112 A.L.R. 550; *Martin v. Cunningham*, 93 Wash. 517, 161 P. 355, L.R.A.1918A, 225; *Mier v. Yoho*, 114 W.Va. 248, 171 S.E. 535; *cf. Wells v. Gould*, 131 Me. 192, 160 A. 30; 112 A.L.R. 553. But the conclusion that the release of the original wrongdoer releases the attending doctor from liability for malpractice has been reached by treating the independent wrongdoers as joint tortfeasors or applying, by analogy, the common-law rule of unity of discharge affecting joint tortfeasors. The common-law rule of unity of discharge is based on the concept of the unity of a cause of action against joint tortfeasors, and its application to the facts of the present case would give the independent tortfeasors herein an advantage wholly inconsistent with the nature of their liability. Moreover, the rule contended for by defendants would stifle compromises, favored in the law, inasmuch as the injured person could not effect a

settlement with the original wrongdoer without surrendering his separate cause of action against one who, by his independent tortious act, aggravated the injury.

[6-8] A release of a cause of action against a wrongdoer is not a release of a separate or distinct cause of action against another independent wrongdoer. It follows that the mere release of Wubben from liability did not result in the discharge of the cause of action against defendants. We are of the opinion that a release of the original wrongdoer should release an attending doctor from liability for aggravation of the injury "if there has been full compensation for both injuries, but not otherwise." *Prosser, Joint Torts and Several Liability*, 25 Cal.L.Rev. 413, 435; *Wheat v. Carter*, 79 N.H. 150, 106 A. 602; *cf. Smith v. Coleman*, 46 Cal.App.2d 507, 513, 116 P.2d 133; *Wallner v. Barry*, 207 Cal. 465, 473, 279 P. 148.

[9] Defendants next contend that plaintiff has in fact received full compensation for both injuries. They argue, in this respect, that Dr. W. L. Mortensen, appearing as a witness for plaintiff in her action against Wubben, gave testimony concerning injuries which plaintiff now asserts resulted from their negligence and for which she seeks damages in this suit, and that the judgment against Wubben necessarily included an award for damages suffered by reason of malpractice. Even if we assume, for purposes of argument, that in her action against Wubben plaintiff sought to recover all the elements of damages to which she may be entitled, the record does not support the contention that plaintiff has received full compensation for both injuries. The only approximation of fair compensation for all the damages sustained by plaintiff which the record in this case offers is the sum of \$15,000, the amount of the judgment against Wubben. Until plaintiff has received money in excess of that figure, there is nothing to show that she has been compensated twice for the same injury. It is undisputed that plaintiff received only \$5,753.22, or slightly more than one-third of the amount of the judgment, and, in our opinion, she is entitled to recover from defendants for actual damages suffered by reason of their tortious acts, if any, for which she has received no compensation.

[10] It has been held in some cases involving unliquidated tort demands that the

payment of any sum in consideration of the release of one of several joint or independent concurrent tortfeasors will be presumed to have been made and accepted as full compensation or satisfaction for the alleged injury. *Hawber v. Raley*, 92 Cal. App. 701, 268 P. 943; *Flynn v. Manson*, 19 Cal.App. 400, 126 P. 181; *Dwy v. Connecticut Co.*, 89 Conn. 74, 92 A. 883, L.R.A. 1915E, 800, Ann.Cas.1918D, 270; *Masterson v. Berlin St. R. Co.*, 83 N.H. 190, 139 A. 753; see *Dougherty v. California Kettleman Oil Royalties, Inc.*, 13 Cal.2d 174, 181, 88 P.2d 690; cf. *Tompkins v. Clay St. R. R.*, 66 Cal. 163, 4 P. 1165. There is also authority to the contrary. *McKenna v. Austin*, 77 U.S.App.D.C. 228, 134 F.2d 659, 148 A.L.R. 1253. But whatever may be the rule with regard to a settlement with joint or independent tortfeasors whose acts concur to produce a single injury, it does not follow that such presumption should be indulged where, as here, the injured person's claim embraces separate injuries caused by independent successive tortfeasors and is liquidated by a judgment against the original tortfeasor. The presumption of full compensation or satisfaction found in the cited cases must be based on the fact that there is but a single indivisible injury and that the claim arising therefrom is unliquidated. Under the circumstances of this case, it would be more logical to presume that part payment of the Wubben judgment represented merely the best obtainable compromise for the liability of the judgment debtor. Cf. *McKenna v. Austin*, supra, 77 U.S.App.D.C. 228, 134 F.2d page 664, 148 A.L.R. 1253.

[11, 12] We do not wish to be understood as holding that in every case of this kind the question of double recovery is to be determined solely by reference to the amount awarded in the first action. The jury's award in the action against Wubben is not binding on defendants or res judicata as to them. They have the right to show what damage, if any, was actually suffered by reason of malpractice and to have the jury's award in this action restricted to the difference between such damage and any sum already received by plaintiff as compensation therefor. Defendants, however, successfully objected to an attempt by plaintiff to introduce evidence of the nature and extent of the separate injuries caused by the successive wrongdoers. There was therefore no consideration of the actual facts, and the rec-

ord is devoid of evidence from which double recovery could be inferred.

The judgments are reversed.

SHENK, CURTIS, CARTER, and SCHAUER, JJ., concurred.

TRAYNOR, Justice.

I concur in the judgment. When plaintiff's action against Wubben was tried, she was still under the medical care of the defendants. On the trial of the action one of the defendants testified with regard to the nature of the injury suffered by plaintiff, the progress of her recuperation until the date of trial, and her prospects for recovery. He stated that plaintiff's right leg had improved enough so that she could put weight on it, but that the fracture of the left leg had not healed as well, because the ends of the bone were not end to end, and that it might be another month or two before there was a callous formation. Unless the hardening took place within that time it would be necessary to use surgery to fasten the ends of the bone with a metal plate and screws. As to the probability of plaintiff's future ability to walk he said: "In any event, she probably will not be able to walk at all normally with these legs in less than a year's time, from the time of the accident. At that time she may be left with some impairment to her walking." Plaintiff contends that the defendants were negligent, on the grounds that they failed to secure the bones in proper position before making the cast, and failed to reset the bones properly after discovering the improper alignment through X-rays. She claims that as a result of this negligence she is not able to walk for more than short distances. The \$15,000 judgment, insofar as it took into account plaintiff's impaired physical condition, was based on the expert testimony of one of the defendants; therefore neither defendants' possible negligence nor its possible consequences beyond the complications of the healing process described in the testimony had any influence on the judgment. There is nothing in the record to indicate that plaintiff had any information as to the alleged malpractice when she entered into the agreement with Wubben after the judgment. For the purposes of this appeal it must therefore be assumed that at the time of the trial of her action against Wubben and of her agreement with him, plaintiff was ignorant of any negligence of the defendants and acted

on the advice received from the defendants as her physicians.

If the improper alignment of the bones in the left leg was a consequence of defendants' negligence, it was also a consequence of the accident which the jury could properly consider in reaching its verdict, since defendants' testimony revealed plaintiff's aggravated condition. Other consequences of defendants' alleged negligence, however, such as the alleged failure to reset the bones properly, were not considered on the trial, and the \$15,000 judgment therefore does not fully reflect the injury allegedly caused by negligence of the defendants.

Any injury caused by malpractice of defendants that was not disclosed by the expert testimony at the trial and that was therefore not reflected in the judgment can be recovered in this action, although the judgment rendered in plaintiff's action against Wubben is *res judicata* insofar as it was based on the same facts as in the present action. *Bernhard v. Bank of America*, 19 Cal.2d 807, 812, 122 P.2d 892; *Good Health, etc., Corp. v. Emery*, 275 N.Y. 14, 9 N.E.2d 758, 112 A.L.R. 401. Defendants cannot rely on the former judgment as *res judicata* insofar as their own misrepresentations, though innocently made, led to plaintiff's failure to include her entire claim in the original action. *White v. Adler*, 289 N.Y. 34, 43 N.E.2d 798, 142 A.L.R. 898, 905; *Vineseck v. Great Northern R. Co.*, 136 Minn. 96, 161 N.W. 494, 2 A.L.R. 530, 531, 534; *Restatement: Judgments*, § 62(b) and *Comment*; see *Panos v. Great Western Packing Co.*, 21 Cal.2d 636, 134 P.2d 242.

As to that part of the injury caused by defendants and included in plaintiff's action against Wubben, the judgment in that action cannot alone discharge defendants, but satisfaction of that judgment would discharge them in the absence of duress, fraud, or mistake. The applicable rule is set forth in section 95 of the *Restatement of Judgments*: "The discharge or satisfaction of a judgment against one of several persons each of whom is liable for a tort, breach of contract, or other breach of duty, discharges each of the others from liability therefor." See, also, *Restatement: Torts*, § 886. This rule applies when the original wrongdoer satisfies a judgment that includes damages for aggravation of the injury because of the negligence of an independent tort-feasor. *Restatement: Judgments*, § 95, *Comment c*; see *Butler v.*

Ashworth, 110 Cal. 614, 43 P. 4, 386; *Milks v. McIver*, 264 N.Y. 267, 190 N.E. 487; *Phillips v. Werndorff*, 215 Iowa 521, 243 N.W. 525; *Thompson v. Fox*, 326 Pa. 209, 192 A. 107, 112 A.L.R. 550; 29 *Columb.L. Rev.* 630, 634; 18 *Cornell L.Q.* 257, 258; 41 *Am.Jur.*, *Physicians and Surgeons*, § 137. Where a judgment against a defendant responsible for the entire harm is satisfied as a whole, the obligation of another obligor is extinguished, whether the judgment was discharged by payment of its full amount or by any other performance received in satisfaction of the judgment. "The fact that plaintiff recovered only part of the damages to which he was entitled is immaterial" (2 *Freeman on Judgments* (1925), § 578, p. 1225; *Blackman v. Simpson*, 120 Mich. 377, 79 N.W. 573, 58 L.R.A. 410; *Westbrook v. Mize*, 35 Kan. 299, 10 P. 881), if the injured person has received "what in law is deemed the equivalent" to actual satisfaction. *Urton v. Price*, 57 Cal. 270, 272; see *Dawson v. Schloss*, 93 Cal. 194, 199, 29 P. 31; *Chetwood v. California Nat. Bank*, 113 Cal. 414, 45 P. 704; *Tompkin v. Clay St. R. R.*, 66 Cal. 163, 4 P. 1165; *Butler v. Ashworth*, 110 Cal. 614, 43 P. 4, 386; *Grundel v. Union Iron Works*, 127 Cal. 438, 442, 47 L.R.A. 467, 59 P. 826, 78 *Am.St.Rep.* 75; *Black v. Bringhurst*, 7 Cal.App.2d 711, 46 P.2d 993; *Minehan v. Silveria*, 11 Cal.App.2d 266, 53 P.2d 770; 6 *Cal.L.Rev.* 230.

Plaintiff, according to the instrument she executed, received \$5,753.22 "for the purpose of making a full and final compromise, adjustment and settlement of all claims for injuries, losses and damages resulting or to result from said accident" and discharged Wubben "from any and all actions, causes of actions, claims and demands of whatsoever kind or nature on account of any and all known and unknown injuries, losses and damages." It was therefore the obvious intention of the parties to have the payment of \$5,753.22 extinguish the entire judgment, not merely a part of it. By thus discharging Wubben's entire obligation, the parties did not intend to reserve plaintiff's rights against the other tortfeasors for any damages covered by the judgment; nor could they have so intended, for neither of them knew or suspected that plaintiff had any claim against defendants. If "facts and intentions * * * control" (*McKenna v. Austin*, 77 U.S.App.D.C. 228, 134 F.2d 659, 664, 148 A.L.R. 1253), the settlement was made and accepted in full satisfaction of the judgment. Plaintiff's

right of action against defendants for any damages covered by the judgment would therefore be barred were it not for the fact that the agreement between her and Wubben was made in ignorance of her claim against them. A general release purporting to cover all claims does not extend to claims that the creditor does not know or suspect exist in his favor at the time of executing the release, if knowledge of such claims would have materially affected his settlement with the debtor. Civ.Code, § 1542; *Backus v. Sessions*, 17 Cal.2d 380, 110 P.2d 51; *O'Meara v. Haiden*, 204 Cal. 354, 268 P. 334, 60 A.L.R. 1381; see 30 Cal.L.Rev. 111; 96 A.L.R. 1144. The provision in the release making it applicable to "unknown injuries, losses and damages" relates only to unknown claims against Wubben (see *Berry v. Struble*, 20 Cal.App. 2d 299, 66 P.2d 746), but not to unknown claims against others.

Plaintiff in the present action may therefore recover: (a) damages for that part of the injury that can be attributed to malpractice of the defendants, which, because of their representations, innocent or otherwise, were not included in the judgment against Wubben; (b) that part of the damages included in the judgment against Wubben that can be attributed to malpractice of defendants, less such part, if any, of the \$5,753.22 already received from Wubben as exceeds the amount of damages for which Wubben is alone responsible.

EDMUNDS, J., concurred.



24 Cal.2d 627

IMPERIAL BEVERAGE CO. et al. v. SUPERIOR COURT OF ALAMEDA COUNTY et al.

CHARLES E. HIRES CO. v. SAME.
S. F. 16929, 16930.

Supreme Court of California.
Aug. 4, 1944.

1. Appeal and error ⇨460(2)

A judgment in defendants' favor for their costs is not "judgment directing payment of money" within statute requiring undertaking to stay execution pending appeal from such judgment, and hence is

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stayed by perfection of appeal. Code Civ. Proc. §§ 942, 946, 949.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment Directing Payment of Money".

2. Appeal and error ⇨441

An appeal from judgment and stay of all proceedings thereon in court below do not deprive such court of jurisdiction to settle bill of exceptions. Code Civ.Proc. § 946.

3. Appeal and error ⇨441

After appeal from judgment and stay of all further proceedings thereon in trial court, such court ordinarily has jurisdiction and owes duty to take all steps and make all orders necessary for preparation of proper and correct record on appeal.

4. Army and navy ⇨24

The trial court had jurisdiction to make and enforce an order staying proceedings on appeal from judgment for defendants, pursuant to Soldiers' and Sailors' Civil Relief Act, on ground of plaintiff's inability to prosecute action because of his military service. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A. Appendix, § 521.

5. Certiorari ⇨5(1)

An order staying proceedings on appeal from judgment for defendants, pursuant to Soldiers' and Sailors' Civil Relief Act, for period of plaintiff's military service and 60 days thereafter, was not a "special order made after final judgment", but merely extended time for preparation of record on appeal, and hence was not appealable, but reviewable on certiorari. Code Civ.Proc. §§ 963, subd. 2, 1068; Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A. Appendix, § 521.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Order after Final Judgment".

6. Appeal and error ⇨82(1)

An intermediate procedural order, extending time to prepare record on appeal from judgment, is not an "order affecting the judgment", and hence is not appealable as "special order after final judgment", whether extension is for fixed or indefinite time. Code Civ.Proc. § 963, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Order Affecting the Judgment".

7. Appeal and error ⇨441

The trial court had jurisdiction to make order staying proceedings in personal injury action, pursuant to Soldiers' and Sailors' Civil Relief Act, after appeal from judgment for defendants, as against contention that jurisdiction over action was vested in appellate court, since appeal merely stayed judgment, not proceedings to prepare record on appeal, and order was limited to proceedings necessary to perfect appeal. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A. Appendix, § 521.

8. Army and navy ⇨24

The trial court's order, granting plaintiff's motion to stay proceedings in personal injury action pursuant to Soldiers' and Sailors' Civil Relief Act, after plaintiff filed notice of appeal from judgment for defendant, was valid until revoked by such court, though it denied plaintiff's previous motion for stay of proceedings after entry of judgment and plaintiff made no affidavit showing new facts claimed, but based second motion on same facts as first motion. Code Civ.Proc. § 1008; Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A. Appendix, § 521.

9. Certiorari ⇨28(2)

A writ of certiorari cannot be granted, unless inferior tribunal, exercising judicial functions, exceeded its jurisdiction. Code Civ.Proc. § 1068.

10. Motions ⇨64

A plea of *res judicata*, though a good defense to action in which interposed, does not deprive court of jurisdiction over action or of jurisdiction to pass on and decide motion for stay of proceedings after having decided a like motion.

11. Army and navy ⇨24

Under provision of Soldiers' and Sailors' Civil Relief Act that any court proceeding in which person in military service is involved shall be stayed on his application at any stage thereof, unless his ability to prosecute or defend action is not materially affected because of such service in court's opinion, trial court has power to grant motion by soldier plaintiff in personal injury suit to stay proceedings therein after filing of his notice of appeal from judgment for defendants. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A. Appendix, § 521.

12. Army and navy ⇨34

The Soldiers' and Sailors' Civil Relief Act must be liberally construed to protect persons in military service, and discretion vested in trial court thereby to stay proceedings in which such persons are involved should not be withheld on nice calculations as to whether prejudice may result from such person's absence or absence result from service. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A. Appendix, § 521.

13. Army and navy ⇨24

In personal injury action by person in military service, evidence was sufficient to justify conclusion that plaintiff's ability to prosecute appeal from judgment for defendants was materially affected by such service, so that court did not abuse its discretion in granting plaintiff's motion to stay further proceedings in action after filing of notice of his appeal from judgment. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A. Appendix, § 521.

SCHAUER, EDMONDS, and CARTER, JJ., dissenting in part.

Certiorari proceedings by the Imperial Beverage Company and another and by the Charles E. Hires Company to review orders of the Superior Court of Alameda County staying proceedings in an action against petitioners by Dino Preftokis for personal injuries.

Orders affirmed.

Hoge, Pelton & Gunther and A. Dal Thomson, all of San Francisco, for petitioners Imperial Beverage Co. and others.

Theodore Hale and Carroll B. Crawford, both of San Francisco, for petitioner Charles E. Hires Co.

John J. Healy, Jr., of San Francisco, and Louis Deadrich, of Oakland, for respondents.

CURTIS, Justice.

These two proceedings grew out of a personal injury action brought by one Dino Preftokis in the Superior Court of the County of Alameda against the three petitioners herein. One of the petitions is a joint petition by the Imperial Beverage Company and the New Century Beverage Company, and the other is by the Charles E. Hires Company alone. All of them were defendants in said personal injury action and they will occasionally be referred to as defendants. The trial of said action was

before the court with a jury and resulted in a verdict in favor of the defendants, upon which a judgment was entered against the plaintiff, Dino Preftokis, who will be referred to herein as the plaintiff. Thereafter plaintiff moved for a new trial and for a stay of all proceedings in said action under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. Appendix, §§ 501-585; hereinafter referred to as the act. The trial court denied both of these motions. The plaintiff then filed a notice of appeal from the judgment and made a second motion for a stay of proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940. This motion for a stay was granted. The order of the court granting said motion was of date February 15, 1943, and, as subsequently modified, is as follows: "That the motion to stay any further proceedings including proceedings on appeal be and the same is hereby granted, on the ground, that, in the opinion of this Court, the plaintiff cannot properly prosecute this action, by reason of his military service; and that said plaintiff, Dino Preftokis, is granted a stay of proceedings for the period of his military service in the armed forces of the United States of America and for a period of sixty days thereafter, in which to prepare his record on appeal, together with the bill of exceptions."

Thereafter these two proceedings were instituted to review said order of the court staying the proceedings in said action. In compliance with an order of this court granting the petitions for review, all proceedings in the trial court relating to each of the two stay orders have been certified to this court by the respondents and are now before us for our consideration. The same factual situation is presented in each of these two proceedings, and the same legal questions involved in one proceeding are present in the other. For this reason only one opinion will be necessary for the decision of both matters.

It may be well to state at the outset that the order under review was made by the trial court and these proceedings were instituted to review the same prior to the adoption of the "New Rules on Appeal" effective July 1, 1943. The discussion therefore of the question herein involved deals with the procedure on appeal prior to the effective date of the new rules.

The first question with which we are confronted is whether the writ of review

is a proper proceeding to test the validity of the order staying proceedings in said action before the court. Neither the respondents nor the plaintiff in the trial court, who, besides the petitioners, is the only real party in interest in the proceedings now before us, have made any appearance herein nor has either of them furnished us with any brief or argument in any form in opposition to the granting of the present petitions.

By section 1068 of the Code of Civil Procedure a writ of review may be granted when an inferior court, exercising judicial functions, has exceeded its jurisdiction and there is no appeal nor other adequate remedy. We know of no other remedy that could be employed to test the challenged order now before us except that of appeal or review. Accordingly, if the order of stay is appealable, review will not lie. Appealable orders are enumerated in section 963 of the Code of Civil Procedure. Among such orders is "any special order made after final judgment." An order to stay proceedings in a court where the action is pending is not specifically mentioned in said section or elsewhere in the Code of Civil Procedure, and petitioners tacitly admit that if the order of stay now before us is a special order made after judgment within the meaning of section 963 of the Code of Civil Procedure, it is an appealable order and not reviewable under certiorari proceedings. They contend, however, that it is not such an order and therefore certiorari will lie to review it.

Section 521 of the act reads as follows: "Stay of proceedings where military service affects conduct thereof.

"At any stage thereof *any action or proceeding* in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and *shall*, on application to it by such person or some person on his behalf, *be stayed* as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service." (Italics ours.) This section is § 201, chap. 888, 54 U.S. Stats. 1178, 1181.

[1] It will thus be seen that the provisions of the act are made applicable at any stage of the action, either before or

after trial and judgment, and before or after an appeal has been taken from the judgment. If made after appeal and the execution of the judgment is stayed by the appeal, the order of the court under the act cannot in any manner be held to stay execution on the judgment, for the judgment is already stayed by the appeal. (Code Civ. Proc. § 946.) The judgment in the present action, as entered upon the verdict of the jury, provided that plaintiff take nothing by said action and that defendants recover from plaintiff their costs, amounting to the sums of \$19.64 and \$135.40. Although judgment was rendered in defendants' favor for their costs, such a judgment is not one directing the payment of money mentioned in section 942 of the Code of Civil Procedure, and is therefore stayed by the provisions of section 949 of the same code. *McCallion v. Hibernia, etc., Society*, 98 Cal. 442, 445, 33 P. 329; *Jensen v. Hugh Evans & Co.*, 13 Cal.2d 401, 406, 90 P.2d 72.

[2-4] Section 946 of the Code of Civil Procedure provides: "Whenever an appeal is perfected * * * it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein, * * *; *but the court below may proceed upon any other matter embraced in the action and not affected by the order appealed from.*" (Italics ours.) An appeal from the judgment and a stay of all proceedings therein does not deprive the trial court of jurisdiction to settle a bill of exceptions. *Colbert v. Rankin*, 72 Cal. 197, 13 P. 491; *Hennessy v. Superior Court*, 194 Cal. 368, 228 P. 862. Under the alternative method of appeal it is made the duty of the court to settle the record on appeal and to certify to the truth and correctness of the reporter's transcript before the same may become a part of the record on appeal. (Code Civ. Proc. § 953a.) In fact, after an appeal and the stay of all further proceedings in the trial court upon a judgment, the trial court ordinarily has jurisdiction, and it is its duty to take all necessary steps and make all necessary orders that a proper and correct record on appeal may be prepared. Such proceedings are not stayed by an appeal, but they might be stayed in a proper case by the trial court in making an order under the Soldiers' and Sailors' Civil Relief Act. The action in so far as the preparation of a record on appeal was involved was then pending in the trial court, and that court was the only court which had jurisdiction

to control those proceedings. Therefore, the order staying proceedings, while limited to proceedings on appeal, was within the jurisdiction of the trial court to make and enforce.

[5, 6] Considering the stay order in its limited application, we are called upon to decide whether such an order is a "special order made after final judgment." If it is such, it is appealable, and certiorari will not lie to review it. Such an order neither stays nor enforces the judgment. It is only an order in a procedural matter in connection with the preparation of a record on appeal. In *Lake v. Harris*, 198 Cal. 85, 243 P. 417, there was before this court an order striking the certificate of the trial judge from the clerk's transcript; and it was contended that such an order was a special order made after final judgment and therefore appealable. In passing upon the question, this court ruled as follows (198 Cal. at page 89, 243 P. at page 419): "As to the first ground of refusal, we think the contention of the respondent that the order striking his certificate from the said clerk's transcript was not an appealable order must be sustained. In order that a special order, made after final judgment, as contemplated by subdivision 2 of section 963 of the Code of Civil Procedure, be appealable, such order must affect the judgment in some manner or bear some relation to it either by way of enforcing it or staying its execution. *Griess v. State Invest., etc., Co.*, 93 Cal. 411, 28 P. 1041; *Kaltschmidt v. Weber*, 136 Cal. 675, 69 P. 497; *Watson v. Pryor*, 49 Cal.App. 554, 193 P. 797; 2 Cal.Jur. 153. The order striking said certificate is but an order in an ancillary or procedural matter prescribed by statute in connection with the preparation of a record on appeal and the making thereof neither added to nor subtracted from the relief granted by the judgment. It is obvious that to compel the respondent judge to certify a record on appeal from an order which is not appealable would be to require a vain and useless thing." See, also, *Kaltschmidt v. Weber*, 136 Cal. 675, 677, 69 P. 497, and *Williams v. Superior Court*, 14 Cal.2d 656, 666, 96 P.2d 334.

In view of our determination that the order here challenged is not appealable because it served merely to extend or continue the time for the preparation of the record on appeal, we need not discuss at length the case of *Wood v. Peterson Farms Co.*, 214 Cal. 94, 3 P.2d 922. That case involved

an order *terminating* proceedings for a record—the exact converse of the situation here presented. As stated above, the order under review in the present case did not stay the judgment. The judgment for defendants for costs was automatically stayed by the appeal itself. The order here involved simply continued the time within which the appellant was required to prepare his record on appeal. It has long been recognized that such an intermediate, procedural order as one extending time to prepare the record on appeal is in no sense an order affecting the judgment, and consequently is not appealable as a special order after final judgment. Obviously, the length of such extension (whether for a fixed or an indefinite time) cannot affect the appealability of the order.

[7] While said order is nonappealable and for that reason it is subject to be annulled on certiorari, the petitioners contend that the court was without jurisdiction to make said order as it was made after an appeal had been taken from the judgment, and that by virtue of said appeal jurisdiction over the action was vested in the appellate court. This contention we think has already been answered, and answered adversely to petitioners' contention. As noted above, the appeal stays the judgment but not proceedings to prepare a record on appeal from said judgment. The order on review therefore is limited to such proceeding as may be necessary to perfect appellant's appeal. The trial court had jurisdiction over these proceedings and, under the authority of the Soldiers' and Sailors' Civil Relief Act, entered its order expressly staying such proceedings.

[8,9] As noted above, the trial court first denied appellant's motion to stay proceedings under said act, and then later granted a second motion for the same relief asked for by the first motion. Petitioners contend that the order granting the second motion was in violation of section 1008 of the Code of Civil Procedure, which provides that when an application is made for an order which, prior to the making of said application, had been refused in whole or in part, an affidavit must be filed by the applicant showing, among other matters, "what new facts are claimed"; and that no such affidavit had been filed by the plaintiff at the time he made his motion for a stay, which was granted, but, on the other hand, the second motion was based

upon the same state of facts as the first motion. The penalty for the violation of this section of the code is that the order made under those circumstances may be revoked or set aside by the court in which the action is pending. It is not shown that the trial court has ever revoked said order, and the only inference to be drawn from the provisions of this section is that the order is valid until revoked. At most, the granting of the motion may have been erroneous, but not in excess of the jurisdiction of the court. *Creditors' Adjustment Co. v. Newman*, 185 Cal. 509, 513, 197 P. 334. "In order that the writ of certiorari be granted, there must have been an excess of jurisdiction by the inferior tribunal, exercising judicial functions." (4 Cal.Jur. § 4, p. 1022.)

[10] It is further contended that the order denying the first motion for a stay is *res judicata* as to the subsequent motion. While the plea of *res judicata* may be a good defense to an action in which it is interposed, it does not deprive the court of jurisdiction over the action nor does it deprive the court of jurisdiction to pass upon and decide a motion after it has previously decided a like motion. Its action upon the second motion may be erroneous, but it is not in excess of jurisdiction. *Harth v. Ten Eyck*, 16 Cal.2d 829, 832, 108 P.2d 675.

[11] In addition to what we have just stated respecting the power of the court to act upon and grant this second stay order, we think it pertinent to call attention to that section of the act which provides that a motion to stay proceedings may be made at any stage of the proceedings. (§ 521, *supra*.) If for no other reason, we think the order made under this provision of the act may be within the power of the trial court.

[12] Finally, the petitioners contend that as this case is now on appeal and plaintiff's personal attendance in court is not required, nor is his assistance needed in the preparation and presentation of his appeal, he is not entitled to the benefit of said act. This same contention was made before the trial court, and affidavits on behalf of plaintiff and defendants were received by said court in support of and against the motion. After giving this evidence consideration, the trial court in the exercise of its discretion granted the motion. It will be noted that section 521 of the act expressly provides that a proceeding

in which a person in military service is involved may be stayed in the discretion of the court in which it is pending. Construing this section of the act (which is referred to as § 201, chap. 888, 54 U.S. Stats. 1178, 1181), the Supreme Court of the United States in *Boene v. Lightner*, 319 U.S. 561, at page 575, 63 S.Ct. 1223, at page 1231, 87 L.Ed. 1587, stated the applicable rule in the following language, "The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation. The discretion that is vested in trial courts to that end is not to be withheld on nice calculations as to whether prejudice may result from absence, or absence result from the service. Absence when one's rights or liabilities are being adjudged is usually *prima facie* prejudicial. But in some few cases absence may be a policy, instead of the result of military service, and discretion is vested in the courts to see that the immunities of the Act are not put to such unworthy use."

[13] As just stated, the motion for stay of proceedings in this action resulting in the order of February 15, 1943, was heard upon affidavits. The plaintiff was not present in court but was somewhere with the armed forces of the United States. An affidavit was prepared and sent to him at what was his last-known address, but no response was made to the communication enclosing to him the affidavit, and the information received by the attorney sending him the affidavit was that plaintiff was ill with the measles and isolated in a hospital. His mother had made an affidavit used upon the hearing of the first motion, in which she stated that plaintiff was in the military service of the United States, that his pay was \$50 per month, and that he was without other income and was financially unable to prosecute an appeal while in military service. One of his attorneys by affidavit stated that their employment only continued up to the rendition of judgment, and since that time they had acted gratuitously. They have not appeared in the present proceeding in behalf of plaintiff, or at all, nor has any other attorney appeared for plaintiff at the hearing of this matter before this court. The official reporter in the case, although he signed a statement to the effect that plaintiff had made satisfactory arrangements with him for the payment of costs of preparing the record on

appeal, and waived the filing of a bond, later by affidavit denied that any such arrangements had been made with him, that he signed the waiver "without considering the legal or factual effect of said document" and "that in truth and in fact neither" plaintiff nor his attorneys "nor any other person had made any agreement or contract for the preparation of said transcript on appeal." Evidently the trial court came to the conclusion from the evidence before it that the ability of plaintiff to prosecute his appeal was materially affected by reason of his military service. In our opinion there was a sufficient showing before the court to justify this conclusion. Plaintiff has no attorney nor means to employ an attorney or to meet the costs necessary to the preparation of a record on appeal. Under these circumstances it cannot be successfully claimed that the trial court abused its discretion in granting the order to stay further proceedings in said action.

Defendants rely upon the case of *Rosenthal v. Smith*, Ohio App., 42 N.E.2d 464. In that case the application was made to the appellate court to stay proceedings in that court. The court in its discretion denied the motion and stated as the reason for its denial that the act does not accord the benefits thereof to a person in the military service represented by legal counsel who were "authorized to act for and on behalf of him as to all requisites incident to the appeal."

Two cases based upon section 521 of the act have been decided by the appellate courts of this state, and in each of those cases the court denied the application for a stay. Those cases are *Briner v. Briner*, 60 Cal.App.2d 473, 140 P.2d 995, and *Levin v. Levin*, 64 Cal.App.2d 298, 148 P.2d 714. In each of those cases the application was made in the appellate court to stay proceedings in that court. The court in each instance in the exercise of its discretion denied the application. The facts in neither of those cases are analogous to those in the present action, and even if they were, the decisions therein would not necessarily affect the decision in the present case. The motions were made before the very court in which those decisions were rendered. Whether the courts, in denying the motions, acted within the discretion contemplated by the act was not before either of said courts. Had there been a petition for a hearing in either of said cases, then

this court might have considered the question whether the appellate court properly exercised its discretion in denying the motion; but that question was not before either of the appellate courts at the time they had the motion for a stay under consideration.

In view of our conclusion as hereinbefore stated, we are of the opinion that the orders, and each of them, should be affirmed, and it is so ordered.

GIBSON, C. J., and SHENK and TRAYNOR, JJ., concurred.

SCHAUER, Justice.

I concur in the judgment of affirmance but dissent from the holding that the order appealed from is not appealable.

The motion to stay proceedings was made under the Soldiers' and Sailors' Civil Relief Act of 1940 (§ 201, chap. 888, 54 U. S. Stats. 1178, 1181). The order entered on such motion provides "That the motion to stay any further proceedings including proceedings on appeal be and the same is hereby granted, on the ground that, in the opinion of this Court, the plaintiff cannot properly prosecute this action, by reason of his military service; and that said plaintiff, Dino Preftokis, is granted a stay of proceedings for the period of his military service in the armed forces of the United States of America and for a period of sixty days thereafter, in which to prepare his record on appeal, together with the bill of exceptions."

I would agree that an order merely extending the time for preparation of a record on appeal is not appealable but the above-quoted order effectuates more than a mere extension of time to prepare a record. It is an absolute stay, for the time indicated, of all proceedings in the cause. Whether an order made after final judgment is a "special order made after final judgment" within the meaning of section 963 (2) of the Code of Civil Procedure depends on whether such an order affects the final judgment in some manner or bears some relation to it either by way of enforcing it or staying its execution.

The judgment in this case, from which the appeal was taken, is a judgment that plaintiff take nothing and that defendants recover "their costs amounting to the sum of \$19.64 and \$135.40." In so far as concerns enforcing the judgment for the costs the taking of the appeal automatically

stayed execution. *McCallion v. Hibernia, etc., Society* (1893), 98 Cal. 442, 445, 33 P. 329; *Whitaker v. Title Ins., etc., Co.* (1918), 179 Cal. 111, 114, 175 P. 460. Under these circumstances, then, the effect of the order staying indefinitely all proceedings in the case is to stay indefinitely execution on the judgment. In fact, such stay order operates to suspend the judgment and all of the defendants' rights thereunder for the duration of the war and sixty days thereafter.

Such an order, it seems to me, is appealable within the purview of section 963 (2) of the Code of Civil Procedure. It follows that this proceeding should be dismissed and the order appealed from affirmed.

EDMONDS and CARTER, JJ., concurred.



64 Cal.App.2d 916

DRULEY v. PEYTON.

2 Civ. 14403.

Supreme Court of California.

Aug. 15, 1944.

Courts 122

A complaint showing that plaintiff claimed \$2,200 as net amount allegedly due him, after certain deductions, was within superior court's jurisdiction, even if statement of account, as it appeared in opinion of District Court of Appeal was erroneous on its face.

TRAYNOR and SCHAUER, JJ., dissenting.

Action by N. E. Druley against J. A. Peyton to recover money alleged to be due under an agreement. From a judgment for plaintiff and from an order denying defendant's motion to vacate and set aside the judgment, and to enter another and different judgment, the defendant appealed to the District Court of Appeal, which affirmed the judgment and order, 149 P.2d 478. On petition for hearing in Supreme Court.

Petition denied.

George P. Cook and L. E. Dadmun, both of Los Angeles, for appellant.

McLaughlin & McGinley, of Los Angeles, for respondent.

PER CURIAM.

Petition for a hearing in this court is denied. Assuming, as contended by petitioner, that the statement of account in the foregoing opinion is erroneous on its face, nevertheless, the resume in the opinion of the facts stated in the complaint discloses that the amount claimed is within the jurisdiction of the superior court.

According to such resume the plaintiff was entitled to one-half the profits of his venture with defendant. Those profits totalled \$7,900 (\$2,500 credited on the purchase price and \$5,400 paid to defendant). Offsetting plaintiff's claim for \$3,950 (one-half of \$7,900) was the \$750 due on his share and the \$1,000 which defendant had paid to him on account, a total of \$1,750. Deducting this sum from plaintiff's share of the profits (as distinguished from charging it, or any part of it, against the joint account) leaves \$2,200 as the amount claimed in the complaint.

TRAYNOR and SCHAUER, JJ., dissenting.



24 Cal.2d 638

PEOPLE v. MORONEY, County Clerk.
S. F. 17003.

Supreme Court of California.
Aug. 4, 1944.

1. Taxation ⚡543(8)

A suit to recover taxes paid under protest, although brought against a state officer rather than the state, is treated as an action against the state in regard to immunity of state from costs.

2. Statutes ⚡183, 184, 205, 206, 207

In construing a statute, court must consider statute as a whole to determine true legislative intention, and must construe all parts of statute together and harmonize such parts so far as possible without doing violence to language or to spirit and purpose of statute so that it may stand in its entirety.

3. States ⚡215

Provision in Code of Civil Procedure, section 261b, that filing fee thereby required to be paid by parties litigant in the

superior court in certain counties should not be subject to provision of Government Code, section 6103, exempting the state from payment of costs, is controlling over other provisions referring to state's immunity from costs, and the state is not exempt from such fees. Code Civ.Proc. § 261b, as added by St.1943, § 2968; Pol. Code, § 4300a, as amended by St.1943, p. 2846; St.1943, p. 990, § 6103; Gen.Laws 1937, Act 8488, § 30.

4. Statutes ⚡207

In cases of conflict between provisions of same statute, those susceptible of one meaning will control those susceptible of two if statute can thereby be made harmonious.

5. Statutes ⚡207

Where there is a conflict between specific provisions of a statute and general provisions, specific provisions control, especially when it is possible, by giving effect to such rules, to partially iron out inconsistencies and make the whole harmonious.

6. Statutes ⚡207

A provision of a statute which treats specially and solely of a particular matter prevails over other provisions which make only incidental reference thereto.

7. Statutes ⚡207

Where reference to Government Code, section 6103, dealing with government's exemption from fees, in Code of Civil Procedure, section 261b, relating to litigants' payment of filing fees in certain counties, was added by amendment to the bill after it was introduced, attention of Legislature was particularly directed to such reference, and such reference would control other provisions making only an incidental reference to such subject-matter. Code Civ.Proc. § 261b, as added by St. 1943, p. 2968; St.1943, p. 990, § 6103.

8. Statutes ⚡174, 184

A statute should be interpreted in light of purpose sought to be achieved, and any inconsistency should be harmonized to end that such purpose is not thwarted.

9. States ⚡215

Code of Civil Procedure, section 261b, relating to payment of filing fees by litigants in certain counties, was enacted for purpose of providing a salary basis for compensation of court reporters in such

counties as distinguished from a per diem fee; consequently, when the section is interpreted in light of purpose sought to be achieved, the state is not immune from filing fees thereby imposed on parties litigant. Code Civ.Proc. § 261b, as added by St. 1943, p. 2968; St.1943, p. 990, § 6103.

10. States ⇨215

Provision of Code of Civil Procedure, section 261b, declaring that filing fee therein required of parties litigant should not be subject to state's immunity from costs, which provision was added after bill was introduced in legislature, was controlling over other provisions under the rule that the later provision in point of position controls earlier provision although both are in same statute and passed at same time. Code Civ.Proc. § 261b, as added by St.1943, p. 2968; St.1943, p. 990, § 6103.

In Bank.

Original proceeding in mandamus by the People against J. F. Moroney, as County Clerk of Los Angeles County to compel respondent to accept for filing, and to file without payment of a fee, an answer of the State Franchise Tax Commission in his capacity as such in an action pending in the superior court against the commissioner in his official capacity.

Writ denied.

Robert W. Kenny, Atty. Gen., and H. H. Linney, Chief Asst. Atty. Gen., for petitioner.

J. H. O'Connor, Co. Counsel, and S. V. O. Prichard, Asst. Co. Counsel, both of Los Angeles, for respondent.

CARTER, Justice.

Respondent County Clerk of Los Angeles County has refused to accept for filing or file without the payment of a fee of \$3.50, an answer of the State Franchise Tax Commission in his capacity as such, in an action pending in the superior court of that county to recover franchise taxes paid under protest pursuant to the Bank & Corporation Franchise Tax Act (Stats.1929, p. 19, as amended, Deering's Gen.Laws, 1937, Act 8488). The action is against the commissioner in his official capacity as an officer of the State and is in accordance with the provision for such actions contained in section 30 of the Bank & Corporation Franchise Tax Act. In the instant proceeding petitioner, the State of Cali-

fornia, seeks a writ of mandate to compel respondent to accept and file the answer.

The difficulty arises over the interpretation of section 261b which was added to the Code of Civil Procedure in 1943 (Stats. 1943, ch. 1031, p. 2968). That section provides for the appointment in counties having a population of 900,000 or more of phonographic reporters for the superior court in such counties who shall receive an annual salary of \$4,800 in lieu of any fee from the parties to the litigation excepting for transcription. The salary is made payable out of the salary fund of the county. Parties litigant are required to pay to the county clerk, in addition to fees received by any other law, a fee of \$3.50 in the "following instances: (1) Where Section 4300a of the Political Code requires such party to pay said clerk a fee for the filing of the first paper in a civil action or in a special proceeding, except in an appeal from an inferior court.

"(2) Where Section 4300a of the Political Code requires such party to pay said clerk a fee for filing papers transmitted from another court * * * except in an appeal from an inferior court.

"(3) *Where section 4300a of the Political Code requires such party to pay said clerk a fee on the appearance in a civil action or special proceeding of a defendant, intervener, respondent, correspondent or adverse party, except in an appeal from an inferior court.*

"(4) Where Section 4300a of the Political Code requires such party to pay said clerk a fee for the filing of a petition or other paper in a probate or guardianship matter.

"The fee so required shall be taxed as costs in favor of any party paying the same and to whom costs are awarded by the judgment of the court. *Such fee shall not be subject to the provisions of Section 6103 of the Government Code.*" (Italics added.) The fees so collected are deposited in the county salary fund.

Section 6103 of the Government Code, referred to in section 261b of the Code of Civil Procedure was enacted in 1943 (Stats. 1943, ch. 134 p. 896). It states that neither the State, county, etc., nor any public officer acting in his official capacity on behalf thereof shall pay any fee for the filing of any paper or performance of any official service, except where the officer is acting with reference to private assets or where it is specifically provided otherwise. That

section was based upon section 4295 of the Political Code which was repealed in 1943. The later section read substantially the same as its successor.

[1] It will be recalled that section 261b of the Code of Civil Procedure states that the fee of \$3.50 shall not be subject to section 6103 of the Government Code, indicating that the State or an officer thereof would not be exempted from the payment of such fee. Yet the forepart of section 261b states that the fee shall be paid where, in the various instances, one is payable under 4300a of the Political Code, possibly indicating that if no fees were payable thereunder the fee specified in section 261b need not be paid. Section 4300a, as amended by St.1943, p. 2846, after setting forth the fees to be charged by the clerk for various services states: "No fee shall be charged by the clerk for service rendered in any criminal action or adoption proceeding, *nor for any service to the State of California*. No fee shall be charged by the clerk for service rendered to any municipality or county in said State, or to the National Government, nor for any service relating thereto, except for making or certifying to a copy of a filed paper, record or proceeding, when not otherwise provided by law." (Italics added.) It cannot be doubted that the language is broad enough to include an officer of the State as well as the State itself acting in his official capacity on behalf of the State. It has been held that an action against an officer in his official capacity is equivalent to and may be treated as an action against the State or a political subdivision thereof. See *Bacich v. Board of Control*, 23 Cal.2d 343, 144 P.2d 818; *California Securities Co. v. State*, 111 Cal.App. 258, 295 P. 583. And the Bank & Corporation Franchise Act specifically provides for such a suit against the commissioner. (§ 30.) Likewise, a suit to recover taxes paid under protest although against a state officer rather than the State is treated as an action against the latter in regard to the immunity of the State from costs. See *Innes v. McColgan*, 52 Cal.App.2d 698, 126 P.2d 930.

[2] The reference to section 6103 of the Government Code in section 261b is clear and unambiguous. It is susceptible of only one meaning, and that is, that neither the State nor an officer thereof may avail themselves of the exemption from the payment of fees authorized by section 6103. The reference to section 4300a of

the Political Code in section 261b may be susceptible of a contrary interpretation, that is, that the fees specified are not chargeable where they would not be payable under section 4300a by reason of the above quoted portion thereof. The question arises therefore as to whether those two provisions of section 261b are wholly irreconcilable and if so which one controls. That issue must be resolved in light of the cardinal rule of statutory construction that, as expressed in 23 Cal.Jur. 760:

"* * * a statute must be read and considered as a whole, in order that the true legislative intention may be determined. All the parts of a statute must be construed together, and harmonized, so far as it is possible to do so without doing violence to the language or to the spirit and purpose of the act, so that the statute may stand in its entirety. For the purpose of harmonizing apparently conflicting clauses, each should be read with direct reference to every other which relates to the same subject, and so read, if possible, as to avoid repugnancy."

[3, 4] It is our opinion that the later provision in section 261b referring to section 6103 is controlling and the State is not exempt from the fees; that conclusion may be harmonized with the earlier reference to section 4300a. It will be noted that the later provision is specific and definite. It singles out section 6103 and specifically states that the exemption shall not apply. Likewise, the terms of the latter section are concrete and clear and it deals solely with the subject of *exemption* of the State and its officers from the payment of fees. On the other hand the earlier reference to section 4300a is general and the words have more of a descriptive character. It is clearly susceptible of the construction that it is referring to the times and the particular events which call for the payment of the fee. For illustration the event in the instant case is the filing of an answer. Section 261b states that the fee shall be paid where section 4300a requires a party to pay the clerk a fee on appearance of a defendant in a civil action, but excepts an appeal from an inferior court. Section 4300a is more definite and requires a fee "On the appearance of any defendant, intervenor, respondent, co-respondent, or adverse party, *whether separately or jointly, except for the purpose of making disclaimer*, to be paid upon filing the first paper in the action on his behalf, one dollar (\$1)." Italics.

added.) It is to be noted that additional clauses appear in 4300a which do not appear in 261b(3), namely, the fee must be paid whether the appearance is joint or separate and no fee is required in case of a disclaimer. Hence, meaning and effect is given to the reference to section 4300a. The reasonable conclusion is that that reference is for the purposes above mentioned, rather than that the intent was to include the exemption in the latter part of section 4300a. At least it may be said that it is equally reasonable that the reference to section 4300a is so limited while on the other hand there can be no doubt that by the reference to section 6103 the only purpose was to free the fee from the exemption. In cases of conflict between the provisions of the same statute, those susceptible of only one meaning will control those susceptible of two if the statute can thereby be made harmonious. See *Dennis v. Moses*, 18 Wash. 537, 52 P. 333, 40 L.R.A. 302; *Street v. Commercial Credit Co.*, 35 Ariz. 479, 281 P. 46, 67 A.L.R. 1549.

[5-7] As above stated the reference to section 6103 is specific and that section deals solely with exemption of the State from the payment of fees. Assuming there is a conflict in the provisions of section 261b, the rule should be applied that specific provisions of a statute control over general provisions where there is a conflict. *Rose v. State of California*, 19 Cal.2d 713, 123 P. 2d 505; *Long Beach City School Dist. v. Payne*, 219 Cal. 598, 605, 28 P.2d 663. This is especially true when it is possible at least partially to iron out the inconsistencies and make the whole harmonious. Stated in another way where one provision of a statute treats specially and solely of a matter, it prevails over other provisions which make only incidental reference thereto because the attention of the Legislature was directed to the particular matter. *County Board of Education v. Fiscal Court*, 221 Ky. 106, 298 S.W. 185. The rule is particularly applicable in the instant case inasmuch as the reference to section 6103 was added by an amendment to the bill after it was introduced. The attention of the Legislature was therefore particularly directed to it.

[8,9] Section 261b should be interpreted in the light of the purpose sought to be achieved and any inconsistency should be harmonized to the end that such purpose is not thwarted. Department of Motor Ve-

hicles v. Industrial Acc. Comm., 14 Cal.2d 189, 93 P.2d 131. The obvious purpose in the enactment of section 261b was to provide that the compensation of court reporters in counties with a population of 900,000 or over would be placed upon a salary basis as distinguished from a per diem fee. In some counties the reporter is paid by the parties a fixed fee for each day's services in court. (See Code Civ.Proc. § 274; Pol.Code, §§ 4231-4287a). In others he receives an annual salary from the county and the parties pay the per diem rate to the county. Under section 261b the reporters are paid from the county salary fund, and into that fund are paid the fees specified which are received upon the filing of certain papers rather than the per diem rate for official court reporting. Obviously, it was the purpose of the Legislature in providing for such fees to create a fund at least partially sufficient to pay the annual salaries. Hence, any exemptions from the payment of those fees would to some extent defeat that aim. In this connection it should be observed that the exemption in section 4300a relates to fees for services performed by the clerk, whereas fairly construed the fees mentioned in section 261b are for reporters' services, thus indicating that such exemption was not intended to apply.

[10] Finally, if it be assumed that the earlier and later provisions of section 261b cannot under any circumstances be reconciled, as a last resort it would be appropriate to apply the rule that the later provision in point of position controls the earlier provision although both are in the same statute and passed at the same time. *People v. Dobbins*, 73 Cal. 257, 14 P. 860; *Wilhelm v. Silvester*, 101 Cal. 358, 35 P. 997; *Alameda County v. Dalton*, 148 Cal. 246, 82 P. 1050; *In re Roberts*, 157 Cal. 472, 108 P. 315; *In re Estate of Steehler*, 195 Cal. 386, 233 P. 972; *Smith v. Board of Trustees of Barnes City*, 198 Cal. 301, 245 P. 173. A cogent reason for applying the rule in the instant case is the addition of the reference to section 6103 after the bill was introduced.

For the foregoing reasons the alternative writ of mandate is discharged and the petition for peremptory writ denied.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, TRAYNOR, and SCHAUER, JJ., concurred.

24 Cal.2d 611

WERNER v. STATE BAR.

L. A. 18983.

Supreme Court of California.

Aug. 4, 1944.

1. Stipulations Ⓒ14(8)

Where it was stipulated in disbarment proceeding that transcript of testimony taken in criminal prosecution against attorney should be admissible in disbarment proceeding, which stipulation was made while appeal from conviction was pending, such transcript was admissible even after reversal on appeal although amendment was filed charging specific acts instead of commission of a felony.

2. Evidence Ⓒ577½

Under Code of Civil Procedure, the transcript of evidence at criminal trial of an attorney was admissible hearsay in subsequent disbarment proceeding against the attorney, where it was stipulated that the unavailability of witnesses need not be shown. Code Civ.Proc. § 1870, subd. 8.

3. Attorney and client Ⓒ49, 53(1)

Disbarment proceedings are not governed by the rules of procedure governing civil or criminal litigation and rules of evidence need not be invoked unless necessary to insure a fair hearing. Code Civ. Proc. § 1870, subd. 8.

4. Evidence Ⓒ578

Where attorney had the opportunity to cross-examine witnesses against him in criminal prosecution and he fully exercised that right, admitting in evidence, in subsequent disbarment proceeding, the transcript of testimony at the criminal trial did not deprive attorney of a fair hearing in disbarment proceeding. Code Civ.Proc. § 1870, subd. 8.

5. Evidence Ⓒ579, 580

The parties and subject matter in criminal prosecution against attorney and subsequent disbarment proceeding, were the same within meaning of civil procedure rule permitting use in subsequent proceeding of testimony given in former action. Code Civ.Proc. § 1870, subd. 8.

6. Evidence Ⓒ578, 579, 580

The requirement that parties and subject matter must be the same to make admissible evidence given in the former action is designed to make certain that the

cross-examination in the first proceeding can serve as well as in the second. Code Civ.Proc. § 1870, subd. 8.

7. Attorney and client Ⓒ42

The making of an offer by an attorney to bribe a deputy district attorney, whether or not there was any intention to carry it out, was an act of "moral turpitude" justifying disbarment.

See Words and Phrases, Permanent Edition, for all other definitions of "Moral Turpitude".

8. Evidence Ⓒ314(1)

The hearsay rule does not forbid the introduction of evidence that a statement has been made when the making of the statement is significant irrespective of the truth or falsity of its content.

9. Witnesses Ⓒ414(1)

Evidence as to the statements made by attorney's wife, in attorney's absence, respecting an offer to bribe a deputy district attorney, was admissible in disbarment proceeding as lending credibility to testimony that attorney made a similar offer.

10. Witnesses Ⓒ362

Where an attorney and wife were charged with a crime of which they had already been found guilty at time of disbarment hearing against attorney, it was reasonable to attach less credence to their testimony than to testimony of other witnesses.

11. Attorney and client Ⓒ53(1, 2)

The findings of the State Bar in a disbarment proceeding must be given great weight, and burden is on petitioner to show that the finding is clearly erroneous or unsupported in the record.

12. Attorney and client Ⓒ38, 53(2)

A finding that attorney had agreed to a plan to obtain a sum of money from another, representing that part of said amount would be utilized for the purpose of illegally arranging for the dismissal of criminal charges pending against such other party, was supported by evidence, and whether attorney intended to use the money to bribe a public officer, or to secure it for himself, his action involved "moral turpitude" constituting cause for disbarment.

SHENK and CARTER, JJ., dissenting in part.

Proceeding by Erwin P. Werner against the State Bar to review a recommendation of disbarment.

Petitioner disbarred.

Mark L. Herron, of Los Angeles, for petitioner.

A. W. Ashburn and Jerold E. Weil, both of Los Angeles, for respondent.

TRAYNOR, Justice.

The Board of Governors of The State Bar of California has recommended that petitioner be disbarred on the ground that in 1937 he proposed to William McNeil that the latter give him \$2,500 for the purpose of bribing William E. Simpson, a Deputy District Attorney of Los Angeles County. The ensuing transaction led to petitioner's indictment or attempted grand theft, and he was tried three times. On the first trial the jury disagreed; on the second the verdict was guilty, but the judgment was reversed in the District Court of Appeal (*People v. Werner*, 29 Cal.App.2d 126, 84 P.2d 168); on the third, petitioner was again convicted, but the judgment was reversed in this court. *People v. Werner*, 16 Cal.2d 216, 105 P.2d 927. While petitioner's appeal was pending in this court, The State Bar instituted proceedings against him, charging him with having been convicted of a felony. After the conviction was reversed, the notice to show cause was amended to charge that petitioner made the offer to McNeil with the intention of defrauding him. The local committee found that petitioner committed the acts charged. The Board of Governors found that petitioner offered to use the funds he solicited to obtain the illegal dismissal of a charge against McNeil, and that he made the offer with the intention of defrauding McNeil. The only evidence introduced before The State Bar was the record of the third trial. Early in the course of the proceeding, petitioner stipulated that "the testimony as transcribed by the reporter in the case of *The People of the State of California versus Erwin P. Werner* * * * may be read and used in this proceeding with like force and effect as if the witnesses whose testimony as found in said transcript were on the stand and testifying in person, subject to all legal objections either as to form or as to substance." Petitioner concedes that if this stipulation is applicable, it is irrevocable, and that the evidence was properly admitted, but contends that the stipulation became inapplicable because the

notice was amended to charge specific acts instead of conviction of a felony and that his objection to the admission of the transcript of the criminal trial should have been sustained.

[1] The stipulation provides that the transcript is admissible "in this proceeding." When it was made, it was reasonable to expect that the proceeding would involve precisely the type of amendment made. Since The State Bar proceeding was stayed pending outcome of petitioner's appeal, and since that outcome was unknown, the proceeding could not be continued, in the event of a reversal, without an amendment of the notice to make it charge the commission of certain acts involved in the criminal trial rather than conviction at that trial. The stipulation could hardly be construed as applicable only to a charge of conviction of crime without becoming meaningless, for it provides for the reading of the testimony of witnesses, and there would be no reason for reading such testimony merely to establish conviction of a crime.

[2,3] Even if the stipulation were regarded as inapplicable, this evidence was admissible. The transcript of the evidence at the criminal trial was admissible hearsay in the State Bar proceeding. Such hearsay is admissible in civil proceedings if it is "The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter." Code Civ.Proc. § 1870, subd. 8. In criminal proceedings the rule governing the testimony of witnesses other than defendant is contained in Penal Code, section 686, which provides that the testimony of a witness deceased, insane, out of the jurisdiction, or who cannot be discovered, given at a previous trial of the action, may be admitted. See *People v. Bird*, 132 Cal. 261, 64 P. 259. Petitioner, relying on section 1870, subdivision 8, of the Code of Civil Procedure, contends that the conditions imposed therein are not met. It has been repeatedly held, however, that disbarment proceedings are not governed by the rules of procedure governing civil or criminal litigation. *Johnson v. State Bar*, 4 Cal.2d 744, 52 P.2d 928; *Herron v. State Bar*, 212 Cal. 196, 298 P. 474; *Matter of Danford*, 157 Cal. 425, 430, 108 P. 322; *In re Vaughan*, 189 Cal. 491, 209 P. 353, 24 A.L.R. 858. There is no legislative requirement, therefore, that the rules of evidence in the Code of Civil Procedure be applied in disbarment proceedings, although they are frequently in-

voked to insure a fair hearing. See *In re Richardson*, 209 Cal. 492, 288 P. 669; *In re Lacy*, 234 Mo.App. 71, 112 S.W.2d 594; *In re Durant*, 80 Conn. 140, 67 A. 497, 10 Ann.Cas. 539; 5 Wigmore on Evidence (3d ed. 1940), § 1388, p. 103. There is no reason for invoking them, however, if they are not necessary to serve that purpose.

[4] Hearsay evidence is often excluded to insure that all evidence may be tested by cross-examination. *Englebreton v. Industrial, etc., Comm.*, 170 Cal. 793, 151 P. 421, see 5 Wigmore on Evidence (3d ed. 1940) § 1362. On three successive trials petitioner had the opportunity to cross-examine the witnesses against him and the record shows that he fully exercised the right at the last trial so that there is little likelihood that any significant weakness in the testimony of the witnesses was overlooked. On essentially similar facts, in *Re Durant*, 80 Conn. 140, 67 A. 497, 10 Ann. Cas. 539, and *In re Lacy*, 234 Mo.App. 71, 112 S.W.2d 594, it was held that the record of a previous trial was admissible in a disbarment proceeding, and it was noted that when the court thus exercises its power to supervise its officers in a proceeding in which a jury has no part, there is no need to adhere strictly to rules made primarily to govern jury trials.

[5, 6] In any event the requirements of section 1870, subdivision 8, of the Code of Civil Procedure, which petitioner contends is applicable to this proceeding, have been met. That section imposes three conditions upon the use of testimony given in a former action: the witnesses must be unavailable, the parties must be the same, and the subject matter of the proceedings must be the same. It was stipulated that The State Bar need not establish that the witnesses were unavailable. Petitioner was prosecuted in the name of the People of California, and the trial was conducted by attorneys representing the People. In the present proceeding the case against petitioner is presented by The State Bar, acting as the arm of this court and also representing the People of the State. In reality the parties are the same. Petitioner's contention that the subject matter is not the same is based on the fact that this proceeding is for disbarment, whereas the earlier case was a criminal prosecution. The Legislature, however, aware that a disbarment proceeding is different from any other type of action, could hardly have intended to preclude the use of the transcript of an earlier proceeding in a proceeding for disbarment.

The State Bar seeks to prove the same facts that the public prosecutor sought to prove so that both proceedings actually do concern the same matter. *Fredericks v. Judah*, 73 Cal. 604, 15 P. 305; *McAlister v. Dungan*, 108 Cal.App. 185, 291 P. 419. The requirement that parties and subject matter be the same is designed to make certain that the cross-examination in the first proceeding can serve as well in the second. *Lyon v. Rhode Island Co.*, 38 R.I. 252, 94 A. 893, L.R.A.1916A, 983; 5 Wigmore on Evidence (1940), § 1388, p. 95. Since this purpose is fulfilled, the transcript was properly admitted. Moreover, petitioner was free to introduce additional evidence in his own behalf but did not avail himself of this right.

Petitioner contends that this evidence, even if admissible, does not establish that he offered to bribe the deputy district attorney. McNeil was under indictment for grand theft because of certain transactions in securities with a Mrs. Bovell. Petitioner had served as his attorney in similar situations until they had a disagreement over fees. Some time after the commencement of this prosecution against McNeil, however, petitioner attempted to communicate with him, calling on McNeil's attorney in the litigation over the fee as well as on his attorney in the Bovell matter. McNeil, while at first unwilling to see him, finally telegraphed petitioner that he get in touch with him. On the 19th or 20th of August, 1937, petitioner called on McNeil, and in the following week several conferences took place between petitioner, McNeil, and petitioner's wife. After the first visit by petitioner, when McNeil allegedly offered to bribe Simpson, McNeil communicated with the district attorney's office. A dictaphone was placed in McNeil's home and listeners were posted in his basement.

McNeil was the principal witness against petitioner. He testified that petitioner said, when he first called on August 19th or 20th, that "Mrs. Werner had some good ideas and that he had some good ideas as to how to handle it in the District Attorney's office * * * and he said that Mrs. Werner was very well acquainted with Mr. Simpson, the Chief Deputy District Attorney there, and that for about \$2,500 he could get Mr. Simpson to, as he said, kick this case out of the District Attorney's Office; in other words, he could square it up, but it would be necessary, naturally, to satisfy Mrs. Bovell. * * *" McNeil testified that on the same occasion petitioner stated

"that he was satisfied that he could take care of it in the District Attorney's Office, by paying Mr. Simpson \$2,500, and spreading some money around the police department. * * *" Petitioner and his wife called on McNeil the following Monday, and after a brief conversation petitioner went upstairs. McNeil testified that meanwhile he and Mrs. Werner discussed the arrangements to be made with the district attorney's office, and that "She said anything that was to be handled in the settlement of this matter in the District Attorney's Office, she would handle, herself; and if she didn't get to handle the money she would not have anything to do with it, because any time theretofore when they had any cases of this kind, if Pete got hold of the money she never got any of it, and that she could have this case dismissed in the District Attorney's Office by paying to Bill Simpson, the Chief Deputy District Attorney, \$2,500." McNeil then testified that subsequently petitioner returned to the room and the conversation devolved upon possible arrangements with Mrs. Bovell. Thereafter petitioner went out to a drugstore, and during his absence discussion of the arrangements with the district attorney's office was resumed, Mrs. Werner again insisting that she handle the money and direct the arrangements. On the following Thursday when the three met again there was a dispute between petitioner and McNeil as to the funds required for settling the case. Petitioner testified that " * * * he [McNeil] said, 'I will put up \$10,000 to clear up your situation, Bergman and Mrs. Bovell, and give up the equity in the Crenshaw house and the furniture and these two houses in Culver City as soon as you can come and tell me that the District Attorney will dismiss my case * * *.'" Petitioner replied, "You want me to settle this case for you on jawbone," but "It can't be done." According to McNeil it was then arranged that Mrs. Werner visit McNeil's house alone, but there is some dispute as to petitioner's knowledge of this arrangement. In any event, on Friday afternoon Mrs. Werner called and indicated that arrangements with Simpson had been completed, and again warned that she must handle the cash and the arrangements with the district attorney's office. On Friday evening petitioner and Mrs. Werner returned to McNeil's house. After petitioner was told that the cash for all the arrangements would be turned over Saturday, McNeil turned over to Mrs. Werner, while petitioner was out, an en-

velope supposedly containing the cash. Actually it contained some paper and one dollar bills. Petitioner and Mrs. Werner were arrested as they left the house.

The testimony of McNeil thus describes an offer to bribe Simpson by petitioner, acting through Mrs. Werner who repeated the offer several times. The fraudulence of such an offer is revealed by Simpson's testimony that he did not know Mrs. Werner, although he had met her once, and that he was absent from Los Angeles at the time the offer was made.

[7] In any event, the making of such an offer, whether or not there was any intention to carry it out, is an act of moral turpitude.

McNeil's own testimony was impeached, for it was shown that he was hostile to petitioner, that he had been convicted of a felony, and that he had made various inconsistent statements as to the time and substance of some of the conversations described. His testimony, however, was corroborated by the employees of the district attorney who had been posted in the cellar, Miss Ruthe Wood, a secretary who took notes of the conversations in shorthand, and Mr. Frank T. Allen, an investigator who took some longhand notes.

Miss Wood's notes record that at the Wednesday conference, while petitioner was absent, Mrs. Werner said, "I want you before we leave here to make Erwin promise that he will talk with me and we will agree with you on everything that is to be done, because what Pete will do—and I want you not to let him do is have any contact with the District Attorney's office * * * I wouldn't go up there. I see Mr. Simpson—very old friend." Werner insisted on having control of the funds, saying, "I want you to pay me the money that is a part of this frame-up." Mr. Allen's notes likewise show that Mrs. Werner stated, "I will see Mr. Simpson; very old friend," and that she insisted on control of the funds.

Miss Wood's notes record further that on petitioner's return McNeil said to petitioner, "Helen and I had a talk while you were out. * * * Helen is cocksure and you are and I am that this Bovell matter will be settled. This house and furniture plus \$5,000. I don't care if you pay Bergman and the Police Department. As quick as we can all arrive at just what is necessary and the quicker I can hand it over—I don't want a receipt—it is a deal between three people. * * * I am willing to go

on that and I am willing to split another \$5,000. There is no use to go ahead and hire a lawyer and go to trial and not know what the outcome is * * * I will let Helen and you work out the details. I believe it would be best that this thing can be worked out under her direction of what she has in mind. * * * If Helen and you can come out at noon tomorrow and tell me that is all set and another \$5,000 on the outside. * * * Mrs. Werner: "I am not going to take you for one thing so far as my little end of it goes." McNeil: "You come out and tell me what you can do, it is worth something like that." Mrs. Werner: "I want to see one person and I can do that in the morning. They won't know what I want."

Miss Wood and Mr. Allen were away at the time of the Thursday conversation, but took notes again on Friday afternoon when Mrs. Werner appeared alone. Miss Wood's notes show that Mrs. Werner told McNeil that Simpson would instruct Mr. Arterberry, the deputy in charge of the McNeil case, to dismiss it; and that the following conversation occurred: McNeil: "The house, furniture and a deed to those houses out there and \$10,000." Mrs. Werner: "That is Bovshover (Mrs. Bovell's manager)." McNeil: "The other to slide through D. A. office." Mrs. Werner: "This one usually charges \$2,500."

Miss Wood testified that there was a conversation on Friday night between petitioner, McNeil, and Mrs. Werner as follows: McNeil: "About the other part. I am going to let Helen handle the money. I want you to be sure and be down here by the 12th. * * * This case is going to come up the 27th and I want it booted out of the District Attorney's office. I suggest this: Two fingers in the pie is a bad thing. If you are going to handle the District Attorney's end of it, if you want Pete to come in, he comes in, but not unless you want it. Is that right Pete?" Werner: "Yes." McNeil: "Pete handles the other end; you handle the District Attorney's office. Pete does only as you tell him and if it goes wrong, you are the one that gummed it up, Helen." Mrs. Werner: "I won't gum it up. I have never gotten in a mess up there on anything I have tried." The testimony of these witnesses shows that Mrs. Werner spoke of approaching Simpson and of a charge of \$2,500 in that connection, and that petitioner was aware that his wife was to approach the office of the district attorney.

The fact that all references to Simpson occurred while petitioner was absent may be attributed to Mrs. Werner's desire to retain control of the funds, and to the likelihood that petitioner wished to remain in the background, having recently been subjected to criminal prosecution and to suspension proceedings by The State Bar. See *Werner v. State Bar*, 13 Cal.2d 666, 91 P.2d 881. There was evidence that petitioner had previous experience with dictaphones, and some of the conversations were carried on in tones so low that Allen and Miss Wood were unable to hear them. It was Mrs. Werner who claimed to know Simpson, and was therefore the logical person to plan the approach to his office. The fact that Mrs. Werner proposed to bribe Simpson shortly after she arrived with petitioner to establish means to free McNeil, suggests that she had been led by petitioner to believe that such object was contemplated in the negotiations. There is additional corroboration of McNeil's testimony in the testimony of Mrs. Schapiro, McNeil's attorney in the litigation over fees, that petitioner told her when trying to communicate with McNeil, "You know I can have that case of the People against McNeil dismissed," and by the testimony of Mr. Newmire, McNeil's attorney in the Bovell matter, that petitioner stated to him that "he was in a position to square the beef for Mac," and "that it was not too late yet to fix the matter."

[8, 9] It is contended by petitioner that the testimony of McNeil, Allen and Miss Wood, relative to the statements made by Mrs. Werner were hearsay as to petitioner. The hearsay rule, however, does not forbid the introduction of evidence that a statement has been made when the making of the statement is significant irrespective of the truth or falsity of its content. *Smith v. Whittier*, 95 Cal. 279, 293, 30 P. 529; see 6 Wigmore, op. cit. supra, § 1772, p. 191; see cases collected at 10 Cal.Jur., § 288, p. 1036. Mrs. Werner's declarations that she would see Simpson were not offered as evidence that she intended to do so, but the making of the offer lends credibility to McNeil's testimony that petitioner made a similar offer.

People v. Werner, 16 Cal.2d 216, 105 P.2d 927, does not establish that Mrs. Werner's statements may not be considered in determining whether petitioner offered to bribe Simpson. Petitioner was there appealing from a conviction for attempted grand theft. The conviction was reversed,

first, because McNeil's knowledge of the intention of petitioner and his wife, and his cooperation in turning over the envelope supposedly containing the funds made impossible either theft or an attempt at theft; secondly, because an attempt requires a direct effectual act in furtherance of the crime attempted, and although Mrs. Werner took the envelope she did so without petitioner's knowledge with the intention of keeping the proceeds from him, so that her act could not be attributed to him. The statement that the taking by Mrs. Werner was "foreign to the alleged common plan" cannot be regarded as denying the existence of such a plan.

Petitioner questions the accuracy of Miss Wood's notes, specifying various omissions, testimony that her symbols for "I" and "he" were much alike, and her dependence on the context of her notes and on her memory to determine their meaning. There is no showing, however, that the similarity in symbols led to any substantial error, and it was not essential for Miss Wood to attempt to record everything.

[10] Much of the testimony indicating petitioner's guilt was contradicted by petitioner and Mrs. Werner. It was reasonable, however, to attach greater credence to the testimony of McNeil, for it was corroborated by independent witnesses, than to that of petitioner and his wife. It is reasonable to suppose that the testimony of the latter would be influenced by the fact that they were charged with a crime of which they had already been found guilty. *Caldwell v. Weiner*, 203 Cal. 543, 264 P. 1100; *Davis v. Judson*, 159 Cal. 121, 128, 113 P. 147; *Blanc v. Connor*, 167 Cal. 719, 723, 141 P. 217.

The evidence shows unquestionably that petitioner was trying to make some arrangement for the dismissal of the charge against McNeil. Petitioner contends, however, that the evidence shows that the arrangement contemplated was restitution to Mrs. Bovell and a demonstration to Mr. Arterberry, the Deputy District Attorney in charge of the Bovell matter, of the weakness of the prosecution's case. It appears from Miss Wood's notes and from testimony of other witnesses that there was much conversation on the possibility of satisfying Mrs. Bovell and of convincing her that she overstated the case against McNeil, so that she would lose her effectiveness as principal witness for Arter-

berry. Thus Miss Wood's notes show that petitioner said, "I think we can put a story in her mind to the effect that there is nothing criminal about this; that Mr. Bovshover got her to say certain things that weren't true." The concern of petitioner and Mrs. Werner over Mrs. Bovell's attitude and the presentation of a strong case to Arterberry is not inconsistent with the evidence that they proposed to bribe Simpson. The reason given for bribing Simpson was that Arterberry was subject to his authority. Miss Wood's notes record that when Mrs. Werner was asked by McNeil, "Do you think he [Simpson] has control of Arterberry?" she replied, "Completely." Simpson, however, could hardly direct Arterberry to dismiss the prosecution without giving some reason; otherwise, not only Arterberry but Mrs. Bovell and her attorney, Mr. Bergman, would question the dismissal. An adjustment with Mrs. Bovell and an explanation to Arterberry for the dismissal of the prosecution would be natural if Simpson were to be bribed.

Petitioner contends also that Mrs. Werner was not going to bribe Simpson, but was going to hire another attorney to present the case to the district attorney's office; that this plan was implicit in her reference, made in petitioner's presence, to seeing a certain person; and that this plan accounts for the \$2,500 of the \$10,000 that was to be given Mrs. Werner, otherwise unaccounted for except for the testimony that it was to be used for a bribe. To support this argument, the attorney who defended Mrs. Werner on the criminal trial, and who now represents petitioner, testified that he was to be the attorney to present the case to the district attorney's office. This evidence was brought forward for the first time on the third trial and the conflict between it and the testimony of McNeil, Miss Wood, and Allen was resolved against petitioner by the local committee and the Board of Governors.

[11] It is well established that the findings of The State Bar must be given great weight. *Light v. State Bar*, 14 Cal. 2d 328, 94 P.2d 35; *Furman v. State Bar*, 12 Cal.2d 212, 83 P.2d 12; *Hizar v. State Bar*, 20 Cal.2d 223, 124 P.2d 812; *Utz v. State Bar*, 21 Cal.2d 100, 104, 130 P.2d 377; *Peterser v. State Bar*, 21 Cal.2d 866, 870, 136 P.2d 561. The burden is on petitioner to show that the finding is clearly erroneous or unsupported in the record. *Hizar*

v. State Bar, *supra*, 20 Cal.2d at page 227, 124 P.2d 812; Petersen v. State Bar, *supra*, 21 Cal.2d at page 870, 136 P.2d 561; Moura v. State Bar, 18 Cal.2d 31, 112 P.2d 629; Kennedy v. State Bar, 13 Cal.2d 236, 240, 88 P.2d 920. Petitioner has not sustained this burden.

[12] Petitioner contends that the finding of the Board of Governors is not within the issues raised by the notice. The notice stated that petitioner proposed to pay a sum of money to William Simpson for the purpose of bribing him in connection with the case of *People v. McNeil*, and that petitioner attempted to defraud McNeil by seeking to obtain from him a sum of money on the false representation that it would be used to bribe Simpson. The local committee found that petitioner made such an offer, and that it was intended as a means of defrauding McNeil. The finding of the Board of Governors was less explicit, declaring that petitioner entered into a plan with his wife to obtain \$10,000 from William McNeil, and "represented to said McNeil that a part of said amount would be utilized for the purpose of illegally arranging for the dismissal of a criminal charge pending against McNeil. * * *" While this finding does not follow the language of the notice, it is amply supported by the evidence, and shows a plan to defraud and an offer to bribe a public officer. The board also found "that as a part of said plan the respondent, with his wife, sought to obtain \$10,000 from William McNeil with intent to commit grand theft of a portion of said amount."

Whether petitioner intended to use the money to bribe a public officer or whether he intended to secure it for himself, he committed acts involving moral turpitude that constitute a cause for disbarment.

It is therefore ordered that the petitioner be disbarred from the practice of law in California and that his name be struck from the roll of attorneys, this order to become effective thirty days after it is filed.

GIBSON, C. J., and CURTIS, and EDMONDS, J., concurred.

SHENK, J. (concurring and dissenting).

I concur in the order of disbarment on the ground that the transcript of the testimony of witnesses taken on the trial of the petitioner for the criminal offense was admissible in evidence in the disbarment proceeding pursuant to the stipulation entered

into by the petitioner, and that the evidence supports the conclusion that disbarment should follow. However, I dissent from the determination that, aside from the stipulation, and assuming unavailability of the witnesses, the transcript of the testimony taken at the trial of the petitioner on a felony charge as to which there was no final judgment of conviction, may be introduced in a disbarment proceeding against him to prove the commission of acts of moral turpitude. In a case of conviction, the testimony would be unnecessary as the fact of conviction is ground for disbarment. In my opinion this court should not in the absence of a stipulation, approve the introduction in evidence in a disbarment proceeding of the transcribed testimony of witnesses taken in the trial of an attorney on a charge of which he was not finally convicted, to prove acts of moral turpitude, much less in a case, such as this, where the determination of the question is not a necessary ground for disbarment.

Furthermore, I am in disagreement with the statement in the majority opinion that the requirements of section 1870, subdivision 8 of the Code of Civil Procedure have been met, in that the testimony was "given in a former action between the same parties, relating to the same matter." The majority do not come to the conclusion that the parties and subject matter are the same. Cf. *United States v. Aluminum Co. of America*, D.C.N.Y., 1 F.R.D. 48. The opinion avoids the necessity for such a conclusion by stating in essence that the effect is the same; that in disbarment proceedings the law does not require a strict adherence to the rules of procedure governing civil and criminal cases, and that there is no reason for invoking such rules unless they are necessary to insure a fair hearing. This court has recognized that in hearings in disbarment proceedings there is a measure of freedom from the rules of procedure applicable to the courts. But this court has also adhered to the requirement that an attorney may not be stripped of his privileges except on competent and legal evidence. In *Matter of Richardson*, 209 Cal. 492, 288 P. 669, it was pointed out that it is not so much a matter of procedural rules, as it is the kind of evidence that is necessary and sufficient to deprive an attorney of his right to practice. In that decision, in holding that hearsay evidence is not competent for the purpose, it was said at page 499 of 209 Cal.,

at page 671 of 288 P.: "Legal evidence alone should be required to deprive a duly admitted attorney of the vitally important and valuable right to practice his profession, and to impose upon him the stigma of disbarment. The court can be asked in such review only to consider the sufficiency of legal evidence. We are of the view, therefore, that only legal evidence, as that term is understood among lawyers, should receive the consideration of the Board of Governors and committees of the State Bar in the exercise of the disciplinary features of the Bar Act." That view was followed with reliance on the Richardson case in *Masters v. Board of Dental Examiners*, 15 Cal.App.2d 506, 59 P.2d 827.

The well understood test in this state as to the admissibility of the testimony of witnesses taken at a previous trial, where there has been opportunity for cross-examination, is not the court's opinion as to the adequacy of the cross-examination and fairness in the particular case, but is the identity of subject matter and parties. In *Neblett v. State Bar*, 17 Cal.2d 77, 109 P.2d 340, it was noted that the differences in the nature of the proceedings, in the parties, and in the subject matter inherent in a previous trial and in a disbarment proceeding, might greatly affect the interests and therefore the results produced by cross-examination of the same witnesses.

The cases supporting the majority and minority rules governing the admissibility of testimony taken in a previous trial when the witnesses are unavailable, as an exception to the rule excluding hearsay, are collected in 21 Ann.Cas. page 179, et seq. The majority rule, prevailing in England, Canada, and in our federal and state courts, requires essential identity of the matter in issue and of the parties, the latter comprehending privies in blood, in law or in estate. The statement in the text of the minority rule permitting opportunity for cross-examination (instead of requiring identity of parties and subject matter), as the test of admissibility—the rule applied by the decision in the present case—is supported by the citation of a case from each of two states, Connecticut and Nevada. The decision adds one from the State of Missouri. There may be others, but it seems to me that the majority rule, which has been adopted in this state by statute, should not be disregarded in any determination of the question.

CARTER, J., concurred.

CAL.REP.149-150 P.2d-53

LITVINUK v. LITVINUK,
Civ. 14261.

District Court of Appeal, Second District,
Division 3, California.

July 20, 1944.

Hearing Granted Sept. 14, 1944.

1. Appeal and error ⇨347(1)

Defendant's right to appeal from judgment and right to have a review of order denying her motion in so far as it related to her motion for a new trial expired with 60th day after entry of judgment. Code Civ.Proc. § 939.

2. Divorce ⇨165(3)

In husband's divorce action where record discloses that court was not advised at time of trial that husband had previously sued for divorce in Pennsylvania and had been denied a decree, wife and son had come from Pennsylvania to contest husband's divorce action but wife was reluctant to testify in absence of her attorney who was engaged in criminal trial and evidence was insufficient to meet requirements of statute prohibiting divorce on uncorroborated testimony or admission of parties, denial of motion to vacate divorce decree was error. Civ.Code, § 130; Code Civ. Proc. § 473.

3. Divorce ⇨127(4), 130, 133(1)

In husband's divorce action, testimony of witness was insufficient to establish either cruelty or desertion and failed to meet statutory requirements that no divorce shall be granted on uncorroborated testimony or admission of parties. Civ. Code, § 130.

4. Divorce ⇨127(3)

Where statutory requirements that no divorce shall be granted on uncorroborated testimony or admission of parties had not been met, court was without authority to grant divorce. Civ.Code, § 130.

5. Divorce ⇨1

Court has no general power to grant divorces but its authority is derived from statutory law and must be exercised within legal limitations. Civ.Code, § 130.

6. Judgment ⇨193, 340

Where matters of great public policy are involved, ignorance or negligence of parties or mere mistakes or derelictions of

their attorneys cannot affect power of court to withhold a judgment which is underserved or to vacate one which has been obtained wrongfully.

7. Divorce ☞11

The decision of court as to whether a divorce will be granted cannot be influenced by agreements or stipulations of parties and it cannot be affected, where questions of public policy are involved, by mistakes or negligence of parties.

Appeals from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action for divorce by Paul Litvinuk against Anna Litvinuk. From a judgment for plaintiff, from an order denying the defendant's motion to vacate judgment for plaintiff and from order denying motion to reopen case and for a new trial, defendant appeals.

Order denying motion to vacate judgment reversed and appeals from judgment and order denying motion to reopen case and for new trial dismissed.

Prior opinion, 149 P.2d 882.

A. P. Coviello, of Los Angeles, for appellant.

Ernest Best, of Los Angeles, for respondent.

SHINN, Justice.

Plaintiff brought this action for divorce, charging desertion and mental cruelty. Defendant, who resided in Pennsylvania, came to California, employed attorneys and filed an answer. In August, 1942, an order was made for the payment of \$25 fees to defendant's attorney and \$4 a week for the support of the 17-year-old son of the parties, who was residing with defendant. On October 6 defendant changed attorneys and employed one A. P. Coviello, who was then engaged in the trial of a criminal case in which his client, with many others, was charged with murder. Prior to that time the divorce trial had been set for March 15, 1943. On October 9 plaintiff served on defendant's first attorneys a notice of a motion to advance the case for trial; the motion was heard October 16 and the trial was advanced to November 23; on the latter date Mr. Coviello made a motion for a continuance on the ground that he was then actually engaged in the trial

of the murder case. The motion was denied by a judge who was acting as presiding judge, the case was sent out to a trial department and, because of other engagements of the judge of that department, was sent back to the calendar department, where it was continued to December 4. In granting the continuance the court ordered that the case be tried on December 4 and that Mr. Coviello or some other attorney be prepared to try it at that time. On December 4 Mr. Coviello was still engaged in the criminal case and made a motion for a further short continuance, supported by affidavit. This motion was denied, but on account of the condition of the calendar the case went over from Friday to Monday, December 7, when it was again sent out to a trial department. Mr. Coviello was still engaged in the criminal case. He sent a clerk to the trial department to inform the court that he was so engaged. Defendant during these proceedings had been accompanied to court by an adult son of the parties. In the trial department she requested a continuance until her attorney could be present. The court denied a continuance and proceeded with the trial in the absence of Mr. Coviello and without communicating with him. Plaintiff was sworn and gave testimony which, if believed and corroborated, would have justified the granting of a divorce to him. At the conclusion of plaintiff's testimony and that of a witness which was offered under the label of corroboration, the following proceedings took place:

"The Court: Take the stand, Mrs. Litvinuk.

"The Defendant: Your Honor, I can't understand without my attorney here. I would like to have him here.

"The Court: The record shows your attorney has had plenty of chance to be here.

"The Defendant: He told me I should say this to you.

"The Court: You get up on the stand and I will be your attorney.

"The Defendant: But my attorney, I want him to be here, please.

"The Court: He has had plenty of chance to be here. Do you want to tell me about your side of the case?

"The Defendant: I can't tell it without my attorney.

"The Court: All right. Decree granted to the plaintiff."

Later, on the same day, Mr. Coviello gave notice of a motion, to be heard on December 16, to vacate the minute entry ordering a decree in favor of plaintiff and for reopening of the case. He made an affidavit by which he represented that on December 7 he was actually engaged in the trial of the criminal case, and defendant made an affidavit in which she stated that on December 4, when the motion had been made for a short continuance in the calendar department, Mr. Coviello's client in the criminal case was then under cross-examination by the district attorney and it was impossible for him to leave the trial to attend the trial of the instant case. Her affidavit further stated that plaintiff, shortly before coming to California, had instituted an action for divorce in the State of Pennsylvania; that the case had been tried and that plaintiff had been denied a divorce. No affidavit by plaintiff was filed denying these statements concerning the Pennsylvania case. Plaintiff's attorney filed an affidavit which contained the following equivocal statement: "That affiant also alleges that to his knowledge no action was ever filed for divorce in the State of Pennsylvania wherein the divorce was denied." Unaccountably, Mr. Coviello failed to make an appearance on December 16 to present his motion and it was denied. Immediately thereafter findings and a decree of divorce were signed and filed. On February 17 Mr. Coviello gave notice of a motion, under section 473 of the Code of Civil Procedure, to vacate the decree on the grounds of "mistake, inadvertence, and surprise." With the motion was tendered a verified proposed cross-complaint for separate maintenance, charging plaintiff with willful neglect. It was alleged in the cross-complaint that plaintiff herein on or about March 5, 1940, had instituted a divorce action in the Court of Common Pleas for Philadelphia County, Pennsylvania; that said divorce proceeding continued for approximately one year, and that plaintiff herein had been denied a divorce in that action.

In an affidavit of defendant's attorney filed shortly before the argument of the motion to vacate the judgment, it was stated that in several conversations between the affiant and plaintiff's attorney, prior to the trial, mention had been made of the Pennsylvania case and of the fact that plaintiff had not complied with an order made in that case for the payment of costs

and attorney's fees. Plaintiff's attorney filed an affidavit on the following day in which there was no denial of these conversations or of the existence of the Pennsylvania decree.

[1] Defendant so framed her notice of motion to vacate the judgment that it could be construed as also a notice of intention to move for a new trial but she filed the notice on the 61st day after the judgment was entered. Her right to appeal from the judgment expired with the 60th day and with it the right to have a review of the order denying her motion in so far as it related to her motion for a new trial. Code of Civ.Proc. § 939; *Pacific Light, etc., Corp. v. Kauffman*, 1919, 39 Cal.App. 499, 179 P. 452; *Bates v. Ransome-Crummey Co.*, 1919, 42 Cal.App. 699, 184 P. 39. The question is suggested by these facts whether defendant upon her appeal from the order refusing to vacate the judgment has a right to have reviewed rulings which were made before the findings and judgment were signed and which were specified as a ground for a new trial. We do not answer this question for reasons which will hereinafter appear. We deem it immaterial whether as a matter of strict right and according to established procedure defendant could attack the judgment by motion under section 473 of the Code of Civil Procedure (but see *Foley v. Foley* (1898), 120 Cal. 33, 52 P. 122, 65 Am.St.Rep. 147; *Rehfuss v. Rehfuss*, 1915, 169 Cal. 86, 91, 145 P. 1020).

The case, in our opinion, is clearly one in which the interest of the state was and is paramount to the interests or procedural rights of either or both of the parties. We think it was the duty of the court to vacate the judgment when it was made to appear that the plaintiff, shortly before coming to California, had been denied a divorce after a trial in Pennsylvania.

[2] It appears from the record that the court was not advised at the time of the trial of the case that plaintiff had previously sued for divorce and had been denied a decree. As the record stands, it appears as an admitted fact that after being denied a divorce in Pennsylvania plaintiff came to California and instituted the present action as soon as he had established a residence and that he concealed the fact of the former judgment from the California court. No claim was made at the trial that any grounds for divorce had arisen recent-

ly; plaintiff accused his wife of cruelty and desertion and it appeared that they had not lived together since 1934 and that he had made no effort to bring her to California.

[3] Only one witness was produced to corroborate the plaintiff's testimony, one Mary Dimitroff, whose testimony we quote in full, as follows: "By Mr. Best: Q. You know both parties to this action, Anna and Paul Litvinut? A. I know Anna Litvinut from 1912, when I come to the United States.

"Q. You know Paul has lived in this County and State since February, 1941? A. In this State, yes; he has been to my house.

"Q. You knew both these parties when they were married back East, did you not? A. Yes.

"Q. Do you know of your own knowledge these parties separated in 1934? A. Yes; I was on a trip back East then, and I heard from my parents they are separated. They fight, and they lead an unhappy life.

"Q. You also saw Paul at that time, did you not? A. Yes.

"Q. You knew he had left the house? A. Yes.

"Q. Because he was going to be beaten up? A. I heard they fighting and don't live together.

"Q. You know that separation was against his will and consent? A. That's right.

"Q. You know they have lived separated and apart ever since that time? A. That's right.

"Q. Were these parties very happily married? A. I know they was not.

"Q. Tell the Court what you have observed about the married life—fighting on the streets, and all that? A. Well, I believe it was 1921; I am not very sure; I saw them on Easter Day, another lady fighting her.

"Q. On the street? A. Yes.

"Q. A fist fight? A. Yes; they been fighting.

"Q. Do you know that Paul and Anna were never happy in the house? A. That's what I heard.

"Q. You were in the house too, weren't you? A. Yes.

"Q. Did you ever see how Anna treated Paul? A. No, I never saw.

"Q. Never saw her treat him affectionately? A. No.

"Mr. Best: That's all."

We think it must be conceded that the testimony of this witness was wholly ineffective as evidence to establish either cruelty or desertion and that the proof failed to meet the requirements of section 130 of the Civil Code that no divorce shall be granted upon the uncorroborated testimony or admission of the parties.

[4, 5] When the court was called upon to vacate the judgment it was confronted not alone with the claims of error asserted by the defendant, but with established rules of law and public policy which affect the interests of the state and of the court. Through inadvertent failure of the court to properly appraise the testimony, a decree of divorce had been granted to plaintiff which it was not within the power of the court to grant, for under no construction of the attempted corroboration could the evidence of Mary Dimitroff have been deemed sufficient to meet the requirement of the statute. The court has no general power to grant divorces. Its authority is derived from statutory law and must be exercised within legal limitations. It was said in *Grannis v. Superior Court*, 1905, 146 Cal. 245, at page 253, 79 P. 891, at page 895, 106 Am.St.Rep. 23, "The provision forbidding the granting of a divorce solely upon the admission, stipulation, or testimony of the parties goes to the sufficiency of the proof, which is not ordinarily disclosed upon the record. A disregard of this provision cannot be made to appear of record except upon appeal, and for this reason it cannot be made the subject of inquiry upon any collateral attack. But on appeal, where such disregard appears, it is always held to be an act beyond the power of the court to do, or of the parties to sanction, and absolutely void."

We mention the obvious insufficiency of the evidence because it should have appealed to the court as a good reason for vacating the decree as being unauthorized by law and also because the requirement for corroboration is a manifestation of the interest of the state in the matter of divorce, which should be considered with other questions of public policy which confronted the trial court and confront us on the appeal. At the risk of redundancy we will mention a few of the pertinent ex-

pressions of our courts touching the subject of divorce. In *McBlain v. McBlain*, 1888, 77 Cal. 507, at page 509, 20 P. 61, it was said: "Not only can no divorce be granted upon the default of the defendant, or a finding of fact made by a referee, but the law inhibits the granting of divorces upon the uncorroborated testimony or admission of the parties. The parties to the action are not the only people interested in the result thereof. The public has an interest in the result of every suit for divorce; the policy and the letter of the law concur in guarding against collusion and fraud; and it should be the aim of the court to afford the fullest possible hearing in such matters." See also *Cottrell v. Cottrell*, 1890, 83 Cal. 457, 23 P. 531. In *Grannis v. Superior Court*, supra, 146 Cal. at page 252, 79 P. at page 894, 106 Am.St.Rep. 23, it was said: "The parties to such an action have not the right to control procedure as in other actions. The court is not bound by admissions in the pleadings, nor by the stipulations of the parties, nor is its inquiry as to the facts limited by the pleadings" and the court quoted from *Deyoe v. Superior Court*, 1903, 140 Cal. 476, 482, 74 P. 28, 98 Am.St.Rep. 73, as follows: "While an action to obtain a decree dissolving the relation of husband and wife is nominally an action between two parties, the state, because of its interest in maintaining the same unless good cause for its dissolution exists, is an interested party. It has been said by eminent writers upon the subject that such an action is really a triangular proceeding in which the husband and the wife and the state are parties." See also *Kegley v. Kegley*, 1936, 16 Cal.App.2d 216, 60 P.2d 482. In *Rehfuss v. Rehfuss*, supra, 169 Cal. 86, at page 92, 145 P. 1020, at page 1022, the court said: "Where it becomes manifest to the court, before it loses jurisdiction of the case, that a judgment decreeing a divorce has been obtained by collusive agreement between the parties, or through fraud practiced upon the court, the court has the inherent power to set aside the judgment. This it may do on its own motion. [Citing cases.]"

[6] An attempt to procure a divorce in this state which had recently been denied by the courts of Pennsylvania, by concealing information as to the earlier case, would have been a flagrant fraud. It would be scandalous and a reproach to the administration of justice to allow one who

had been denied a divorce in the state of his domicile to go to another state and, through concealment of the earlier judgment, obtain relief which his own courts had denied him. The interest which the state has in the institution of marriage and the preservation of family ties and sound public policy call for the assertion by the courts of their dignity and independence and for prompt and effective action to learn whether a litigant is attempting or has perpetrated deceit upon the court by the concealment or misrepresentation of material facts. The divorce laws of California are moderately strict and the legislature has repeatedly refused to relax them. By reason of this attitude and the vigilance of the courts in requiring adequate proof in divorce cases, including corroboration as to material facts, the courts of California have been free from the criticism that divorces may be had for the mere asking, with little or no regard for the merits of the case. So far as the record shows, defendant had a complete defense to the action. The fact that the former adjudication was not alleged by answer evidences neglect upon the part of defendant or her counsel or both. But where matters of grave public policy are involved, the ignorance or negligence of the parties or the mere mistakes or derelictions of their attorneys cannot affect the power and duty of the court to withhold a judgment which is undeserved or to vacate one which has been obtained wrongfully. It is the policy and the practice of the courts to allow and even to encourage a full disclosure of the facts in divorce cases. The rules of procedure are relaxed as in no other class of cases so as to accord a hearing as to the merits of defenses asserted in apparent good faith. This policy has been consistently followed in our state and we regard it as controlling upon this appeal. The defendant had come to California with a son of the parties for the purpose of defending the action. Both were in court for the purpose of testifying and they had been accused by the testimony of plaintiff of having forcibly ejected him from the home. The son was accused of having struck his father on that occasion. Defendant, through no fault of her own, found herself without the services of her attorney on the day of the trial. It does not appear that she had ever been advised that she would have to procure the services of another attorney on the trial if Mr.

Coviello was unable to attend, nor does it appear that Mr. Coviello made any effort to procure the services of other counsel for her. She should not be held accountable for her attorney's mistakes or lack of co-operation to the extent of having the case go against her without a full hearing. She was given an opportunity to tell her story, but in insisting that she could not do so in the absence of her attorney she appears to have been acting under his instruction. She was not questioned as to the acts of which she and the son had been accused in the testimony of the husband. It is not at all surprising that she felt helpless and incapable of presenting her defense when asked if she wanted to tell about her side of the case. She must have had an earnest desire to tell it when she came from Pennsylvania to California for that purpose. The opportunity which she had to present her defense might have been sufficient in an ordinary civil action but we think it was not sufficient in this suit for divorce. As said in *Rehfuss v. Rehfuss*, supra, 169 Cal. 86, at page 92, 145 P. 1020, at page 1022: "An action for divorce concerns not only the parties immediately interested, but also the state. The attorneys in the case represent the respective parties—the court in a sense represents the state. It is the duty of the court, representing the state, in accordance with the letter and policy of the law, to guard strictly against fraud, collusion, or imposition when the husband or wife seeks to dissolve the bonds that bind them together."

[7] No excuse has been offered for the failure to plead the former adjudication as a defense to the action, and if this were an ordinary civil action, defendant's motion to vacate the judgment could have possessed little merit in view of the manner in which her case had been handled. But the decision of the court as to whether a divorce will be granted cannot be influenced by the agreements or stipulations of the parties nor can it be affected, where questions of public policy are involved, by the mistakes or negligence of the parties. Even if the decree should not have been vacated upon any of the grounds of de-

fendant's motion, the facts alleged by defendant and not contradicted should have caused the court to vacate the decree on its own motion. The alleged facts as to the Pennsylvania decree were not brought to the attention of the court until the case had been tried. They were first alleged in the affidavit filed December 7 with defendant's motion to reopen the case. At the time set for hearing the motion Mr. Coviello made no appearance. The record does not show that defendant's affidavit was called to the attention of the court or that the court was, otherwise informed of the alleged facts as to the Pennsylvania case. Mr. Coviello's failure to appear and press the motion may well have indicated to the court that the effort to reopen the case had been abandoned. But however that may be, the motion to vacate the decree was submitted March 19, 1943, on the record and the affidavits of the attorneys for plaintiff and defendant, and no objection was made by plaintiff that the questions involved had previously been submitted to the court and that they had been ruled upon directly or indirectly. It was within the jurisdiction of the court to vacate the decree and to allow a trial of the action on the merits. For the reasons we have stated, we think there was also a duty to vacate it so as to allow a full inquiry into the facts, which showed, prima facie, that the court had been imposed upon by plaintiff's concealment of the alleged facts concerning the Pennsylvania case. It is quite probable that the court had no knowledge of the claims made with reference to that case until the motion to vacate was presented, but if the facts could have been or were known to the court before and no action had been taken thereon, no theory of estoppel or *res judicata* could deprive the court of its inherent power to correct the mistake.

The order is reversed for further proceedings in accordance with the views herein expressed. The appeals from the judgment and the order denying the motion to reopen the case and for a new trial are dismissed.

DESMOND, P. J., and PARKER WOOD, J., concur.

65 Cal.App.2d 456

COSTA v. MAGGIO.
Civ. 2898.

District Court of Appeal, Fourth District,
California.

Aug. 8, 1944.

Rehearing Denied Aug. 29, 1944.

1. Partnership ⇨336(3)

In action for termination of partnership and an accounting, evidence supported finding that profits from a certain transaction, in which plaintiff allegedly had released his interest in consideration of advance of partnership funds, were part of partnership assets, and that there was no breach of agreement by plaintiff.

2. Partnership ⇨336(3)

In action for termination of partnership engaged in buying and selling lettuce and carrot crops and an accounting, evidence supported finding that defendant was chargeable with amounts not credited to partnership account received from purchasers in repayment of shipping expenses paid by partnership, and was not entitled to a packing charge in excess of actual cost of packing.

3. Partnership ⇨345

Conflict of evidence as to items of accounting between partners was for trial court.

4. Accord and satisfaction ⇨23

Compromise and settlement ⇨17(1)

Executed agreement of accord and satisfaction, which was made by parties dealing upon equal terms, without fraud, misrepresentation, or mistake and adjusted existing differences concerning relative rights and obligations under a valid pre-existing agreement, is conclusive as to merits of controversy on which settlement was based.

5. Accord and satisfaction ⇨10(1)

Compromise and settlement ⇨6(2)

An agreement of accord and satisfaction can be predicated upon a dispute concerning a claim for money alleged to be due under existing contract only if it is shown that such dispute was bona fide.

6. Appeal and error ⇨1008(1)

Whether purported dispute on which alleged accord and satisfaction is predicated was in truth and fact a bona fide dispute is for trial court to determine from all the circumstances.

7. Accord and satisfaction ⇨26(3)

Compromise and settlement ⇨23(3)

Evidence supported finding that, though check accepted and cashed by one partner bore indorsement "according to final settlement of dealings in partnership," there was no true accounting, and that no accord and satisfaction resulted.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by Angelo J. Costa against Joe Maggio for termination of partnership and an accounting. Judgment for plaintiff, and defendant appeals.

Judgment affirmed.

Whitelaw & Whitelaw, of El Centro, and Henry O. Wackerbarth, of Los Angeles, for appellant.

Harry W. Horton, of El Centro, for respondent.

GRIFFIN, Justice.

This is an action for termination of partnership and for accounting. In August, 1941, plaintiff and respondent discussed with defendant and appellant the matter of transacting business in jointly buying and selling certain lettuce and carrot crops in Imperial Valley. As defendant expressed it: "We go out and buy certain patches and we joint. We are supposed to put up so much money apiece and joint them, pack them and split the profits." To furnish the necessary funds to carry out this enterprise plaintiff Costa, on January 7, 1942, delivered to defendant Maggio, \$3,200, which amount was, according to agreement, to be placed in Maggio's private bank account at Holtville. On January 7, 1942, Maggio had \$596.83 in his private account. He deposited an additional \$900 and also deposited plaintiff's \$3,200. Maggio was an experienced buyer and had partnership deals with persons other than plaintiff. He had conducted a packing business and owned sheds and machinery used in connection therewith. As of April 1, 1942, there had been ten patches of carrots and two of lettuce purchased by the partnership. Five patches of carrots and two of lettuce had been harvested. On March 16, 1942, carrots from the "Watanabe Ranch" were purchased and on May 6-14, 1942, were sold at a net profit of \$4,446.71. According to the audit of a referee appointed by the trial

court the gross sales by the partnership during the several months of the partnership enterprise were \$159,949.12. The operating expenses were \$124,422.62. The net profit was \$35,526.50.

The main dispute here presented is whether the "Watanabe Ranch" deal was a partnership deal in which plaintiff and defendant were entitled to participate in the profit, or whether it was a private deal of defendant Maggio and should not have been included in the partnership accounting.

On January 12, 1942, and thereafter, Maggio executed certain chattel mortgages and notes to one Sam Andrews. They were executed to secure advancements made by Andrews to carry on and conduct the packing business, pay expenses, labor in digging carrots and transporting same. These loans approximated several thousands of dollars. The notes and mortgages were signed by Maggio personally. In addition to the partnership patches of carrots the mortgage also covered two patches of carrots (115 acres) in which Maggio personally had a one-half interest. On January 7, 1942, Maggio deposited \$2,250 additional in his bank account. All monies received from the sale of the carrots and lettuce were deposited in Maggio's bank account. All expenses were paid from that account. Costa spent a considerable part of his time in harvesting and looking after the patches of carrots which Maggio had purchased. On February 23, 1942, Costa asked Maggio for and received \$200. On March 7, 1942, an additional \$300 was paid. Later, on March 18, 1942, Maggio advanced Costa, at his request, \$2,700, and on April 1, 1942, \$3,900. The \$2,700 was to be used by Costa in some claimed personal cherry deal in Northern California. Costa was to go north and negotiate his cherry transaction. A few days before the cherry deal was mentioned, Maggio had purchased the "Watanabe Patch." Maggio claims that before he would pay Costa the \$2,700 above mentioned, Costa agreed to release all of his interest in the "Watanabe Patch" to Maggio unless Costa returned soon and replaced the sum so drawn to the credit of the partnership venture. Costa left, but in a few days returned to the valley and continued looking after the harvesting of carrots which were purchased by Maggio under their joint venture agreement. Costa went to the "Watanabe Patch" and found that Maggio had had a disagreement with the pickers and had walked off of the ranch.

Through the efforts of Costa the harvesting continued and the crop was spared, resulting in a net profit of \$4,446.71.

[1] It appears from Maggio's testimony that the reason the profits on the "Watanabe carrots" were to be excluded from the partnership accounting is because Costa violated his agreement and did not return the \$2,700 to the bank account of Maggio but placed it in a personal account of Costa in the same bank. The evidence shows that the net profits from all partnership transactions as of April 1, 1942, were in excess of \$20,000. No demand was made on Costa to return the amount of \$2,700 to Maggio's bank account. No impairment of working capital was shown by failure of Costa to return the \$2,700 to the particular account suggested. Maggio admitted that the only reason he desired the return of the \$2,700 to the partnership account was to cover the possible loss of partnership operations. The evidence fully supports the trial court's finding that the profits from the "Watanabe Patch" were a part of the assets of the partnership and that there was no breach of agreement on the part of plaintiff.

The trial court found that the mortgage and notes were repaid from the profits of the partnership; that after all debts and expenses were paid there remained a net profit of \$35,526.50, exclusive of advances made by each of the copartners; that one-half thereof belonged to the respective parties; that \$11,026.95 had been paid from the profits to plaintiff from time to time and that a balance of \$6,736.30 was now owing from the partnership funds to plaintiff. Judgment was given accordingly.

[2, 3] In the accounting that was had it was discovered that the partnership had paid \$30 per car for "top ice" in shipping; that the purchaser repaid this amount to Maggio but that he made no record of the return of such amounts in the partnership accounts. Maggio admitted that such practice had been indulged in but claimed an offset of this amount in that he was entitled to 10¢ per crate as a packing charge and that he instructed the bookkeeper to recalculate the cost of operation accordingly. Costa testified that there was no such arrangements and that everything was to be done on an actual cost basis. Defendant, in the final accounting, was charged with the amount returned for "top ice" and his claim to the 10¢ per crate packing charge was disallowed. The evidence supports this finding. The question of conflict of evi-

dence was for the trial court's determination.

The last point raised involves the question of accord and satisfaction. On July 1, 1942, defendant Maggio drew a check on the partnership account in the sum of \$7,126.95, which was payable to Costa. Defendant alleges in his answer that he rendered an accounting to plaintiff from time to time; that a dispute arose as to the "top ice charge" and the claimed credit due on the "Watanabe Patch"; that plaintiff agreed to allow defendant 10¢ per crate packing charge; to exclude the "Watanabe Patch" from the partnership accounting; and that he accepted, in settlement of the dispute and partnership accounting, the \$7,126.95 check. The check, received by plaintiff on July 1, 1942, and cashed on September 10, 1942, had endorsed thereon: "According to final settlement of dealings in partnership." As to this transaction, the evidence shows that not until July 1, 1942, had Maggio's bookkeeper made up any form of final statement; that a rough pencil account was prepared which set forth only the ultimate result of profits realized on the respective patches. The accuracy or inaccuracy of the statement could only be determined by an investigation of vouchers, checks, invoices and other voluminous records. The document as thus prepared was not such an accounting as would disclose the entire transactions. Defendant's bookkeeper admitted that he was to prepare a further accounting for plaintiff. Such an accounting was not prepared until a few days before trial. Plaintiff, at the time he attempted to cash the check, struck off the words contained thereon regarding the settlement. The bank refused to cash the check as thus modified. On advice of counsel, plaintiff later reinstated that portion, cashed the check, and, by letter, notified defendant that the sum received on the check was to apply on the amount due him; that a full accounting had not been furnished him as promised and indicated that certain discoveries had been made by him respecting the accounting which would show that more money was due him. Plaintiff demanded another and corrected accounting. Defendant called at plaintiff's attorney's office and promised to render one as soon as his bookkeeper, who was away, had returned. No further accounting was made until time of trial.

[4-7] After hearing all of the evidence the trial court found that there was no

agreement between the parties to the effect that defendant was to have 10¢ per crate over actual cost of packing; that \$30 per car received by defendant for "top ice" was omitted from the accounting rendered to plaintiff; that certain discounts were obtained by defendant for material purchased which were not reflected in the statement; that plaintiff demanded an accounting but defendant failed and refused to furnish one; that when the complaint in this action was filed defendant was about to depart from the County of Imperial for parts unknown; that on July 1, 1942, defendant drew the check for \$7,126.95 and delivered it to plaintiff. But the court found "that said check * * * represented only the amount which the defendant admitted owing to the plaintiff in connection with said partnership operations and nothing in excess thereof and that the plaintiff accepted said check only upon account, and * * * that there was not an accounting, accord or satisfaction between the plaintiff and the defendant in connection with said partnership operations and profits." Where the parties to an executed agreement of accord and satisfaction have met upon equal terms, and without fraud, misrepresentation, or mistake, have adjusted their existing differences concerning their relative rights and obligations arising out of a valid, pre-existing agreement, it is neither necessary nor permissible to go behind a settlement actually made, for the purpose of ascertaining which of the parties was right in a controversy which preceded and constituted the basis of such settlement. However, before a dispute concerning a claim for money alleged to be due under an existing contract can be made the basis of an agreement of accord and satisfaction, it must be shown that such dispute was bona fide. It is for the trial court to determine from all the circumstances of the transaction whether the apparent or purported dispute or the controversy claimed to exist by the one urging the accord and satisfaction was in truth and fact a bona fide one. When the court in this case found that there was not an accord and satisfaction, it may have done so upon the basis of all of the facts submitted to it and determined that the defendant was not in good faith in his conduct or his contentions; that he was in fact acting fraudulently and in bad faith and that he was attempting to fraudulently evade and avoid the obligation he knew to be due. Other cases bearing upon the subject and emphasizing the nec-

essity of there being good faith in the dispute are *Cloyne v. Levy*, 26 Cal.App. 637, 148 P. 224; *Work v. Associated Almond Growers*, 102 Cal.App. 232, 282 P. 965; *Everhardy v. Union Finance Co.*, 115 Cal. App. 460, 1 P.2d 1024; *Messer v. Tait's, Inc.*, 121 Cal.App. 698, 9 P.2d 536; *B. & W. Engineering Co. v. Beam*, 23 Cal.App. 164, 137 P. 624.

The evidence fully supports the trial court's finding that there was no true accounting and that no accord and satisfaction resulted.

Judgment affirmed.

BARNARD, P. J., concurs.



65 Cal.App.2d 441

Ex parte ANGELUS.

Cr. 2313.

District Court of Appeal, First District,
Division 2, California,

Aug. 8, 1944.

1. Municipal corporations ⇨601

The right to zone may be resorted to by municipality on proper invocation of the police power, but such zoning must be reasonably necessary and reasonably related to health, safety, morals, or general welfare of the community.

2. Municipal corporations ⇨63(2)

Municipal by-laws and ordinances undertaking to regulate useful business enterprises are subject to investigation in courts with view to determining whether law or ordinance is lawful exercise of police power, or whether, under guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with right to carry on lawful business, to make contracts, or to use and enjoy property.

3. Constitutional law ⇨70(3)

A large discretion is vested in Legislature with reference to exercise of police power, and every intendment is to be indulged in favor of its validity, and it is only when it probably has no substantial

relation to the public health, safety, morals, and general welfare that it will be nullified by the court.

4. Municipal corporations ⇨621

An ordinance of city of Oakland requiring property owner to secure permit from city managers to make excavation in property, except an excavation for foundation for erection of a building for which a building permit has been issued, is valid as a proper exercise of the police power. St.1917, p. 1419.

Special Proceeding for Writ of Habeas Corpus from Superior Court, Alameda County; S. Victor Wagler, Judge.

Proceeding in the matter of the application of Louis Angelus for a writ of habeas corpus for purpose of determining validity of certain sections of the Municipal Code of the City of Oakland.

Writ discharged, and petitioner remanded to custody of Chief of Police of the City of Oakland.

J. Paul St. Sure, Edward H. Moore, and James R. Agee, all of Oakland, for petitioner.

F. Bert Fernhoff, City Atty., Archer Bowden, Deputy City Atty., and Ralph E. Hoyt, Dist. Atty., all of Oakland, for respondent Chief of Police of City of Oakland.

STURTEVANT, Justice.

This is an application for a writ of habeas corpus brought for the purpose of determining the validity of sections 2—6.01 and 7—1.08 of the Municipal Code of the City of Oakland. Further facts will be stated as we proceed.

The charter under which it is now acting was adopted by the city of Oakland July 1, 1911. Zoning ordinances were authorized by the act of 1917, page 1419. On February 5, 1935, a zoning ordinance thereafter codified in the Municipal Code was adopted. Section 2—6.01 is as follows:

"Excavations other than in streets. It shall be unlawful for any person to make, or cause or permit to be made, any excavation in or under the surface of any land, public or private, in the City of Oakland, without first obtaining a permit so to do from the City Manager in the manner hereinafter provided, excepting, however,

excavations provided for in Article 2 of Chapter 6 of this Code, and excavations for foundation or basement for the erection of a building on the premises in which the excavation is to be made and for which a building permit has been issued. Any excavation referred to herein shall include the removal of any soil, rock, sand or other material for purposes of sale, fill, building, or other construction usage off the premises from which removed."

Section 7—1.08 is as follows:

"'A' District Uses. In the 'A' One-Family District the following regulations shall apply, and the following uses only are permitted:

"One family dwellings,

"Museums, libraries, parks, playgrounds or community centers owned and operated by the City of Oakland.

"Golf Courses.

"Farms and truck gardens.

"Churches.

"Public and parochial elementary and high schools.

"Cemeteries, mausoleums, columbariums and crematories existing on January 1, 1935; alterations or additions thereto; uses requisite to, necessary for, related to, or incidental thereto.

"Accessory buildings on the same lot with any of the above uses, including one private garage, or one private stable for the keeping of not to exceed three (3) horses, when located not less than sixty (60) feet from the front lot line nor less than five (5) feet from any other street line, or a private garage constructed as a part of the main building.

"No outdoor advertising or display or sign of any character shall be permitted in the 'A' District, except: a name plate not exceeding one (1) square foot in area, a sign not exceeding six (6) square feet in area appertaining only to the lease, hire, sale or display of a building or premises; provided further, that no sign or name plate shall be permitted in a front yard or its projection across the entire width of the lot."

Within the extreme southeast corner of the boundary lines of the city of Oakland is a tract called Sheffield Village. It comprises about 100 acres. As shown by photographs introduced in evidence the village is small and stands at the foot of some hills which nearly surround it and gently roll

back from the village. Like all rolling hills they do not have any uniform slope. On some the slope is very gradual, say one foot in four. In other places the slope seems to be nearly one foot in one. The photographs do not indicate any out-croppings of rock. On the 20th day of July, 1942, the petitioner entered into a conditional contract of purchase under the terms of which E. B. Field Corporation, as owner, contracted to sell a tract of about 29 acres to petitioner for the price of \$11,000. The first installment was fixed at \$1100 and was payable on the delivery of said contract and the balance was payable in installments of \$250 every three months until the purchase price was fully paid. The boundaries of the tract so agreed to be sold are not contained in the contract. It recites that the boundaries are contained in Exhibit "A", however no copy of Exhibit "A" is contained in the record.

Prior to June 22, 1944 the petitioner entered upon the tract which he had agreed to purchase, proceeded to dig and excavate a truck load of soil, hauled it off the tract and sold and dumped the truck load. Later he was arrested and thereafter applied for a writ of habeas corpus. Had he not been arrested it was his plan and intention to remove 900,000 yards of the surface soil from his property and haul it away and sell it. The cut which the petitioner proposed to make is not clearly shown by the record before us. There are a number of gullies or small creek beds leading down the side of the hill toward Sheffield. They are studded with live oak trees. The petitioner had done some work and had at that time driven trucks through the village of Sheffield. The excavation involved at the time of the trial was work which he expected to perform by using trucks which he proposed to drive around the village rather than through it. His property laid across one of these small canyons taking in a part of the slope on one side and a part of the slope on the opposite side. How deep he proposed to cut is not clear. However he did propose to cut off the sloping banks on a grade of one and a half to one. There was evidence that the bottom of the canyon was approximately 100 feet above the village. How deep that cut was to sink in the gully or canyon does not appear. However it distinctly appears that the work, if completed, would leave immediately adjacent to said village in the place of the canyon studded with live oak trees

two naked sloping banks more or less in the form of the letter "V", having a valley in between of approximately seven acres. In the work already done the operation of the steam shovel caused a noise that was heard throughout the village. The hauling that was done caused rock to be scattered on the roads and highways which impeded travel. Dust and broken rock rolled over the side of the road. Some broken rock rolled against the fences of the residential district and broke or loosened the boards on the fences. The petitioner claimed he was placing a private road over the lands of the scavenger company. The length of that new road is not stated. However it was not claimed by the petitioner that he would not use any of the roads. It was shown in detail that he would be operating as many as fifteen loaded trucks and the empties over some of the roads. The village of Sheffield contains 198 residences which had cost from \$4500 to \$7500. The residences are occupied by young families. There are 180 children, many of them attending schools that are closely adjacent to the roads which the petitioner expected to use. As the Superintendent of Streets testified: "I started to say as to the safety of the inhabitants of that neighborhood, Revere Avenue runs through about the center of Sheffield Village, and that is the street that would be used in hauling rock from this quarry under Mr. Angelus' original application. The street passes the land that has been set aside for a public school and is now used as a grade school. Also, right in front of a small nursery school. Naturally—the street bisecting the village, the children on one side would have to cross the road to get to the school. I made a computation of the hauling operation, based on the estimated quantity set forth in the application, and found that under ideal operating conditions, maximum capacity of one and one-half yard shovel, loading trucks as fast as they could be put in place, there would be fifteen loaded trucks and fifteen empty trucks passing up and down this street every hour. In other words, there would be a truck using the street every two minutes. To me that indicated a dangerous condition in a residence community where ordinarily you would not have that kind of traffic. Other elements of the general welfare clause and the health clause, I think, can be best answered by relating the particular use as

proposed here. An operation of this magnitude can only be compared to an industrial operation. It is a heavy operation and it is customary to segregate those heavy industrial uses from residential uses. Ordinarily we recite in the list of uses that are permitted in an industrial zone and wind up with a stock covering clause which says, 'And other uses which, because of the existence of odor, dust, gas, smoke or excessive noise are obnoxious or objectionable.' That is the light in which we consider a quarry operation of this size, operation of heavy machinery, blasting, noise and dust is objectionable in a residential neighborhood."

There is not in the immediate neighborhood of Sheffield Village any railroad track of any kind or nature, nor are there any industrial plants operated by equipment which emit objectionable gases, scatter dust or create noises.

The petitioner has taken every step and means within his power under the laws and ordinances of the city of Oakland to obtain relief from the legislative body of that city, but he has been denied any relief whatever.

On the 22nd day of September, 1943, he filed an application for a permit to excavate. Among other things that application recited that he desired to excavate and haul rock, sand, gravel, etc., from 29.50 acres of land adjacent to tract 537 in Sheffield Village; that said material was to be sold or given to persons whom applicant might select; it was to be hauled over Revere Avenue to Foothill Boulevard and then along such streets as the superintendent might permit; that the excavation was estimated at 897,000 cubic yards and that the purpose of the excavation was to grade and subdivide petitioner's tract into lots according to a contour map "filed herewith." No such map is before us. The application further provided that the excavating would be done mechanically and blasting when necessary slope $1\frac{1}{2}$ to $1\frac{2}{3}$ super-elevation. Bulldozer shovels will be used to dig. Hauling will be by trucks. After granting a permit excavation to be commenced within ten days and to be completed in five years.

When that application was filed it was referred to Mr. Frickstad, the superintendent of streets. Under date of October 15, 1943, he reported that "under the application 7 acres would be reclaimed to a grade suitable for building and the remainder

will lie on a $1\frac{1}{2}$ to one slope facing to the southeast. The land so reclaimed would be relatively unsuitable for building purposes. The excavation is therefore obviously the major feature for the project. An excavation project in this locality is not desirable. Heavy blasting will no doubt be required with its accompanying possibilities of hazard and damage to persons and property in the neighborhood. The streets will be damaged if not wholly destroyed, as they are not designed for such heavy hauling purposes. The project commenced and left uncompleted would be even worse in all respects than the completed project. The excavation's costs being of such great magnitude the completion of the project is dependent upon a market for the excavated material. This market is extremely uncertain, and I would say for the next five years or even a greater period, will be unable to absorb the quantities of excavated materials offered within that time. Therefore if for any reason you decide to grant the permit of the petitioner it is suggested that the bond be sufficient to guarantee the completion of the project in accordance with the terms of the application. The cost of excavating this material and carrying it to a place suitable for deposit will be a minimum of 50¢ per cubic yard and may easily be \$1 per cubic yard. An adequate bond for this purpose would be not less than half a million dollars, and such bond is entirely "justified, in my opinion, for the protection of the surrounding properties and the public in general." On the hearing of the application the same was denied.

Mr. A. R. Rowell, attorney for Sheffield Village Home Owners Association, testified that the petitioner's property was subject to a deed of restrictions filed March 10, 1939. One of those restrictions was: "No portion of said property * * * shall be used except for private residential purposes."

A district map, together with a copy of Ordinance 474 C.M.S., the ordinance under attack in the instant case, were introduced. Evidence was also introduced tying the calls of said map to the petitioner's tract. Mr. W. E. Alworth testified that he had been city planning engineer of the city of Oakland since September 1, 1943. Prior to that he had been from 1928 city planning engineer of Pasadena. He testified that he made an examination of the application above mentioned and thereafter

made a report to the city manager's office. The contents of that report are not contained in the record, however he testified that the petitioner's property falls within district "A", a residence district as defined by the zoning ordinance. "The homes are all single family dwellings, all above average in cost, all well maintained, with lawns and shrubbery and flowers in each yard. * * * The subdivision (Sheffield Village) itself is very well done. It is designed to discourage through traffic in the subdivision. It makes provision for the shopping center at the edge of the subdivision so that no through traffic will need to go along the residential streets. There is provision for a school ground. There is land set aside for tennis courts. The streets are curved. The lots are adequate in size, in width and in length. The streets are planted with street trees. The whole development is an exceptionally fine residence development. A quarry operated where petitioner proposes to operate would have an effect on the residence area. As to safety for instance, the operation of the quarry would require the use of Revere Avenue through Sheffield Village. This street runs through about the center of the village. I am talking about the application on which I made my report." Mr. Litt, a resident of Sheffield, testified regarding the operation of trucks: "Well, this village as a whole, as you know, is located in sort of a bowl shape valley, and when that steam shovel operated you could hear it going in almost any part of the village. As to the trucks going through the village, up and down the street, the village is somewhat on a slope. The trucks would have to shift gear several times, usually heavy trucks, and every time the trucks were coming or going through the village either first or second gear, and there was necessarily grinding, because they were using their gears for a brake, resulting in back-fire and general noise which results in using the gears as brakes."

Many points were made by counsel when filing briefs. However the petitioner clarifies that situation by stating in his reply brief: "Comprehensive zoning is a valid exercise of a municipality's police power; lack of reasonableness is the only ground upon which such a zoning ordinance may be attacked; particular occupations or businesses even though not injurious to public health, safety, or general welfare, may nevertheless be excluded from certain

districts, when the same can be carried on elsewhere. If an ordinance is based on a proper exercise of police power the delegation of power thereunder to designated city officials to determine whether applications for a permit shall be granted or denied is proper. That 'financial hardship alone does not entitle owners of property to relief,' is conceded and requires no discussion. Petitioner is not applying for a writ of mandate." Again, quoting the petitioner: "The sole question is, may a municipality prohibit the removal of surface soil material from private property under the guise of its police power?"

[1,2] The petitioner answers the question as just stated in the negative. We think he is in error. *Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, and other cases all of which will be noted below. The petitioner cites and relies on *In re Kelso*, 147 Cal. 609, 82 P. 241, 2 L.R.A.,N.S., 796, 109 Am.St.Rep. 178, and *Matter of Application of Throop*, 169 Cal. 93, 145 P. 1029. We think neither case is pertinent because neither case involved a zoning ordinance. He also cites and relies on *People v. Hawley*, 207 Cal. 395, 279 P. 136. That case is more nearly in point but is to be distinguished in its facts. Three separate actions were brought regarding certain excavations being made by the Los Angeles Rock and Gravel Company. One action involved a nuisance per se and was brought pursuant to the provisions of Section 731, C.C.P. The other actions involved provisions of the zoning ordinances of Los Angeles. All three actions were tried together. The trial was conducted primarily as a trial of facts. In the action involving a nuisance per se the trial court made findings including injunctions affirmative and injunctions negative which resulted in allowing the defendant to proceed but in a legal and proper manner. As to the other two actions the trial court found that to permit the company to continue its excavation operations on its own land subject to the conditions imposed upon said operations by the judgment and decree first mentioned would not result in any substantial injury to any adjoining property or to persons residing or owning property in the near vicinity of the lands of the owner and that any ordinance of said city which would enjoin and prohibit the company from thus using its property was void.

On page 410 of 207 Cal., 279 P. at page 143, the court said:

"In this state the law governing the power of municipalities to enact reasonable zoning legislation has been definitely settled by the recent decisions of this court, notably the cases of *Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479; *Zahn v. Board of Public Works*, 195 Cal. 497, 234 P. 388; *In re White*, 195 Cal. 516, 234 P. 396, and *Pacific Palisades Ass'n v. City of Huntington Beach*, 196 Cal. 211, 237 P. 538, 40 A.L.R. 782. These decisions, with others of this and the several District Courts of Appeal, establish without question that the right to zone may be resorted to by municipalities upon a proper invocation of the police power. 'But such zoning must be reasonably necessary and reasonably related to the health, safety, and morals, or general welfare of the community.' *Pacific Palisades Ass'n v. City of Huntington Beach*, supra, 196 Cal. at page 216, 237 P. 539. Further, the court in the opinion in that case says (page 217 of 196 Cal. [237 P. 540]): 'Ordinances having that effect must be reasonable, and must be for the purpose of protecting the public health, comfort, safety, or welfare. Every intendment is to be made in favor of the lawful exercise of municipal power making such regulations, and it is not the province of courts, except in clear cases, to interfere with the exercise of that authority. But, as was recently said by the Supreme Court of the United States, "While property may be regulated to a certain extent if regulation goes too far it will be recognized as a taking." (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322, 28 A.L.R. 1321; see, also *Rose's U. S. Notes*). Therefore, notwithstanding this general grant of power, it is a thoroughly well-settled doctrine that municipal by-laws, and ordinances undertaking to regulate useful business enterprises are subject to investigation in the court, with a view to determining whether the law or ordinance is a lawful exercise of the police power; or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the right to carry on a lawful business, to make contracts, or to use and enjoy property. (*Dobbins v. [City of] Los Angeles*, 195 U.S. 223, 25 S.Ct. 183, 49 L.Ed. 169;

In re Application of Throop, 169 Cal. 93, 99, 145 P. 1029; Curtis v. City of Los Angeles, 172 Cal. 230, 234, 156 P. 462.)”

Bearing said rules in mind in that case the trial court heard a large amount of evidence and made findings among others including the following. That the work which the defendant was doing when done properly under the findings made by the trial court would be a positive benefit to the adjoining property by controlling flood waters and carrying them off; as to the objectionable noise the trial court found that if the work was done as directed by said findings that the noise would be less than the noise made by the equipment used on the Santa Fe, Union Pacific, and Pacific Electric Railways which operated railroads immediately adjacent to and along the entire length of the Arroyo Seco in which the defendant was operating; and that the defendant proposes to conduct the business and excavations in such a way as to create no menace to public health, safety or morals.

Petitioner also relies on Hadacheck v. Sebastian, Chief of Police of City of Los Angeles, 239 U.S. 394, 36 S.Ct. 143, 60 L. Ed. 348, Ann.Cas.1917B, 927. Hadacheck owned a brickyard in the city of Los Angeles. The city enacted an ordinance prohibiting the manufacture of brick in that territory. Nevertheless Hadacheck proceeded. He was arrested and convicted under the terms of the ordinance. He took out a writ of habeas corpus and in presenting his case he contended that he was conducting a lawful business in a lawful manner. The prosecution introduced evidence to the effect that the brick yard was in a neighborhood that had become built up as a distinctly residential section and that the residents were seriously annoyed by the petitioner's operations. The court held that the ordinance was valid and that the petitioner was legally found guilty of violating it.

The petitioner also relies on Stone v. Kendall, Tex.Civ.App., 268 S.W. 759. The facts in that case are much the same as in In re Kelso, supra. Kendall owned a gravel pit at Waco in the state of Texas. The city passed an ordinance prohibiting the removal of soil. The owner prepared a complaint setting forth that the officers of the city were about to enforce the provisions of said ordinance. The record does not show the allegations of that complaint. In open court the owner presented

the complaint and asked for an injunction. The city officers did not file an answer but objected to the issuance of the injunction. The trial court overruled the objection and issued the injunction. On appeal the court of civil appeals stated the condition of the record and then said: “Can it be said that the excavation, removal, and sale of gravel by appellees in the operation of said gravel pit will in itself necessarily, or even probably, injuriously affect the health, safety, comfort, or welfare of the inhabitants of said city? We think not.”

Village of Terrace Park v. Errett, 6 Cir., 12 F.2d 240, is more nearly in point. However in that case the court states facts showing that the plaintiff was the owner of certain farm lands; that the Village of Terrace Park adopted a zoning ordinance covering a strip of territory including said farm land. The plaintiff sought to remove certain gravel. Before doing so he commenced an action to restrain the Village from interfering with his work. The facts show that the moving of the gravel was beneficial and not injurious to the inhabitants of the Village. The court found: “Upon a full consideration of all of this evidence we have reached the conclusion that the health of the citizens of Terrace Park will not be imperiled by the operation of this plant at such a remote distance from their homes, and that the possibilities of discomfort and annoyance are more imaginary than real, and in no wise to be compared with the inconvenience or annoyance of the noise and soot of the trains that pass through this village every 30 minutes.” Thereupon the court affirmed the issuance of an injunction in behalf of said owner.

Bartsch v. Ragonetti, 123 Misc. 903, 207 N.Y.S. 142, 144, is also relied on by the petitioner. It was a case involving a zoning ordinance. No specific section of the ordinance is set forth. The acts of the owners were temporary in their nature. The court said:

“It appears by the evidence in this case that there have been some structures of a temporary nature which have been erected by these defendants upon portions of this land, such as small shanties and a small office, or something of that kind, and that these may be thought or claimed to be violations of the provisions of this zoning ordinance by the introduction of business buildings in a residential district. But, as before, they are not permanent in their

nature; they are temporary, and purely adjuncts and accessories to the work that is being prosecuted, in the removal of sand from the defendants' land, and so I think they come within the same rule as regards the sand itself. When the sand shall have been removed and its place filled with earth, unquestionably these structures will not be permitted to remain there, and after their use has ceased, if the defendants choose to leave them there, resort may be had to the courts at that time to compel their removal." It should be noted that said case was a decision by the Supreme Court and not by the highest court of the state of New York.

People v. Linabury, Westchester Co. Ct., 209 N.Y.S. 126, involved the zoning ordinance of the city of New York. It involved a construction of section 3 of said ordinance. Said ordinance contained nothing prohibiting excavations. It was contended that excavations were impliedly prohibited. The court held otherwise.

In his closing brief the petitioner states: "The cases cited by respondent in support of his contention are *Town of Lexington v. Menotomy Trust Co.*, 304 Mass. 283, 23 N.E.2d 559, and *West Bros. Brick Co., Inc. v. City of Alexandria*, 169 Va. 271, 192 S.E. 881. Assuming, without admitting, that these decisions support respondent's position, we respectfully state that they are contrary to: *In re Kelso*, 147 Cal. 609, [82 P. 241, 2 L.R.A.,N.S., 796, 109 Am.St.Rep. 178]; *In re Throop*, 169 Cal. 93, [145 P. 1029]; *People v. Hawley*, 207 Cal. 395, [279 P. 136]; *Hadacheck v. Sebastian*, 239 U.S. 394, [36 S.Ct. 143, 60 L.Ed. 348, Ann.Cas.1917B, 927]; *Village of Terrace Park v. Errett*, 6 Cir., 12 F.2d 240; *Bartsch v. Ragonetti*, [123 Misc. 903], 207 N.Y.S. 142, affirmed 214 App. Div. 799, 210 N.Y.S. 825; *People v. Linabury*, [Westchester Co. Ct.], 209 N.Y.S. 126; *Stone v. Kendall*, [Tex.Civ.App.], 268 S.W. 759." With that conclusion we do not agree. As shown above we have no quarrel with any one of those cases. However, we do not concede that any one of them is in conflict with the cases cited from the brief of respondent. *West Bros. Brick Co. v. City of Alexandria*, 169 Va. 271, 192 S.E. 881, as stated above, was decided by the Supreme Court of Virginia. It is a leading case with reference to excavations in gravel pits. It treats all of the problems involved in the instant case

and many others. It cites with approval *Zahn v. Board of Public Works*, 274 U.S. 325, 47 S.Ct. 594, 71 L.Ed. 1074, which approved the decision of our Supreme Court, Id., 195 Cal. 497, 234 P. 388. Moreover, it distinguished *In re Kelso*, 147 Cal. 609, 82 P. 241, 2 L.R.A.,N.S., 796, 109 Am.St.Rep. 178. Finally it closed with this paragraph [169 Va. 271, 192 S.E. 890]:

"An eighteen-acre clay pit in a growing town, contiguous either to residences or business establishments, would doubtless be objectionable. Where it is forbidden by statute (a zoning ordinance), the burden of showing that it is necessary, or even desirable, as adding to the comfort and welfare of the city, does not rest upon it. Statutes are presumed to be valid expressions of legislative will and stand until this is disproven."

After the decision of the Supreme Court of Virginia was rendered an appeal was taken to the United States Supreme Court. That court dismissed the appeal because the record presented no federal question. 302 U.S. 781, 58 S.Ct. 480, 82 L.Ed. 603. Regarding excavating gravel pits within territory covered by a zoning law other decisions are in accord with the case of *West Bros. Brick Co. Town of Lexington v. Menotomy Trust Co.*, 1939, 304 Mass. 283, 23 N.E.2d 559; *Town of Saugus v. B. Perini & Sons*, 1940, 305 Mass. 403, 26 N.E.2d 1.

[3] As we stated in the beginning in *Re Kelso*, supra, did not involve a zoning ordinance, however *Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, did. Therefore in the very beginning of that case, 195 Cal. on page 483, 234 P. on page 383, the court quoted the provisions of the enabling act of 1917 which authorized the enactment of zoning ordinances. Then at page 484 of 195 Cal., 234 P. at page 383, the court said:

"In short, the police power, as such, is not confined within the narrow circumspection of precedents, resting upon past conditions which do not cover and control present-day conditions obviously calling for revised regulations to promote the health, safety, morals, or general welfare of the public; that is to say, as a commonwealth develops politically, economically, and socially, the police power likewise develops, within reason, to meet the changed and changing conditions. What was at one time regarded as an improper exercise

of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power. This is so because: 'What was a reasonable exercise (of this power) in the days of our fathers may to-day seem so utterly unreasonable as to make it difficult for us to comprehend the existence of conditions that would justify same; what would by our fathers have been rejected as unthinkable is to-day accepted as a most proper and reasonable exercise thereof.' *Streich v. Board of Education*, 34 S.D. 169, 147 N. W. 779, L.R.A.1915A, 632, Ann.Cas.1917A, 760."

And again on page 490 of 195 Cal., 234 P. on page 385, the court said:

"It is scarcely necessary to reiterate here the well-recognized principle that courts are loath to substitute their judgment as to the necessity for a particular enactment for the legislative judgment as to the need of such enactment with reference to the exercise of the police power. A large discretion is vested in the legislative branch of the government with reference to the exercise of the police power. *Mehlos v. City of Milwaukee*, 156 Wis. 591, 146 N.W. 882, 51 L.R.A.,N.S., 1009, Ann. Cas.1915C, 1102; *Carter v. Harper*, supra, [182 Wis. 148, 196 N.W. 451, 33 A.L.R. 269]. Every intendment is to be indulged by the courts in favor of the validity of its exercise, and, unless the measure is clearly oppressive it will be deemed to be within the purview of that power. It is only when it is palpable that the measure in controversy has no real or substantial relation to the public health, safety, morals, or general welfare that it will be nullified by the courts. The courts may differ with the Legislature as to the wisdom and propriety of a particular enactment as a means of accomplishing a particular end, but as long as there are considerations of public health, safety, morals, or general welfare which the legislative body may have had in mind, which have justified the regulation, it must be assumed by the court that the legislative body had those considerations in mind and that those considerations did justify the regulation. *State ex rel. Civello v. City of New Orleans*, supra, [154 La. 271, 97 So. 440, 33 A.L.R. 260]. In *Hadacheck [v. Sebastian]*, supra, the court held in effect that, when the necessity or propriety of an enactment was a question upon which reasonable minds might differ, the propriety and necessity

of such enactment was a matter of legislative determination."

Those passages make it clear that what was not proper practice at the time the court decided *In re Kelso*, supra, was by virtue of the enactment of the statute of 1917 a proper enactment within the purview of the police power.

The petitioner's counsel quotes testimony of petitioner and argues that under the terms of the ordinance the result will be that petitioner's property will stand confiscated. That claim rests on the assertion that petitioner's lands are good for nothing but a pit of surplus filling material. That argument falls when one examines the exhibits introduced in evidence. The photographs show said lands to be sightly building lots.

[4] In the instant case under the facts it now appears, and when the legislative body adopted the ordinance we must assume that the facts then showed, or from the facts it could reasonably be apprehended, that the commencement or carrying on of an undertaking such as the petitioner seeks to carry on would result in objectionable noise and turmoil; would create and cause the spreading of clouds of dust; that rock would be scattered on the roads, streets and highways and would greatly impair their usefulness; that the wear and tear of the streets not constructed or intended for heavy traffic would result in the deterioration of said streets, roads and highways; that the hills hereinabove mentioned were in place when the zoning plan was adopted; and that the matter of the future use thereof was manifestly then before the municipal bodies preparing the ordinance under attack. Moreover, that the proposed excavation will clearly result in creating a scarecrow in the face of the inhabitants of Sheffield Village and by reason of the precipitous banks numerous slides will occur in the winter time greatly enhancing the objectionable appearance of the excavated territory. Under such circumstances it is apparent that no court may say that the minds of reasonable men may not differ as to the advisability of allowing such excavation. Having reached that conclusion, under all of the authorities the power of the courts is limited by the determinations heretofore made by the legislative department of the municipality. It follows that it may not be said the ordinance under attack is invalid.

The writ is discharged and the petitioner is remanded to custody of the chief of police of the City of Oakland, State of California.

NOURSE, P. J., and SPENCE, J., concur.



65 Cal.App.2d 499

GLEESON et al. v. FREEMAN et al.
Civ. 3330.

District Court of Appeal, Fourth District,
California.

Aug. 21, 1944.

1. Chattel mortgages ⇨173(4)

In action in claim and delivery to recover possession of turkeys allegedly covered by chattel mortgages executed by husband before his marriage, evidence supported finding that the turkeys belonged to mortgagor's wife and that the turkeys were not covered by the chattel mortgages.

2. Principal and agent ⇨23(5)

Evidence sustained finding that chattel mortgagee acted as agent of assignee of mortgages in handling business in connection with which mortgages were given.

3. Chattel mortgages ⇨173(5)

Where 1,200 turkeys of wife were taken under claim that they were covered by chattel mortgages executed by husband, but 600 of the turkeys were returned to wife, judgment for wife for value of all turkeys taken was reduced by value of turkeys returned.

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Action in claim and delivery by Fred G. Gleeson and another, substituted in the place of Ontario Feed & Milling Company, against C. W. Freeman and Belle Freeman, to recover the possession of certain turkeys, wherein Belle Freeman filed a cross-complaint. From a judgment for Belle Freeman, the plaintiffs appeal.

Judgment modified, and as modified, affirmed.

Wright, Thomas & Dorman, of San Diego, and Davidson & Bartlett, of Ontario, Cal., for appellants.

Fred O'Farrell and E. V. Winnek, both of San Diego, for respondents.

BARNARD, Presiding Justice.

The plaintiffs brought this action in claim and delivery to recover the possession of certain turkeys, claiming that the same were covered by three chattel mortgages executed by C. W. Freeman.

Gleeson conducted a feed store and C. W. Freeman operated a turkey ranch. To secure certain indebtedness and future advances Mr. Freeman gave three notes and chattel mortgages to Gleeson covering all turkeys on his ranch with the increase thereof and the eggs therefrom. The first mortgage was dated July 10, 1939, the second February 9, 1940, and the third May 27, 1940. In May, 1940, Gleeson assigned the second and third of these notes and mortgages to the Ontario Feed and Milling Company as security for his account with that company.

Mr. Freeman was required under the mortgages to buy his feed and supplies from Gleeson. He also marketed his turkeys through Gleeson, and in the account kept at all times by Gleeson many payments were credited on these mortgages and various charges were made against Freeman. At the time this action was brought the plaintiffs claimed that Freeman owed Gleeson about \$6000 balance on the three notes.

On November 9, 1940, Belle Freeman married C. W. Freeman and they occupied his ranch during the year 1941. In January, 1941, Gleeson informed Freeman that he would not furnish him feed or finance him longer and Freeman said he would be unable to raise any more turkeys. Freeman was then delivering turkey eggs to Gleeson but certain small or cull eggs were regarded as unsalable for hatching purposes. There is evidence that Gleeson told Freeman he could do what he pleased with these eggs, that Freeman told Gleeson that Mrs. Freeman had money of her own and that he would give these eggs to her and she would raise what turkeys she could, and that Gleeson consented to this arrangement.

Mrs. Freeman hatched out about 1700 turkeys from these eggs and raised about

1300 of them. She paid for the feed and other expenses with her own funds and in this connection gave a chattel mortgage on these turkeys to another dealer named Elliott, from whom she purchased some of the feed.

In the fall of 1941, the plaintiffs brought this action to obtain possession of the turkeys thus raised by Mrs. Freeman, claiming that they were covered by their three chattel mortgages. Pursuant to this action the sheriff removed 1200 turkeys from the Freeman ranch. For some reason in connection with the failure to give a bond, 600 of these turkeys were returned to the Freeman ranch and with the consent of Mrs. Freeman these were turned over to Elliott, to whom she had given a chattel mortgage.

In this action Mr. Freeman filed an answer in which he attacked various charges made against him by Gleeson and claimed that the three chattel mortgages were paid in full. He also alleged that the turkeys in question were owned by his wife. Mrs. Freeman answered and filed a cross-complaint alleging that the turkeys were her separate property, that they were not covered by the mortgages which had been given by her husband before her marriage, and that they were worth \$2500.

The court found that the three notes given by Mr. Freeman to Gleeson had been fully paid; that the turkeys claimed in this action were not covered by the mortgage; that they were the property of Mrs. Freeman; that Gleeson was the agent of the Ontario Feed and Milling Company; that the sheriff had taken possession of 1200 turkeys in this proceeding; that they were of the value of \$2400; and that Mrs. Freeman had been damaged in that sum. Judgment was entered that the plaintiffs take nothing and that Mrs. Freeman recover \$2400, with costs. From that judgment the plaintiffs have appealed.

It is unnecessary to consider many of the points discussed in the briefs. The pleadings on each side were insufficient in form and some findings are not supported by the evidence. It may be assumed that the finding that the three notes given by Mr. Freeman had been fully paid falls in this category. However, the record rather indicates that if anything at all was still owed on the original three mortgages, after deducting improper charges, it was very little.

[1] The controlling issue here is whether these turkeys were covered by the mortgages given by Mr. Freeman. The court found to the contrary and that the turkeys belonged to Mrs. Freeman. While sharply conflicting, the evidence supports those findings. The turkeys in question were not produced in the manner contemplated by and provided for in the three chattel mortgages and practically all of their value was produced as a direct result of money, credit and labor furnished by Mrs. Freeman who was not a party to those mortgages. As found by the court, this was done with the consent of Gleeson who released from the mortgages certain eggs which were of small value at best.

[2] The appellants further argue that, regardless of the situation of Gleeson as thus disclosed, the release of these eggs was not binding on the Ontario Feed and Milling Company which had taken an assignment of the three mortgages. It is argued that the only evidence that Gleeson was acting as the agent of that corporation is found in the testimony of Gleeson and his bookkeeper, and that agency cannot be established in that manner. While other evidence in this regard is meager it does appear that the assignment of these mortgages to the corporation was made for security only, and there is considerable evidence of subsequent actions on the part of Gleeson, and of business transacted by him in connection with the property which had been mortgaged, which justifies an inference that he was permitted to and did act as an agent for the corporation in handling the business in connection with which the mortgages were given and of which they were a part. In our opinion, the evidence is sufficient to sustain the finding of agency and also the finding that these particular turkeys were not covered by the three mortgages.

[3] However, while the court found that 1200 of these turkeys were taken by the appellants, which were worth \$2 apiece, it appears without contradiction that 600 of these turkeys were returned to the Freeman farm and were delivered by Mrs. Freeman, or with her consent, to another person to whom she had mortgaged them. So far as here appears, she received the value of these turkeys and no reason has been advanced, and we can find none in the record, why she should be paid twice for these turkeys. It follows that the

judgment in her favor should be correspondingly reduced.

That part of the judgment in favor of Belle Freeman is modified by reducing it from \$2400 to \$1200. As thus modified, the judgment appealed from is affirmed. Neither party to recover costs on appeal.

GRIFFIN, J., concurs.



65 Cal.App.2d 306

SARACCO TANK & WELDING CO., LIMITED, v. PLATZ et al.
Civ. 7020.

District Court of Appeal, Third District,
California.

July 31, 1944.

Rehearing Denied Aug. 29, 1944.

Hearing Denied Sept. 28, 1944.

1. Corporations ⚡361

In creditor's suit against directors of insolvent foreign corporation on their statutory liability for making a wrongful distribution of assets to other creditors to exclusion of plaintiff, evidence authorized judgment for plaintiff. Civ.Code, § 412.

2. Appeal and error ⚡1071(6)

In action against directors of insolvent foreign corporation on their statutory liability for wrongful distribution of assets, directors could not complain of failure of court to find that they were guilty of fraud since more particular findings in that regard would have necessarily been adverse. Civ.Code, § 412.

3. Corporations ⚡333

Defendant, who, while secretary and director of insolvent Nevada corporation, with full knowledge of plaintiff's unpaid claim and other indebtedness, organized California corporation and participated in transfer of assets of Nevada corporation to California corporation and distributed assets of Nevada corporation to certain preferred creditors without notice to plaintiff, was personally liable to plaintiff. Civ.Code, Cal. §§ 311, 363, 401a, 412; Comp.Laws Nev. § 1644.

4. Corporations ⚡326

The Code section creating statutory liability against directors of a foreign corporation for violation of specified duties is penal in its nature and should receive a strict construction. Civ.Code, § 412.

5. Corporations ⚡333, 334

The Code section creating a statutory liability against directors of a foreign corporation for violation of specified duties is intended to provide an independent remedy for creditors against directors for their wrongful payment of dividends or distribution of assets and for other prohibited acts. Civ.Code, § 412.

6. Corporations ⚡307

The directors of corporations are trustees for the benefit of stockholders and creditors.

7. Corporations ⚡544(2)

When a corporation becomes insolvent, its assets are held in trust for benefit of stockholders and creditors.

8. Corporations ⚡333

Where Nevada corporation was in debt and directors conveyed all its assets to new California corporation leaving Nevada corporation insolvent and directed payment of all money available to satisfy only a portion of its debts to exclusion of plaintiff's claim without giving plaintiff notice of transfer and with full knowledge of existence of plaintiff's claim and procured issuance of shares of stock in California corporation for their individual benefit, directors were liable to plaintiff for loss sustained. Civ.Code Cal., §§ 311, 363, 401a, 412; Comp.Laws Nev. § 1644.

9. Corporations ⚡357

Where creditor of Nevada corporation, after its directors with knowledge of existence of creditor's claim had transferred all assets to California corporation, reduced claim against Nevada corporation to judgment, which remained unsatisfied, in creditor's subsequent action against directors on their statutory liability for a wrongful distribution of assets court properly denied directors' motion to join Nevada corporation as a party defendant. Civ.Code Cal., § 412; Comp.Laws Nev. § 1644.

10. Fraudulent conveyances ⚡255(3)

Where an action is brought by a creditor against grantees of property alleged

to have been fraudulently conveyed, fraudulent grantor who has reserved no interest in property, although a proper party, is not a necessary party.

11. Corporations ⇨361

In creditor's action against directors of foreign corporation on statutory liability for wrongful distribution of assets, evidence sustained finding that corporation rather than one director individually was the debtor and that accordingly all directors were liable. Civ.Code, § 412.

12. Appeal and error ⇨909(6)

In creditor's action on statutory liability of directors of foreign corporation for wrongful distribution of assets, where trial court's findings adverse to directors were adequately supported by evidence, appellate court would assume that activities of one director, which other directors asserted were taken in his individual capacity, were carried on as agent for foreign corporation. Civ.Code, § 412.

13. Corporations ⇨352

Where directors of Nevada corporation, with knowledge of existence of creditor's claim, transferred all assets to new California corporation, creditor was entitled to a lien on certain shares of stock in new company which were a part of consideration for which transfer was made and held by one director to secure his fees as attorney for Nevada corporation. Civ.Code Cal., § 412; Comp.Laws Nev. § 1644.

14. Appeal and error ⇨1071(6)

A litigant is entitled to findings on every essential issue of pleading, and a failure to adopt findings on a material issue may authorize a reversal, but if findings are adopted upon all essential issues necessary to a determination of the cause or it is apparent that adoption of more specific findings would necessarily be adverse to appellant, omitted findings are not prejudicial and judgment should be affirmed.

15. Trial ⇨395(1)

In action by creditor of Nevada corporation against directors on their statutory liability for wrongful distribution of assets by transfer of assets to new California corporation, finding that shares of California corporation held by attorney director of Nevada corporation as trustee were assets of Nevada corporation subject to payment of creditor's claim was a sufficient

finding on issue of whether attorney director had a valid claim for attorney's fees against Nevada corporation which would entitle him to a paramount lien on such shares of California corporation held by him to secure payment of his claim. Civ. Code Cal., § 412; Comp.Laws Nev. § 1644.

16. Attorney and client ⇨186

Where attorney for Nevada corporation was also a director thereof and participated in transfer of Nevada corporation's assets to new California corporation without notice to a creditor and in a preferential payment to certain other creditors, attorney's lien on shares of stock in California corporation belonging to Nevada corporation was void as against creditor. Civ.Code Cal., § 412; Comp.Laws Nev. § 1644.

17. Trial ⇨398

Where transactions involved were exceedingly complicated, the fact that findings included numerous statements of fact unessential to determination of litigation did not make findings objectionable as irreconcilably conflicting.

18. Corporations ⇨353

Where creditor of Nevada corporation had secured a judgment against it which was unsatisfied and all assets of Nevada corporation had been transferred to new California corporation so that supplemental proceedings would have been useless, creditor was not required to bring supplemental proceedings against Nevada corporation as a prerequisite to action against directors thereof for a wrongful distribution of assets. Civ.Code Cal., § 412; Code Civ. Proc.Cal. § 714; Comp.Laws Nev. § 1644.

19. Creditors' suit ⇨13

When property which may be subjected to payment of a judgment creditor has been transferred to and is held by a third party who claims title thereto, a creditor's suit may be maintained without first resorting to supplemental proceedings. Code Civ.Proc. §§ 714, 720.

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Creditor's suit by Saracco Tank & Welding Company, Limited, against Albert E. Platz and others as officers and directors of Contact Mercury Mines Company, Inc.,

a Nevada corporation, on the statutory liability of such officers and directors for wrongful distribution of assets of such foreign corporation while it was insolvent to other creditors to exclusion of plaintiff. From a judgment for plaintiff, defendant Bryce Swartfager, individually and as trustee, appeals.

Affirmed.

Joseph Maddux and Bryce Swartfager, both of Santa Rosa, for appellant.

Gunther R. Detert, of San Francisco, for respondents.

PER CURIAM.

Bryce Swartfager, individually and as trustee, has appealed from a judgment which was rendered against him and other officers and directors of Contact Mercury Mines, Co., Inc., a corporation organized under the laws of Nevada, in a creditor's suit for liability under Section 412 of the Civil Code, for materials sold to the mine, no part of which was paid. None of the other defendants appealed from the judgment. The judgment was rendered against the appellant and other directors and agents of the foreign corporation on their statutory liability for wrongful "distribution of assets" of the insolvent foreign corporation to other creditors, to the exclusion of the plaintiff. The plaintiff was awarded judgment for the amount of its unpaid claim in the sum of \$3,718.99, together with interest and costs. A lien on 137,640 shares of stock of the new California corporation, which were held by the appellant as security for payment of an attorney's fee of \$5,000 due from the last-mentioned company, was also granted in this case, with authority to sell the same to satisfy the judgment.

The estate of John E. Grover, deceased, is the owner of a 20 acre quicksilver mining claim in Pine Flat District 18 miles northwest of Healdsburg in Sonoma County. The estate of Grover, deceased, was in the process of probate in Sonoma County. The appellant, Bryce Swartfager, was attorney for Hattie E. Ward, administratrix of the estate. October 8, 1937, the defendant, H. G. Walker, in behalf of himself and other investors, entered into a written agreement and option with said administratrix to purchase the mining claim for the sum of \$40,000, to be paid in specified installments. The contract of sale was

duly confirmed by the Probate Court July 28, 1938. January 11, 1938, the Contact Mercury Mines Company, Inc., was incorporated in the State of Nevada for mining purposes. February 11, 1938, Walker assigned and transferred the option and property to that corporation. H. G. Walker, Albert E. Platz and Bryce Swartfager were directors and officers of that corporation. Appellant admitted that he became a director of the corporation April 12, 1939. Mr. Swartfager was also the secretary and attorney for the corporation. It was duly authorized to transact business in California, and its principal place of business was in Santa Rosa, California, where the appellant resided. He had charge of the accounts of the mining corporation after he became an officer and director.

August 3, 1938, the Contact Mercury Mines Company became indebted to the plaintiff, Saracco Tank and Welding Company, for machinery and materials purchased for the mine in the sum of \$3,176.52, no part of which has been paid. The appellant knew that indebtedness was due and unpaid. Plaintiff repeatedly demanded of the appellant payment of that debt. The appellant also knew that the corporation owed unpaid debts aggregating some \$9,000. No dividends were ever earned or paid to stockholders. The corporation became insolvent. It was in default of payment to the Grover estate of an installment of \$10,000 due upon the purchase price of the mining property.

February 25, 1939, in consideration of the expressed sum of \$10, the Nevada mining company assigned and transferred to H. G. Walker all of its right, title and interest in said option and mining property. March 8, 1939, the appellant organized a new California corporation for mining purposes, called Contact Mining Company. He then became and still is a director of the new corporation. February 27, 1939, for the expressed consideration of \$10, Mr. Walker assigned and transferred the option and property of the Nevada corporation to the new California mining company. The real consideration for the assignment and transfer of the option to purchase, together with all mining equipment and personal property, to the new California corporation, as appears from the written offer of Walker dated March 22, 1937, was the sum of \$62,000, to be paid by issuing and delivering the following number

of shares in the new California corporation to the parties named, to wit:

200,000 shares to H. G. Walker
50,000 shares to R. L. Page
30,000 shares to C. E. Halliburton
5,000 shares to H. H. Warde

The remaining portion of that purchase price is expressed in that document as follows: "The remaining balance of said consideration, to wit, Five Thousand Dollars (\$5,000.00) shall be paid by the assumption and payment by said corporation of obligations outstanding against said property and said H. G. Walker in a total amount limited to the sum of Five Thousand Dollars (\$5,000.00), and limited to items and persons to be designated by the said H. G. Walker."

That offer was duly accepted by the new California corporation, and the shares were accordingly issued and delivered to the individuals previously mentioned, and said sum of \$5,000 was paid to Mr. Swartfager with instructions to pay the same to certain creditors named by Walker. The claim of this plaintiff was not mentioned.

This appellant testified that: "This trustee stock and the \$5,000.00 is money paid to a portion of the old creditors constituted the consideration given by the Contact Mining Company for the option agreement and mining claims obtained from Mr. Walker."

Clearly Mr. Walker was acting for and in behalf of the Nevada corporation in all the negotiations and transactions of the mining enterprise. The appellant had complete knowledge of those transactions as secretary of the Nevada corporation, and he drew many of the documents as an attorney for Mr. Walker and for the organizers of the original corporation. He testified: "I have been the attorney for the Contact Mercury Mines Co. at all times to and including the present, since October, 1938."

He also testified: "Contact Mercury Mines Co. received for the transfer to the Contact Mining Company of its interest in the lease and option to purchase payment of creditors claims in the sum of \$5,000.00, and thereupon the Contact Mining Company issued 160,000 shares of its stock to me as trustee for the benefit of Mr. Walker, Mr. Platz, Mr. Swartfager, Mr. Halliburton and Mr. England in the amounts set forth in the Walker trust agreement."

The appellant received said consideration of \$5,000 belonging to the original Nevada corporation and distributed it among certain creditors as directed. He said in that regard: "Following incorporation of Contact Mining Company I received from Mr. Walker a list of creditors of the Contact Mercury Mines Company to be paid from the \$5,000.00 to come from the new company. * * * The list for payment did not include plaintiff's account. I knew that plaintiff's account remained unpaid. I was told by Walker at the time that plaintiff's account was to be taken care of later in stock. The \$5,000.00 from the new company was received in various amounts over a period of a year. I paid all the \$5,000.00 as received to the creditors of the old company, most of whom had attachments or other claimed liens against the mine."

The appellant wrongfully paid out the assets of the Nevada corporation without notice to the unpaid creditors, knowing that the money was insufficient with which to pay all of them. Regarding the failure to give that notice he said: "No notice to creditors of dissolution of Contact Mercury Mines Co., a corporation, was sent out at the time of the transfer of its assets. No dissolution legal or otherwise of the corporation was undertaken for the Contact Mercury Mines Co. I never informed the plaintiff that the Contact Mercury Mines Co. had transferred all its assets to the Contact Mining Company or that said Contact Mining Company, after the transfer, was operating said mine. I did not give this notice."

When the appellant subsequently learned of the transfer of all the assets of the Nevada corporation to the new California company and appellant's payment of said sum of \$5,000 to other creditors without giving it notice of said transactions, it brought suit in the Superior Court of the City and County of San Francisco and recovered judgment against the Contact Mercury Mines Company and H. G. Walker. That judgment remains wholly unsatisfied. This suit against the directors of the Nevada corporation for personal liability on account of said unauthorized distribution of assets was then instituted.

Upon the foregoing testimony and other competent evidence adduced at the trial the court adopted findings adverse to the defendants, to the effect that the foreign corporation was possessed of the lease and op-

tion to purchase the Sonoma County mine, together with its machinery and equipment; that the directors of the Nevada corporation, acting through H. G. Walker as agent, negotiated to transfer all of its assets to the new Contact Mining Company in consideration of \$40,000 "payable to said H. G. Walker on behalf of said three directors and for the further consideration of \$5,000.00 in cash from the new company to be paid to creditors of the old company"; that the original Nevada corporation was then indebted to creditors in the sum of \$9,000; that no provision was made to satisfy plaintiff's unpaid claim of \$3,718.99; that the appellant became a director of the Nevada corporation April 12, 1939, and as secretary and attorney of that company he was familiar with all said proceedings and knew plaintiff's claim was wholly unsatisfied; that he personally organized the new California corporation to which said assets were subsequently transferred, and he became a director and attorney for the new corporation; that pursuant to said agreement "the new company paid the old company \$5,000.00 cash" and all of the assets of Contact Mercury Mines Company were transferred to the new company; that said \$5,000 was paid to Bryce Swartfager, who thereafter distributed and paid said sum to certain creditors of the old corporation, without notice to plaintiff and without provision for the satisfaction of any portion of its debt; that the new company issued to Bryce Swartfager, as trustee, 137,646 shares of the stock of said new company, which are held to secure his attorney's fees in the agreed sum of \$5,000, and that said transfer of assets rendered the Nevada corporation wholly insolvent.

Based upon those findings, the court rendered judgment against this appellant and the other directors of the Contact Mercury Mines Company upon their statutory liability created by Section 412 of the Civil Code, for the amount of plaintiff's claim in the sum of \$3,718.99, and gave plaintiff a lien on said shares of stock standing in the name of Bryce Swartfager, as trustee, to secure the payment of said claim, directing the sale of said stock to satisfy the judgment.

A motion for new trial was denied. From the judgment Bryce Swartfager only has appealed.

The appellant contends that the findings and judgment are not supported by the evidence; that the court erred in rendering a

personal judgment against him for the debt of the Nevada corporation; that his title to the shares of the Contact Mining Company, which are held in trust to secure payment of his attorney's fees, is superior to that of the plaintiff; that the court erred in refusing to make Contact Mercury Mines Company a party defendant in this action, and that the court failed to adopt findings upon certain specified issues presented by the pleadings.

[1,2] We are of the opinion the findings and judgment are adequately supported by the evidence. The judgment is founded on the statutory liability in favor of creditors and against directors of a foreign corporation doing business within this state, for violation of their official duties in making unwarranted "distributions of assets," as provided by Section 412 of the Civil Code. That personal liability of directors for the acts or omissions referred to in that section does not necessarily depend upon proof of fraud, in spite of the fact that their conduct may constitute constructive or even actual fraud. The complaint in this case does charge the directors with fraud, but the court did not find that they were guilty of fraud. We think such findings are not necessary in order to support the judgment. If the acts and conduct of the appellant, which are specifically found by the court to have transpired, do constitute constructive fraud, the omission of the court to have so concluded is harmless because it is apparent that more particular findings in that regard would have necessarily been adverse to the appellant. *Kramer v. Sanguinetti*, 33 Cal.App.2d 303, 312, 91 P.2d 604; 24 Cal.Jur. 944, sec. 188.

[3] The evidence satisfactorily shows that while the appellant was acting as secretary and as a director of the Nevada corporation, with full knowledge of plaintiff's unpaid claim and of other indebtedness in the aggregate sum of \$9,000, he organized a new corporation and participated in the transfer of all property and assets of the foreign corporation to the new Contact Mining Company, leaving the former corporation defunct and insolvent. He then received and distributed assets of the former corporation in the form of cash in the sum of \$5,000, to certain preferred creditors, without notice to this plaintiff.

Section 412 of the Civil Code provides in part: "The directors of a foreign corporation transacting business in this State

shall be liable to * * * creditors, * * * for the making of unauthorized dividends, purchases of its shares, or distributions of assets, * * * whether committed or done in this State or elsewhere. Such liabilities may be enforced in the courts of this State."

Section 45 of the Nevada Corporation Law, Comp.Laws Nev. § 1644, likewise provides that the transfer of any property of a corporation whose insolvency is imminent, "with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid." That section concludes by declaring that: "Every director or officer of a corporation who shall violate or be concerned in violating any provision of this section shall be personally liable to the creditors and stockholders of the corporation of which he shall be director or an officer to the full extent of any loss they may respectively sustain by such violation."

In Restatement of the Law on Conflict of Laws, page 276, section 188, it is said with respect to the liability of directors:

"So far as the directors or agents are participants in acts done within the state, a state can impose liability upon the directors or agents of a foreign corporation doing business in the state for acts done within the state or for failure to do acts required by the law of the state as a condition of doing business within the state."

[4-6] Section 412 of the Civil Code, which creates a statutory liability against directors of a foreign corporation for violation of specified duties, is penal in its nature (Western Mortgage & Guaranty Co. v. Gray, 215 Cal. 191, 200, 8 P.2d 1016, 80 A.L.R. 866; 19 C.J.S., Corporations, p. 303, § 876) and should receive a strict construction in that regard. That section is intended to provide an independent remedy for creditors against directors for their unauthorized payment of dividends or distribution of assets and for other prohibited acts. It has been held the directors of corporations are trustees for the benefit of stockholders and creditors. Winchester v. Howard, 136 Cal. 432, 442, 64 P. 692, 69 P. 77, 89 St.Rep. 153; 6A Cal.Jur. 1100, sec. 620. In the Winchester case, supra, it is said: "Directors are also trustees for the stockholders and indirectly for the creditors. They have always been held responsible as trustees in their manage-

ment of the property and affairs of the corporation."

[7] When a corporation becomes insolvent its assets are held in trust for the benefit of the stockholders and creditors. In 15A Fletcher's Cyc. of Corp., Perm.Ed. (1938) sec. 7369, at page 59, it is said: "The theory of the trust fund doctrine is that all of the assets of a corporation, immediately on its becoming insolvent, become a trust fund for the benefit of all of its creditors."

Section 311 of the Civil Code provides that "Directors and officers shall exercise their powers in good faith."

Section 363 of the Civil Code declares that: "Except as provided in this title, the directors of a corporation shall not authorize or ratify the purchase by it of its shares or declare or pay dividends or authorize or ratify the withdrawal or distribution of any part of its assets among its shareholders."

The preceding section specifically provides that in case of any "wilful or negligent violation of the provisions of this section" the directors "shall be jointly and severally liable to the corporation * * * for the benefit of the creditors." That section also provides that any judgment creditor of the corporation may sue either the corporation or any or all of the directors for the detriment caused by such violation of the statute. Section 412 of the Civil Code creates a statutory liability against the directors of a foreign corporation for other violations of specified acts and omissions among which are the making of "unauthorized dividends" and the unauthorized "distributions of assets."

[8] In the present case the directors violated both of the last-mentioned prohibitions of the statute. While the Nevada corporation was indebted to creditors in the aggregate sum of \$9,000, the directors of the foreign corporation conveyed to the new California company all of its assets, leaving the original company insolvent, and directed payment of all the money available to satisfy only a portion of its debts to the exclusion of the plaintiff's claim, without giving it notice of the transfer, and with full knowledge on the part of the directors of the existence of the debt. They also procured the issuance of shares of stock in the new company for their individual benefit. The transfer was made

without notice to the plaintiff. That transaction was a clear breach of trust and rendered the directors liable for the loss thereby sustained to plaintiff. The original corporation never thereafter transacted business. The transfer amounted to a voluntary dissolution of the Nevada corporation, without providing for the payment of all of its debts. It resulted in a preference of existing creditors. Section 401a of the Civil Code provides that a distribution of assets to the stockholders on dissolution of the corporation may be made only "after determining that all the known debts and liabilities * * * have been paid or adequately provided for." This was not done. The directors are therefore liable for plaintiff's claim.

Numerous authorities hold that directors of corporations are liable to creditors under such circumstances. *Darcy v. Brooklyn & N. Y. Ferry Co.*, 196 N.Y. 99, 89 N.E. 461, 26 L.R.A., N.S., 267, 134 Am.St.Rep. 827; *McIver v. Young Hardware Co.*, 144 N.C. 478, 57 S.E. 169, 119 Am.St.Rep. 970. The same principle imposing liability in favor of stockholders and creditors against directors and officers of corporations for violation of their trust is uniformly upheld by the great weight of authority. *Lowe v. Copeland*, 125 Cal.App. 315, 13 P.2d 522; *Southern Cal. Home Builders v. Young*, 45 Cal.App. 679, 188 P. 586; *Nelson v. Jones*, 38 Idaho 664, 224 P. 435, 38 A.L.R. 85; *Associated Fruit Co. v. Idaho-Oregon Fruit Growers' Ass'n*, 44 Idaho 200, 256 P. 99; *Whitfield v. Kern*, 120 N.J.Eq. 115, 184 A. 333.

In the *Darcy* case, *supra*, under circumstances strikingly similar to those of the present case, the court said:

"The consideration for the transfer did not pass from the purchasing corporation to the Brooklyn & New York Ferry Company or its directors, but was turned over directly to the stockholders of the selling corporation and distributed among them. * * * No proceedings were ever taken to effect a dissolution of the corporation according to law. No notice of the transfer was given to creditors nor was any property retained by the directors with which to meet the plaintiff's claim. * * *

"The liability of the directors is predicated, not on the ground that their action in making the transfer was fraudulent, but upon the proposition that it is a viola-

tion of duty on the part of the directors of a corporation to divest it of all its property without affording a reasonable opportunity to its creditors to present and enforce their claims before the transfer shall become effective. * * * We think it is sound in law, and should be upheld. * * * The motives which induced the omission are immaterial. The entire assets could not lawfully be set over by the selling corporation to the purchasing corporation until some sort of opportunity had been given to the creditors of the latter to present and enforce their claims. * * * Their omission to make adequate provision for the protection of the creditors was proof of their dereliction and good faith constitutes no defense."

In the *McIver* case, *supra*, under circumstances also similar to those of the present case, the court held, for the same reasons expressed in the *Darcy* case, *supra*, that it is "settled that the stockholders and officers of the corporation are liable to it and to its creditors for any acts of malfeasance, misfeasance, or nonfeasance by which their rights are injuriously affected, and, as a consequence, for any loss arising out of their fraud or negligence." [144 N.C. 478, 57 S.E. 171, 119 Am.St.Rep. 970.] Numerous authorities are cited in that opinion in support of that doctrine.

[9] The court did not err in denying appellant's motion to join the judgment debtor, Contact Mercury Mines Company, as a party defendant in this case. The plaintiff had previously obtained judgment against that company for its claim in a suit brought in the Superior Court of the City and County of San Francisco, which remains wholly unsatisfied. That company was rendered defunct and insolvent by transfer of all of its assets to the new California corporation. It is possessed of no property or assets which would be affected by this judgment or from which the judgment could be satisfied. The stock of the new company, which is involved in this judgment, was issued to the individuals heretofore mentioned for their personal benefit. All of the directors and parties interested in this suit are parties defendant.

[10] It has been held that where an action is brought by a creditor against a grantee of property alleged to have been fraudulently conveyed, the fraudulent grantor who has reserved no interest, legal or

equitable, in the property, although he may be a proper party to the action to set it aside, is not a necessary party. *Liuzza v. Bell*, 40 Cal.App.2d 417, 424, 104 P.2d 1095; *Blanc v. Paymaster Mining Co.*, 95 Cal. 524, 30 P. 765, 29 Am.St.Rep. 149. The appellant is not prejudiced because the Nevada corporation was not a party to this action.

[11] The appellant contends that the evidence shows that plaintiff's debt of \$3,718.99 was incurred by H. G. Walker, individually, and not by the Nevada corporation, and that the court therefore erred in holding appellant liable as a director of the company for unauthorized distribution of the funds. The court found that on August 3, 1938, the Nevada company became indebted to plaintiff for goods sold and delivered, and that plaintiff had previously recovered judgment in the Superior Court of the City and County of San Francisco, on September 6, 1940, in a suit against the corporation and Walker, for the sum of \$3,639.59 and \$79.40 costs, aggregating the exact sum for which this suit was brought. It was stipulated at this trial that said judgment was procured by the plaintiff against the Nevada corporation and Walker. The execution was returned, unsatisfied. It is not contended any part of that judgment has been satisfied. We are convinced the evidence adequately supports the court's findings that the indebtedness was incurred by the Nevada company, and that Walker was acting in behalf of that company in purchasing the machinery and equipment.

In several assignments of alleged insufficiency of evidence to support the findings the appellant asserts that the Nevada corporation issued no stock and that it was in default of payments of certain installments of the agreed purchase price of the mine; that Mr. Walker personally paid the delinquent installments and that one Kassabaum subsequently operated the mine pursuant to an agreement based on a division of royalties secured from the mine, but he thereafter defaulted and abandoned his contract, and that Walker then procured the funds, including said sum of \$5,000 which was paid to appellant for creditors, with which the enterprise was financed, that said money did not belong to the Nevada company and the directors therefore did not make "unauthorized distributions" of the funds belonging to the corporation.

[12] That is legitimate argument in view of the fact that Section 412 of the Civil Code is penal in character and should therefore receive a strict construction against judgment creditors. The court, however, adopted findings against the directors on all of those issues. We are of the opinion those findings are adequately supported by the evidence. We must therefore assume those transactions were carried on by Mr. Walker as agent for the Nevada corporation, and that said sum of \$5,000 belonged to that company. It was distributed to preferred creditors to the exclusion of the plaintiff.

[13] There is also sufficient evidence to support the finding that plaintiff was entitled to a lien on the 137,640 shares of the new company held by the appellant to secure his attorney's fees. Those shares were a part of the consideration for which the transfer was made. Neither the new company nor the other individual defendants deny that lien. All of them were parties to this action, and none of them, except the appellant, has appealed. The title to neither the shares of the new company which were issued to other defendants, nor those which were issued to the appellant to be held in trust to secure his attorney's fees, was paramount to the prior right of an unpaid judgment creditor to enforce payment of his valid claim against the property of the Nevada corporation, under the circumstances of this case.

For the reasons previously stated, we find no substantial merit in the other assignments of lack of evidence to support the findings and judgment.

[14] It is true that a party to an action is entitled to findings on every essential issue of the pleadings, and that a failure to adopt findings on a material issue may entitle an appellant to a reversal of the judgment. *Taylor v. Taylor*, 192 Cal. 71, 80, 218 P. 756, 51 A.L.R. 1074. But it is the established rule, supported by a multitude of authorities, that if findings are adopted upon all essential issues necessary to a determination of the cause, or it is apparent that the adoption of more specific findings would necessarily be adverse to the appellant, the omitted findings are not prejudicial, and the judgment should be affirmed. (24 Cal.Jur. 947, sec. 190.)

[15] The appellant asserts that the court erred in failing to adopt findings

upon the issue as to whether he had a valid claim for attorney's fees against the Nevada corporation which entitled him to a paramount lien upon the shares of the new company held by him to secure payment of his claim. The court did find as its conclusion: "That 137,640 shares of Contact Mining Company stock represented by certificate numbers 3, 21 and 22, held by Bryce Swartfager as trustee are assets of the Contact Mercury Mine Co., Inc., subject to the payment of plaintiff's claim as creditor of the old company."

We think that is a sufficient finding that the stock of the new company which is held by the appellant is "subject to the payment of plaintiff's claim as creditor of the old company." The appellant did testify that the old company owed him \$5,000 as attorney's fees and that said sum was agreed to by Mr. Walker as manager of the company. But he also testified, "I was to be paid out of the dividends on the stock coming from the new company."

[16] We do not question the validity of appellant's claim for attorney's fees against the Nevada corporation, nor the fact that he is a creditor of that company. But it is apparent that it was a breach of his trust as a director of that company to participate in the transfer of all the assets of the Nevada corporation by means of which he might secure stock in the new company to hold as security for payment of his debt in preference to other valid claims of creditors. For the reasons previously stated, that alleged lien would be void. The court therefore properly found that appellant held the stock of the new corporation subject to the payment of plaintiff's established claim as a creditor. More specific findings on that subject would necessarily have been adverse to the appellant. The findings are therefore adequate in that respect.

[17] The appellant has challenged several of the findings as irreconcilably conflicting. We have critically examined those findings and find no substantial merit in that charge. The transactions which are involved in this suit are exceedingly complicated. The findings do include numerous statements of facts which appear to be unessential to the determination of this action. But we are of the opinion the

material findings are not irreconcilably conflicting.

[18, 19] Finally, the appellant declares that this suit against the directors for breach of trust in making unauthorized distribution of funds of a foreign corporation will not lie until plaintiff's remedy for collection of his claim against the corporation has first been exhausted. In support of that contention he relies on the cases of *Bond v. Bulgheroni*, 215 Cal. 7, 8 P.2d 133, and *Farmers' and Merchants' Bank of Los Angeles v. Bank of Italy*, 216 Cal. 452, 14 P.2d 527. It is asserted that supplemental proceedings against the judgment debtor as provided by Section 714 of the Code of Civil Procedure was a prerequisite to the maintenance of this suit. That procedure was not necessary under the circumstances of this case. The plaintiff held a judgment against the Nevada corporation and H. G. Walker. An execution was returned in that case wholly unsatisfied. The judgment debtor possessed no assets from which the debt could be satisfied. The new corporation held the assets, including the option to purchase the mine and the machinery and equipment, claiming title thereto. The \$5,000 had been expended by the appellant in payment of other creditors. The stock of the new corporation was held by individuals who claimed title thereto. It would be futile and useless to prosecute supplemental proceedings under Section 714 of the Code of Civil Procedure. Under such circumstances supplementary proceedings are wholly inadequate and a suit in the nature of a creditor's bill is therefore authorized. *Bond v. Bulgheroni*, supra; 7 Cal.Jur. 800, sec. 10. When the property which may be subjected to the payment of a judgment creditor has been transferred to and is held by a third party who claims title thereto a creditor's suit may be maintained without first resorting to supplemental proceedings. Sec. 720, Code Civ.Proc.; *Brunvold v. Victor Johnson & Co., Inc.*, 59 Cal.App.2d 75, 81, 138 P.2d 32; *Booge v. First Trust and Savings Bank of Pasadena*, 46 Cal.App.2d Supp. 879, 116 P.2d 503.

The judgment is affirmed.

Hearing denied; CURTIS, J., dissenting.

65 Cal.App.2d 371

PEOPLE v. PLANAGAN.

Cr. 3770.

District Court of Appeal, Second District,
Division 1, California.

Aug. 2, 1944.

Hearing Denied Sept. 1, 1944.

1. Criminal law ⇨568

The absence of evidence suggesting a motive for the commission of the crime charged is a circumstance in favor of accused to be given such weight as the jury deems proper, but proof of motive is never indispensable to conviction.

2. Homicide ⇨166(1)

Considerable latitude is allowed in the reception of evidence on question of motive, and evidence having a direct tendency to prove motive on the part of a person who commits the homicide, and thus to solve a doubt either as to identity of the slayer, the degree of the offense, the insanity of accused, or to the justification of his act, is admissible.

3. Homicide ⇨233

A failure to prove motive is not fatal in a prosecution for murder where the conviction is based upon circumstantial evidence.

4. Homicide ⇨166(3)

In murder prosecution, the admission of testimony with respect to a childhood episode in which the mother of the slain child warned defendant to leave the child alone and not to come on her premises again, as an attempt to prove a motive for the crime, was not erroneous.

5. Criminal law ⇨703

In a criminal prosecution it is the duty of counsel making a statement to jury to state the facts fairly and to refrain from stating facts which he cannot or will not be permitted to prove.

6. Criminal law ⇨1171(2)

The district attorney's opening statement is supposed to be an outline of what the people intend to prove, and the failure to make such proof does not necessarily indicate prejudice, but it is the substance and implication of a statement, or the effect of an act, which determines what the law recognizes as prejudicial conduct.

7. Criminal law ⇨1171(2)

In murder prosecution, where prosecuting attorney's opening statement to jury referred to specific details of a childhood episode which the state would attempt to prove as a motive, but which details, imputing improper conduct on part of defendant, the state was not permitted to prove other than to show that defendant had been warned to stay away, opening statement did not constitute prejudicial misconduct.

8. Criminal law ⇨720(1)

The scope of comment by the prosecuting attorney extends to facts that have been established by cross-examination as well as those that have been proved by direct examination, and the permissible range of discussion of the merits of the case, both as to the law and the facts, is comprehensive.

9. Criminal law ⇨1171(1, 3, 6)

It is only where the district attorney refers to matters not in evidence or expresses his own conclusions which are not founded upon evidence, or where he indulges in unwarranted attacks upon defendants or interferes with the orderly processes of the court, that his alleged misconduct in argument to the jury may be construed to be reversible error.

10. Criminal law ⇨730(2)

In murder prosecution, refusing defendant's requested instruction that all the circumstances related by prosecuting attorney in his opening statement in connection with a prior episode, which would show motive, should be disregarded as unsupported by evidence, was properly refused, where the court adequately instructed that statements of counsel were not to be regarded as evidence and there was evidence supporting some of the facts which prosecuting attorney stated he would prove.

11. Criminal law ⇨562

Evidence showing an opportunity to commit the crime charged does not justify a conviction apart from other circumstances, unless it excludes all reasonable opportunity for its commission by another.

12. Criminal law ⇨552(3)

The rule that the circumstances relied upon to establish the guilt of one accused of crime must be consistent with that hypothesis and inconsistent with any other

rational conclusion is a rule of instruction to the jury and not a rule for the guidance of the court on review.

13. Criminal law §1159(6)

Where the circumstances are such as to reasonably justify an inference of guilt, as found by the jury, the fact that an inference of innocence might likewise be reasonably drawn therefrom does not present a question of law for review, and the verdict will not be disturbed.

14. Criminal law §404(3)

Tools and instruments of crime found in the possession or under the control of defendant soon after the commission of the offense may be offered in evidence whenever they constitute a link in the chain of circumstances which tend to connect him with the commission of the offense charged.

15. Criminal law §404(3)

Before tools and instruments of crime can be received in evidence, it must be shown that the crime charged was in fact committed and that it was committed with the aid of instruments like those proposed to be shown in evidence and that defendant was in the vicinity at or about the time the offense was committed.

16. Criminal law §404(1)

In prosecution for murder committed with the aid of knives, admission in evidence of a hunting knife, belonging to defendant and found at his home shortly after the homicide, as the type of knife used, was not an abuse of discretion.

17. Criminal law §404(4)

Physical objects which form a part of or serve to illustrate the transaction or occurrence which is the subject of investigation may be formally introduced in evidence.

18. Criminal law §404(1)

Demonstrative evidence to be competent must be relevant to the issue, and where it tends to throw light on, and has a direct bearing upon, a material issue, it is admissible and is not to be excluded because of its other effects on the jury.

19. Criminal law §1160

After the finding of the jury has been approved by the trial court on a motion for a new trial, an appellate court may disturb it only when it can be said as a matter of

law that there was no sufficient and substantial evidence to support it.

20. Criminal law §1144(13)

The appellate court must assume in favor of the decision of the jury the existence of every fact which the jury could reasonably have deduced from the evidence and then determine whether guilt is deducible therefrom.

21. Criminal law §1159(2)

The court on appeal will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt.

22. Homicide §254

Evidence, although circumstantial except for evidence definitely placing defendant at the scene of the homicide, was sufficient to support verdict of guilty of murder in the second degree.

23. Criminal law §663

The practice of placing pieces of red cellophane upon clothing introduced in evidence to mark blood stains, which were not visible to the naked eye is condemned.

24. Criminal law §569

Evidence did not establish that the rights of youth of 16 charged with murder were violated by any unkind treatment or improper questioning on the part of police officers.

WHITE, J., dissenting.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

John M. Planagan was convicted of murder in the second degree, and he appeals.

Affirmed.

Joseph Scott, J. Howard Ziemann, and G. L. McFarland, all of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

By an indictment presented by the Grand Jury of Los Angeles County, defendant was accused of the murder of Dorothy

Marie Courtemanche on or about April 21, 1943.

Upon arraignment of defendant the cause was transferred for further proceedings to the Juvenile Court, which court found him to be under the age of sixteen years and ordered him committed to the care and custody of the sheriff for suitable detention, pursuant to section 731 of the Welfare and Institutions Code, St.1937, p. 1036. Thereafter, said Juvenile Court found defendant was not a fit and proper subject to be dealt with under the Juvenile Court Law, and the cause was "transferred to Department 43 for prosecution under the general law." In said Department 43 of the Superior Court, defendant entered his plea of "not guilty as charged in the indictment," and further pleaded that he was "not guilty of the offense charged because he was insane at the time that he is alleged to have committed said unlawful act." Three doctors were "appointed under section 1027 Penal Code to examine the defendant as to his sanity and report to the Court as to his mental condition." When the cause was called for trial, defendant, by leave of court, withdrew his plea of "not guilty by reason of insanity," for the reason, as stated by his counsel, that the three doctors appointed to examine defendant "have found the boy sane."

At the conclusion of the trial, the jury returned a verdict of guilty of murder, a felony, as charged in the indictment, and found it to be murder of the second degree. From the judgment of conviction which was thereafter entered, and from the order denying his motion for a new trial, defendant prosecutes this appeal.

Appellant here urges that the judgment of conviction be reversed for the following reasons:

"1) The absence of any proof of motive is fatal in this case where all of the evidence is purely circumstantial; and

"2) Opportunity alone is insufficient to sustain the verdict of guilty; and

"3) The circumstantial evidence relied upon herein is inconsistent with guilt and is only consistent with innocence; and

"4) Reversible error was committed when Exhibit 21, a spring blade knife, in no way connected with the crime herein, was admitted as evidence; and

"5) The evidence is wholly insufficient to support the verdict of guilty; and

"6) Grievous error was committed in admitting evidence of a childhood incident occurring six years before the date of the crime charged herein, and wholly unconnected with the crime herein; and

"7) The district attorney was guilty of gross misconduct prejudicial to the defendant; and

"8) The motion for a new trial should have been granted."

The case is one of circumstantial evidence, and because appellant's statement of facts is somewhat abridged and therefore inadequate for a proper understanding of the circumstances attending the homicide, this court has reviewed the evidence set forth in over 1200 pages of the Reporter's Transcript, and finds that respondent's brief summary of the evidence produced is a fair statement of the facts as disclosed by the record:

Mrs. Courtemanche and her three children, Marilyn, Pete, and the deceased child, Dorothy Marie, who was commonly called Doris, for eight years had lived in the downstairs portion of the old Sepulveda home at 751 North Palos Verdes in the city of San Pedro, located on a mesa above the Wilmington-San Pedro Road, directly across from the Los Angeles Shipbuilding Corporation. The father died in November, 1942. Mrs. Eva Worden with her husband and children occupied the upstairs portion of the house and had lived there five years previous to the homicide, the property being owned jointly by the two families. Since the death of Mr. Courtemanche, Mrs. Courtemanche had been working in Torrance, leaving home at 7:15 o'clock in the morning and returning about 5:00 o'clock in the evening. Marilyn Courtemanche was also employed, and usually left home at 12:00 or 12:30 o'clock in the afternoon returning about 4:30. Doris, the deceased child, was twelve years of age, and Pete, her brother, was fourteen.

The Planagan family consisted of the father, who was acting Captain of Fire Boat No. 3 of the Los Angeles Fire Department at San Pedro; the mother; appellant, who was fifteen years of age, 6 feet 3 inches tall and weighed 175 pounds; and William, thirteen years of age. They lived at 450 Donald Street, San Pedro, which was about four-tenths of a mile from the Courtemanche home. The Planagans had lived there since 1923 and the children of the

two families played together and visited each other's homes. Pete Courtemanche and appellant were pretty good friends until about a year before the homicide. Appellant "was always horsing around," would get Pete down, get his "arm and twist it, or something like that," which Pete did not like, therefore he stayed away from appellant. One time while Pete was standing out in front of his house, appellant was playing around with a knife and put it to Pete's back and started fooling around with it, pushing it hard against Pete's back, but did not cut him. Pete had not seen appellant at his (Pete's) house for three months prior to April 21, 1943, the date of the homicide, which occurred during the Easter vacation week. At school Pete had seen appellant with a push-button knife and later with a hunting knife, which appellant carried in the zipper pocket of his black leather coat. This was about three months before the homicide. The blade of the hunting knife was about five inches in length with a dark red handle and a cross bar or guard. The blade was about an inch wide and appellant carried it in a scabbard.

Frank Cordero, fifteen years of age, who lived at 319 North Mesa, went to the Courtemanche home nearly every day after school. He and Pete played together. Appellant used to come to his home and they would go to Pete's house. This was about three months before the murder. Appellant went around with bigger boys. Frank had seen appellant with a hunting knife with a blade about $4\frac{1}{2}$ inches long; which was sharp on one side and had sort of a red and black handle with an aluminum tip, and was carried by appellant in the side zipper pocket of his jacket in a leather case. Sometimes Pete tried to avoid appellant. When Frank and appellant went to Pete's on their bicycles, they would go across the lot on the path, and appellant would go to the front door and whistle for Pete.

On Monday night, April 19, 1943, Mrs. Courtemanche heard appellant call Doris several times. Mrs. Courtemanche went to an open window, looked out and saw appellant underneath the window of Doris' bedroom. She asked him why he was calling Doris and appellant said he was not calling Doris but was calling Pete. She told him that Pete was going to bed and for him to go home, and appellant replied "All right," very snarly and surly. After the first two or three months that the Courtemanche family lived there, appellant came to their

home regularly and played with the children. This continued for a year and a half. At that time, or approximately six years before April 21, 1943, the date of the homicide, Mrs. Courtemanche talked with appellant at her home and told him not to return. He remained away for at least two years, and when he returned she noticed that he had grown quite a bit. On seven or eight other occasions she had sent appellant home and believed she had not seen him for a year prior to the time in question.

On April 20, 1943, around 11:00 o'clock in the morning Mrs. Worden's daughter Betty, thirteen years of age, went downstairs to the Courtemanches where she stayed about an hour and a half. Appellant was sitting on the couch and Doris was knitting. Only the three were there. Doris, the murdered girl, received a telephone call from a boy friend and she asked appellant if he thought she should go with this boy to the park. Appellant said: "Oh, I don't think so. Why don't you wait a few more years before you go out with the boys?" Appellant ruffled Doris' hair and when she combed it, he ruffled it again, all in a friendly mood; Doris not being angry at him for doing it. Appellant did not look wild-eyed or crazy or all "worked up," but as a playful schoolboy with a schoolgirl.

On this same day, April 20th, Marilyn Courtemanche arrived home from work at about 4:30 o'clock, and Mrs. Courtemanche and Pete came home about 5:45 o'clock in the afternoon. When Marilyn came into the house she saw appellant in the front room. Doris was there, and in the presence of appellant, Marilyn told Doris that she had to go to work the next day in the morning instead of the afternoon and did not know how long she would have to work, probably late. She told Doris she wanted her to get some things downtown, some darning cotton, and Doris said O.K. The next morning Marilyn left home at 8:00 o'clock and returned at about 1:00 o'clock in the afternoon. As hereinbefore mentioned, it was Easter vacation week.

On April 21, 1943, the day of the homicide, at about 9:00 o'clock in the morning, Pete Courtemanche and Frank Cordero went to Cabrillo Beach at San Pedro and stayed until around three o'clock that afternoon. On that same morning at 9:00 o'clock, Doris asked Mrs. Blevins, who lived in a court at 266 Settle Street, San Pedro, if her son Richard could go to town with her. Richard got ready to go with

Doris. In the meantime Doris went home, then returned to the Blevins house and they left there at 9:15. Around 9:30 or 9:45 that morning, appellant came to the house of Mrs. Cordero, mother of Frank, in an automobile and called for Frank. She went out and told appellant that Frank was not at home, that he had gone to the beach with Pete. Appellant asked her if they had gone on the bus and she said yes, to which appellant replied; "Well, that's what I thought." She told appellant they had gone only a few minutes before and appellant said, "O.K., thanks," and left. At 10:20 that morning Mrs. Blevins and Mrs. Stiff, who lived in the same court, left home to go to town on the bus. As the bus stopped, Doris and Richard got off, this being the end of the bus line. At 11:00 o'clock, Mrs. Worden's daughter, Betty, saw Doris by the white fence in front of the house; and at 11:25, that morning, Mrs. Olson, who lived on the corner of Driefus and Settle Streets, saw Doris with her dog going through two courts to Driefus Street, about a block from Doris' house. Mrs. Olson was going up Settle Street on her way to town to meet her husband, and paid no attention as to which way Doris was going, whether away from or toward her home.

Mrs. Stiff's children, James, 8 years of age, and Melanee, 8 years of age, and some other children, were playing on the steps of the back porch of their home at 266 Settle Street while their mother and Mrs. Blevins had gone to town. James and Melanee knew appellant and saw him riding his bicycle on the sidewalk through the court to the path which leads across the vacant lots to Doris' home. Melanee stated she saw appellant shortly before lunch time and thought it was about 11:00 o'clock; that she had not had her lunch and didn't get it until her mother came home. Mrs. Stiff testified she arrived home around noon. At about 11:30 o'clock on this same day, Mrs. Worden came downstairs to hang up some clothes which she had washed that morning, and while going to the rear of the house she saw appellant coming through a vacant lot toward her house on his bicycle. She paid no further attention to him. After hanging up the clothes, which took 15 or 20 minutes, she went back upstairs. At the time she came downstairs she did not notice the playing of the radio in the Courtemanche home, but as she returned upstairs the radio was playing music very loud.

The entrance to the upstairs is on the south side of the house.

Between 11:35 and 12:10 o'clock on this day, April 21, 1943, Mrs. Nolton, who lived at 266 Seventh Street, about one block from the Courtemanche house, was pulling weeds in her yard, but she did not notice appellant and could not say whether he passed her premises or not. Between 11:30 and 12:00 o'clock, Mrs. McKenzie, who lived at 229 Settle Street, while looking for gardening tools in her yard, heard an unusual laugh of a feminine voice and she looked toward the Courtemanche house but saw no one. Mrs. McKenzie was interested in the Courtemanche family, because she knew the mother worked. About 20 or 30 minutes later, she saw Robert Courtemanche standing on the porch looking toward the Courtemanche house. She did not see appellant.

Robert Courtemanche, the 27 year old brother of Doris, who lived at 722 Gulf Avenue, Wilmington, arrived at the Courtemanche home with his wife and two children at 12:28 o'clock, for the purpose of getting some wire to make rabbit hutches. He stepped up onto the front porch, looked through the main window in the front of the house and saw a body lying in front of the divan in the living room. He immediately entered the house, the door being unlocked, and telephoned for an ambulance and the police. Before the police arrived, his wife and oldest son came into the room, and his wife went on upstairs to Mrs. Worden's. He did not think he lifted or removed any part of the covering over the body. The police came in about ten minutes and examined the purse lying beside the body. When the officers went through the purse, Robert Courtemanche was then sure it was his sister Doris; up to that time he was not sure who it was. Nothing in the room was disarranged; the radio was on but inaudible, and the gas heater was burning.

Officer Gannon of the San Pedro Detective Bureau, with Lieutenant Elliott, arrived at the Courtemanche home between 12:35 and 12:40 o'clock, on the day of the homicide, at which time two uniformed police officers were there. Officer Gannon saw a body under a blanket near the divan about 10 feet from the front door. There was a wrench lying to the left of the body near the left heel. This wrench was identified by Pete Courtemanche as one of the

wrenches he had used in repairing his bicycle in his bedroom the previous day and which he had left on the dresser in his room which is next to the front room. Officer Gannon noticed a spot of blood about 12 inches in diameter on the cushion on the south side of the divan extending over to the second cushion. There was a smaller spot on the back of the divan near the cushion which was about four inches long and two and a half inches wide. There was a puddle of blood between the two right-hand cushions, one directly on the arm, and considerable blood on the breasts of the victim. A loose leaf of the telephone book with numbers on it and a brown leather pocketbook were partially under the body.

Dr. Wilmoth, Receiving Hospital Surgeon at San Pedro, arrived at the Courtemanche home at approximately 1:00 o'clock. He made a cursory examination of the body, which was covered, and discovered that death had occurred before his arrival. There was blood on the neck of the girl and on other parts of the body, as well as on the divan. The blood was more or less liquid, not having completely coagulated. In his opinion the girl had died within an hour before he examined the body, which was beginning to get a little bit stiff with rigor mortis. He did not take the cover off the body and made no further examination of it. Upon cross-examination, Dr. Wilmoth admitted he was not prepared to say that death had not occurred an hour and a half before his arrival.

On the day of the homicide, Ray Pinker, forensic chemist for the Los Angeles Police Department, went to the Courtemanche home and removed the couch cover from the body in the presence of several detectives. He found there was a large blood stain in the center of the cover where it was in contact with the body which stain had soaked through the cover; that the stains were still wet, the blood not having thoroughly dried. This witness also saw the wrench which was lying on the floor to the left of the body. Due to its soiled and rough surface, the wrench did not retain finger prints of any kind. Mr. Pinker examined the walls and ceiling of the room to determine whether or not there was any blood contamination and found none, at least none that could be seen with the naked eye.

Dr. Clinton Thienes, called by the defense as a witness, found human blood on a shade of a floor lamp, on a door post

about five or six feet above the floor and on wood casing of an archway five or six feet above the floor.

The autopsy performed on the body of Doris showed four penetrating stab wounds and two superficial stab wounds on the front of her body and four stab wounds in the back. On the left side of her head were seven wounds, three of which resulted not only in lacerations to the scalp, but depressed fractures of the skull. The brain tissue was contused and there was subdural hemorrhage. The cause of death was stab wound of the heart and compound depressed fractures of the skull. The wrench found at the scene of the crime fitted into the depressed fracture areas of the skull. The stab wounds could have been caused by a hunting knife about the size of seven-eighths of an inch to an inch at its maximum, near the handle, sharp on one side and rounded on the other. The hymen was of small type and was intact. There was no evidence of any sexual attack upon this girl.

Ray Pinker, forensic chemist, was present at the time the autopsy was performed by Dr. Webb. Tests were made by him and Dr. Webb by having various portions of the wrench in close juxtaposition to the penetrations of the skull in an effort to discover whether or not the instrument could have been responsible for the injuries sustained by the victim. They discovered that the peculiarity of the penetrations in the skull and the wounds in the scalp matched the curved portions of this wrench, namely, the upper end jaw of the wrench. They found that the curved portion was the portion that fitted exactly into the skull fracture in two places. Mr. Pinker observed that the wounds on the body had been caused by a sharp instrument, approximately one inch wide, similar to a knife blade.

On April 22, 1943, the day after the homicide occurred, appellant's father, John Planagan, Sr., called at the office of Chief Alderson of the Los Angeles Fire Department at 217 So. Hill St., Los Angeles, to seek his advice because of certain things his son had told him. Mr. Planagan, after introducing his son, who accompanied him, asked Chief Alderson if he had read about the murder in San Pedro. The Chief recalled having seen newspaper headlines to that effect and told the boy that there was no way he could help him or advise his father unless he spoke the truth and told him just what it was all about. Mr.

Planagan stated that he was on vacation, it being Easter week, and that he had been painting his house; that his son had been helping; that on the day of the murder his son had either not painted at all or had stopped painting sometime in the middle portion of the morning; that he had released the boy from working and that he was then free to play or do what he saw fit. The boy (appellant) then picked up the story and stated that two of his playmates, a boy named Frankie and a boy named Pete, the latter being the brother of the deceased child, had planned to go swimming down on the waterfront, and that he wanted to go with them but due to the work at home, it had not been possible for him to go; that this particular morning when there was no more work to be done, he thought he would try to catch them to go swimming with them; that he got on his bicycle and as he left the house his mother gave him a utility bill to pay, either the gas bill, the light bill or the water bill, and told him to pay it before he came home; that he went to the home of Frankie and learned from Frankie's mother (Mrs. Cordero) that Frankie had gone swimming with Pete (Courtemanche); that he (appellant) stated that possibly he could catch the boys at Pete's house and go with them; that he rode his bicycle from Frankie's house to Pete's house across vacant lots; that he put his bicycle up against the side of the (Courtemanche) house and called for Pete; that there was a lady who lived upstairs (Mrs. Worden); that she came down with a basket of clothing to hang out on the line in the backyard; that he did not speak to her and she did not speak to him; that he called for Pete a couple of times and no one appeared; that he then looked through the window on the side of the house and saw an object on a divan which appeared to be covered; that protruding from it he saw a foot in an odd position which aroused his curiosity and made him feel that there was something wrong; that he went to the front and rang the doorbell but no one answered; that he tried the door which was unfastened, and then opened the door and entered the room. Chief Alderson asked appellant if that was not an unusual thing to do, and his father volunteered the information that they had known one another for possibly eight or ten years; that the children visited back and forth in one another's homes; that the people from Pete's home ran through his house and had since they were little

tots, and that the Planagan children ran through Pete's house. Appellant told Chief Alderson that it was not unusual for him to walk into the Courtemanche house, and picking up the story from that point, he said that he went to the divan; that the body or object was covered with a blanket or a throw of some kind; that he raised the coverlet and it was very bloody; that blood was dripping or running from it and the child's body was exposed there in front of him. Chief Alderson asked the boy to tell him just what he saw and the boy held his hands close together and held his head down and shook it from side to side, closing his eyes, giving the impression that he wanted to erase from his memory what he had seen. Chief Alderson let the boy compose himself for a moment and then asked him to state what had happened. Appellant stated: "Well, I don't know. I must have gone screwy. I don't know what I did. * * * I recall that the radio was playing, and I intended to shut the radio off, and I went over to the radio, but whether I shut it off or not, I don't know. * * * I don't know what made me do it, but I wanted to get out. I wanted to get away from there." The boy said he went outside, got on his bicycle and started to ride away. Chief Alderson asked him whether anyone saw him leave the house and the boy said that there was a lady (Mrs. Nolton) across the street, possibly two-thirds of a block or a block down the street whom he was sure saw him as he left on his bicycle; that he knew her and she knew him, but she didn't get along particularly well with the kids and so he just rode on by; that he was positive that she looked at him and saw him; that he rode his bicycle for several blocks toward San Pedro; that he felt sick and upset and wanted to go home; that he turned and went home, went in the house and to his own room, sat down, and felt sick to his stomach and nervous and upset; that he did not know what he was doing; that his mother came in and asked him what was the matter and he gave her no answer; that she told him, "You are ill or there is something wrong with you. You better lie down on the bed. You are sick"; that he lay down on the bed for awhile and still felt bad; that he felt that if he got out of there and went somewhere and did something he would feel better, so he went to one of the schools and played a game or two or three of handball; that he came back home again; that his mother served

dinner; that his father was not home; that he couldn't eat his dinner; that his mother attempted to make him eat but he had no appetite; that this thing was in front of him there, and everytime he thought about it, why it made him sick, so he decided that if he went to a moving picture show, sat through a movie, maybe that would get his mind off it and he would feel better, so he went to a movie, came home and went to bed. Mr. Planagan picked up the story from there and told Chief Alderson that he came home about eight o'clock, at which time his wife told him there was something wrong with Jack. "He came rushing in the house today and went in his room. He was sick and upset and I made him lie down and then he went on and came back and wouldn't eat any dinner and he has gone to a movie. He won't talk. He won't tell me what is the matter with him." So Mr. Planagan decided that when the boy came home he would question him; that Mr. Planagan stated that when the boy came home he went to his room and to bed; that Mr. Planagan was puzzled how to approach his son; that there had been a murder in the neighborhood; that the boy had acted in an odd manner, had refused to tell his mother what was wrong with him, and he was therefore a little reluctant to approach the boy and question him; that the boy had been a good boy and had never given him any trouble; that it was a terrible thing for a father to walk up to his son and begin to question him as to whether or not he had been involved in a murder; that he postponed talking to the boy and lay down himself but was unable to sleep, became nervous, the mother was crying and they put in a rather bad night without getting much, if any, sleep; that he went to the boy's room once or twice with the intention of waking him but did not do so because he just lacked the approach as to how to bring this thing up for discussion, but he did examine the boy's clothing. Chief Alderson asked Mr. Planagan if the boy had worn the same clothing all of this time, if he had made any effort to change his clothing or hide it, and Mr. Planagan said no, that the boy wore the same clothing that he had, some old trousers and shirt and a leather jacket in which he had been painting and on which there were a considerable number of paint stains, that he had worn the same to the handball court, the movies and home again; that he (the

father) had examined the clothing and was not positive whether there were any blood stains on it because of the paint and one thing and another, but rather imagined that he could detect in one or two places some indication of blood which rather upset him and the mother; that when morning came the boy arose and he (the father) approached the boy and told him he wanted to know what was the matter with him and wanted him to explain his actions on the previous day; that the boy was a bit hesitant to talk, but upon insistence the boy related the same story to him (the father) which he had just related to Chief Alderson in his presence.

Chief Alderson asked the boy if he ever had any difficulty in school and both he and his father said he had not; that the boy had always gotten along well with his lessons and never had any trouble with the other children or anything of that kind at all. The father then asked Chief Alderson for his advice and was told by the Chief that there was only one thing to do and that was to talk to the police officers and have the boy tell the story to them; that if the boy's story was the truth, he could be of material assistance to the police officers; that his presence at the scene of the crime would eventually be discovered, and that if the boy's story was not true, why then it was the father's duty to report it to the police anyway. The boy stated that was exactly what he wanted; that he wanted to get this off his mind and get the thing cleared up. The father was entirely agreeable and the Chief told him that he would call the police department and ask them to send someone over. Chief Horrall of the police department was at lunch and Chief Alderson talked to Captain Harrison, who referred him to Inspector Bruce Clark. Chief Alderson told the latter that he would like him to come to his office personally; that he had some information in connection with this case which he did not wish to disclose over the telephone. In a very few minutes Inspector Clark came to Chief Alderson's office and he introduced the inspector to both Mr. Planagan and his son, outlining briefly what the boy had told him. Inspector Clark, after questioning the boy and making some notes, said that there was only one thing to do: go to the police department and get in touch with the officers making the investigation and tell his story to them, let the boy go with the officers to the house where

the murder had occurred and reconstruct what he had done. The inspector inquired if the boy's clothes were available. He was not wearing the clothes he had worn the previous day, and Mr. Planagan told the inspector that the clothes were available; had not been disturbed; were at home and he could have them. With that they left Chief Alderson's office.

Inspector Clark asked appellant if he had a hunting knife and the boy said he had. His father stated: "Yes, I spoke to him about the knife this morning, and the boy told me this morning that the knife had been stolen from him about a week previously." Inspector Clark asked the father if that was the first time he had heard of it, and he said: "Yes, this morning was the first time I knew the knife was missing." Inspector Clark asked the boy if he was wearing the same clothes that he was wearing on the day before, and the father said that he was not, that on the previous day he had worn the leather jacket. Inspector Clark asked the father if he had observed any blood on the jacket and the father said: "Yes, there was a smear of blood on his sleeve, the sleeve of the leather jacket." The three of them walked to the City Hall and Inspector Clark called in the investigators of the homicide squad to talk to the father and son.

Officer Hurst, one of the investigating officers, was told by Inspector Clark that Mr. Planagan had brought his son to Chief Alderson's office and he (Clark) had brought the boy and his father to the City Hall, and that the boy had visited the Courtemanche home on the day before and found the body of the murdered girl. Officer Hurst questioned appellant in the presence of Captain Rasmussen and the forensic chemist, Ray Pinker. Officer Hurst said to the father, Mr. Planagan, Sr.: "We would like to talk to the boy now, Mr. Planagan, you can stay if you like." Mr. Planagan replied: "No, I would rather go out in the hall, I feel a bit nervous." Officer Hurst asked appellant to tell him of the occasion of his going to the Courtemanche home on the previous day. Appellant stated that he rode there on his bicycle about noon, parked his bicycle at the rear of the house and went to the front door and called for Pete; that he got no response so he looked in the window and saw something on the floor; that he went into the house

by the front door and noticed a body on the floor covered with a blanket, with one foot protruding from under the blanket and a white sandal on the foot; that he heard the radio playing when he went in; that he lifted the corner of the blanket and saw the body of Doris Courtemanche and that he "blackened out"; that he then got on his bicycle and rode toward town and eventually reached home and took a nap; that later that day he went to town, paid some bills, came back, played three or four games of handball with his brother and went to a show that night. Officer Hurst asked him how he was dressed when he went to the Courtemanche home, and appellant stated in a black leather jacket, a pair of cords and some sandals. Officer Hurst asked him where the clothing was and appellant stated it was at his home. Officer Hurst then asked appellant if he notified his parents of what he had seen and he stated that he did not notify them until the morning of the 22nd. Officer Hurst asked, appellant if, after he had found the body on the floor, he thought to call a doctor or call for help, and appellant stated that he did not. Officer Hurst asked appellant if he was the owner of any knives and he stated that he owned three but had lost one, and described these knives as, one, a pocket knife with a spring back and one a hunting knife. Appellant stated he owned the hunting knife for about two months and carried it to school in his coat pocket, and that the reason he carried the hunting knife to school was because he had to have a spring-back knife. Officer Hurst asked appellant if he had notified his folks or told anybody else that he had lost his knife and appellant stated that he had not.

Immediately following this conversation on April 22, 1943 (the day following the homicide), Officer Hurst and Ray Pinker took appellant by automobile to the San Pedro Police Station, Officer Hurst having previously telephoned that he was leaving for San Pedro and that he had appellant with him. They were met at the San Pedro Station by Captain Rasmussen, Lieutenant Elliott, Sergeant Gannon and Officer Hargett of the San Pedro Detective Bureau. Ray Pinker, Captain Rasmussen and two detectives from the said bureau went to appellant's residence, where they were met by Mr. and Mrs. Planagan, appellant's parents. The black leather jacket worn by appellant was hanging on the back of

a chair in the living room and this was turned over to Mr. Pinker. He also received from Mrs. Planagan a pair of corduroy trousers, a pair of shoes, and also a white shirt and a pair of white shorts, both of which latter garments Mrs. Planagan said she had washed the evening before. No blood was found on the shoes. Mr. Pinker took the leather jacket to the crime investigation laboratory and examined and analyzed certain stains appearing on it. On the left front portion of the garment, an area near the zipper and down near the bottom of the garment, Mr. Pinker found sixteen small spatter stains, not smears, which he analyzed to be blood stains. These stains were on the exterior of the garment. Because the jacket was black in color and the blood red, it is very difficult to see these stains with the naked eye, and for that reason Mr. Pinker marked the location of these stains with particular bits of red cellophane paper. On the left sleeve there was a red streak. Inside of this streak he found in excess of forty tiny microscopical dried blood spatters. On the outside of the left sleeve there were smears which came as a result of contact with a bloody object and the brushing over of spatters before the spatters had an opportunity to thoroughly dry. One smear was so heavy and pronounced that in bright light, such as daylight, it could be seen as a reddish haze over the black background. There were five or six spatters somewhat larger than the other tiny spatters. On the cuff of the right sleeve of the jacket, Mr. Pinker found smears of blood covering the surface of the leather jacket which had soaked into the thread stitching of the coat at the sleeve. Inside of this particular sleeve and extending up as high as three inches on the inside of the sleeve and soaked into the lining he found stains of blood. These stains were of human blood. There was a zipper pocket appearing on the lefthand side of the front portion of the jacket. On the inside of this pocket, on the blue lining, Mr. Pinker found eight spots of human blood. One spot was quite large and could be seen easily with the naked eye. He could not say whether these spots were smears or spatters or simply contact spots because of the fact that the fabric was absorbent in character and consequently the original shape of the stain had disappeared, and had been absorbed into the fabric. Spatters mean a fine spray of microscopical

tiny drops of blood flying through the air and contacting a nonabsorbent surface. Mr. Pinker found human blood on the trousers over the right side pocket and over the right rear pocket. Mrs. Planagan indicated that the trousers she gave Mr. Pinker were the ones she thought Jack (appellant) had been wearing. Appellant had described to Mr. Pinker a pair of corduroy trousers with a tear in the vicinity of the left knee which tear was present. There was contamination of blood inside that tear, which blood Mr. Pinker did not analyze to determine whether or not it was human blood.

In the late afternoon of April 22nd (the day after the homicide occurred), Officer Gannon had a conversation with appellant in the presence of Officer Hargett. Appellant was asked by Officer Gannon how he figured in the Courtemanche case, to which appellant replied that he had been working on the roof, helping around the house during the Easter vacation with his brother; that sometime around 11:30 o'clock on April 21st, he had a very queer feeling in his stomach; that he crawled down off the roof, went in the house and took a bath, got on his bicycle and went over to the Courtemanche house. Officer Gannon asked appellant the route he took and appellant said he took a short cut; that he left his bicycle against the Courtemanche garage and in passing from the garage to the house on the south side he saw Mrs. Worden out in the back hanging up clothing; that he went around the side, up on the porch and called for Pete; that he thought he called two or three times while he was walking toward the front door, and when he reached the front door he called again; receiving no answer, he looked into the small side window adjoining the door and saw somebody under a blanket; that he saw a white foot sticking out and so, instead of calling again, he opened the door and went in; that he did not remember whether the dog was there or not; that he picked up the corner of the blanket, looked under it, saw some blood and knew it was Doris; that he picked up the blanket 18 inches or so and dropped it; that his stomach turned a flip-flop; that he went out the front door closing it; that the radio was playing; that he did not remember whether the gas heater was on or off; that he got on his bicycle and instead of going back over the path by which he had come, he went to

Settle Street; that he saw a woman standing on her porch on Settle Street; that he did not stop to tell her what he had seen; that he did not tell Mrs. Worden; that he took this different route because he was all "balled up," and gestured like he was sick to his stomach; that when he got home his mother and brother were there; that his mother asked him what was wrong and he told her that in going down a small grade at First and Mesa he struck a woman while riding his bicycle; that he did not give the woman his name; that he was upset; that there might have been some blood on his clothing; that he removed his trousers and went to bed, leaving his jacket on the chair, and took a nap for about ten or fifteen minutes; that he got up and walked around the house; that his brother was still working about the place; that shortly thereafter his mother asked him to take the car and go to the creamery and get some milk; that he and his brother drove down there; that he did not tell his mother what he had seen at the Courtemanche house because he didn't feel very good; that after returning home with the milk, he and his brother went to the Barton High School and played four games of handball and then returned home and had dinner; that they took the local newspaper of San Pedro; that after dinner his mother mentioned about what she had read in the newspaper and stated she had known Doris and remarked what a terrible thing it was; that he didn't tell his mother that he had been to the Courtemanche home that noon because he didn't feel very good; that after dinner he and his brother Bill went to the Barton Hills Theatre and saw Joe E. Brown in a comic; that neither on the way to or from the theatre did he tell his brother anything about it; that he liked the comedy; that after the show he and his brother went home and went to bed; that the next morning his father asked him if he had seen anything of what happened to Doris Courtemanche, and he said yes; that his father asked him if he was over there at noon, and he said yes, and that was when he told his father what he knew about it; that his father decided to take him to see Chief Alderson. Officer Gannon asked appellant if he had a knife, and appellant said yes he had had three or four knives; that he had had a hunting knife but had lost it either Thursday or Friday before Easter week; that he had been playing basketball

at school and had left it in his leather jacket with his fur lined gloves and lost them; that the knife and gloves were not in his jacket when he got back; that he had a spring-blade knife with about three and one-quarter inch blade that he used around the house for different work; that the hunting knife had about a three and one-half inch blade with a vari-colored handle and a leather scabbard with a half inch strap around the top; that he carried the knife just to have it; that he had never had any trouble with it; that he carried the knife in the zipper pocket of his leather jacket and it just fitted in there nicely, snugly; that he bought the knife about three months previously from Roy Hook on Seventh and Pacific Avenue in San Pedro (a merchant). Appellant stated that no other person had worn his leather jacket except on one occasion when he let his brother wear it from school.

At the police station on April 22nd, Mrs. Planagan in the presence of appellant stated that when Jack came home from the Courtemanche house he was suffering from shock. Officer Gannon asked her just what she meant by shock and she said it must have been the shock of what he had seen over there. Officer Gannon said to her: "Well, playing handball and going to shows and enjoying the comics, that is not an indication of shock is it?" She said: "I don't know, but the boy was very badly shocked." Mrs. Planagan also told Officer Gannon that she had given Jack some bills that morning to pay and that he didn't pay them; that he was supposed to go down later in the afternoon; that he didn't pay them in the morning.

Officer Hargett's testimony relative to this conversation with appellant was in substance the same as testified to by Officer Gannon, except that Officer Hargett testified that appellant stated that the story he told his mother of hitting a woman with his bicycle was a falsehood, and that he had told his mother that story so she would not worry about his condition. Officer Hargett asked appellant who his friends were, and appellant stated that he usually ran around with Pete Courtemanche and Frank Cordero. He asked appellant if he knew where they were on the day of the homicide and appellant said that early in the morning he had gone to Mrs. Cordero's home and was told by her that Pete and Frank had gone to the beach at about 9 o'clock; that at this time he

was on his way to the ferry landing where he was to meet his father to give him the key to their automobile. Officer Hargett asked appellant if he thought that picking up the blanket in the manner stated by him had splashed blood on his jacket, and appellant said that stranger things had happened.

On April 23, 1943, forensic chemist Ray Pinker had a conversation with appellant in the San Pedro jail, at which detective Gannon was present and a jailer was present part of the time. Mr. Pinker had with him appellant's leather jacket which was identified by appellant. Mr. Pinker asked appellant whether or not, in view of the fact that there was contamination of blood on the jacket, he would like to look at a couple of photographs of the scene of this crime as they found it, with the blanket covering the body, to see whether or not he could pick out for him the particular corner of the blanket which he had lifted in order to view the sandals of the victim. Appellant said he would like to see the photographs. Mr. Pinker had copies of some photographs, People's Exhibits 13a and 13b, which he showed to appellant. Appellant looked at the photographs and then pointed to a spot on one photograph and said, "This is the corner that I picked up." It was the corner of the blanket lying on the floor approximately one foot from the right hand of the victim. There was a small space between the right hand and the blanket. Mr. Pinker told appellant that that particular corner of the blanket had no blood contamination on it; in fact, none of the four corners of the blanket was contaminated with blood; that detective lieutenant Hurst and himself, and all of them there, not only lifted that corner of the blanket but removed the blanket from the body and turned the body over without any of them becoming contaminated with blood. Mr. Pinker said to appellant, "Now, is it your explanation that any blood appearing on that jacket came as the result of contamination from lifting the blanket?", and appellant said that it was. He said to appellant: "Jack, there is something peculiar about the stains on this jacket, not only can the blood be identified from the stains by an examination of the stain but also in identifying the means or manner in which the contamination took place. In other words, Jack, there is a difference in the appearance from a smear stain and a spattered stain. Now, there is

a bottle of ink." A bottle of ink and a pen were set before them. Mr. Pinker poured some of the ink onto a piece of paper and made a small pool, then he dipped his finger into the pool and smeared and wiped his finger on another piece of paper and designated that to appellant as being a smear type of stain. Then he took the pen and dipped it in the ink, held the pen up above a piece of paper and flicked a drop of ink from the pen point on the paper and showed him the type of splatter it would make. It left a crown shaped spatter which he pointed out to appellant. He then threw another drop of ink from the pen against the wall and partly at an angle, showing appellant how blood acted. He stated to appellant that from examination of these three types of stains it is possible to determine how each was made and from what particular angle the ink came; that blood acted in the same fashion, and he showed appellant the jacket and the areas where he found numerous blood spatters. He showed appellant the left portion of the jacket and said: "Jack, this area has a number of spatters, not smears, but spatters on it." He showed appellant the left sleeve and said: "Jack, on this at the time we found it there are numerous spatters. * * * There are numerous spatters and in addition we found smears. I want to know what is your explanation for these blood stains, the spatter stains on this jacket." Appellant said: "I have no explanation to make." Mr. Pinker said to appellant: "This jacket was an eye-witness to that crime. This jacket is going to testify to the facts that I have told you about. I will have to interpret its testimony, true. You are playing a sucker game if you think your phony story can compete with the microscope and test tubes." Appellant said: "Well, you know strange things happen, sometimes. I read of a story where a person committed suicide with a gun. A bullet had previously become lodged in the barrel of this gun and when they shot themselves the gun kicked back behind a davenport and an innocent person was prosecuted for murdering that person because of that bullet having stuck in the barrel." Mr. Pinker said to appellant: "Jack, you read that in a story. Ofttimes the simple facts of one paragraph or two is enlarged to 10 or 12 pages in a story, and sensational angles are purposely injected in a story in order to make the reading interesting; that probably the true facts

of that particular case that he read about are quite simple, and no doubt there have been extortions in the story. * * * A common example of that are these horror moving picture plays in which a murder is committed, and each of us attempt to pick out the criminal during the course of the filming of the picture, and we are always mistaken. The least suspected person, the person who appears to be the most innocent usually turns out to be the guilty person." Appellant said: "Well, I have not had that happen to me. I only saw three chapters of the Grand Central murder case, and I was able to pick out the criminal without any difficulty." Appellant then asked Mr. Pinker: "Is it possible for these stains to have got on my jacket from a pool of blood?" Mr. Pinker replied: "No, Jack, the only pool of blood was underneath the body, and it was on the floor and protected by the body. The only additional large stain was a large stain on the blanket covering the body, this being an absorbent type of material it had absorbed the blood, and the blood could not be there. * * * Furthermore, this particular blood when it contaminated this jacket was fresh blood. It had not yet coagulated. Perhaps you are familiar, Jack, with the rate or the speed with which blood coagulates and dries. Perhaps sometimes you have injured yourself, you have cut your finger or you have observed someone else do it, and you perhaps have noticed that the blood coagulates anywhere from a minute to five minutes." Appellant said: "That is right." Mr. Pinker repeated: "The blood at the time it had contaminated this black jacket had not yet coagulated." Appellant made no reply. Mr. Pinker then asked him if he had anything to add to what he had told them and appellant said he had not. Whereupon Mr. Pinker said: "Well, think it over, Jack, you are in as deep as you can get in at the time. I may come back and talk to you a little bit later, if there is anything that you can say that might help us clear it up, now is the time to say it. If there are any extenuating circumstances, maybe there might have been some self-defense involved here, it is up to you to tell us what happened in order that you can answer and help, and now is the time to tell your story and clear your conscience." Appellant made no reply; he whistled. Mr. Pinker asked appellant if he had in mind that it was necessary for him to dispose of, how would he dispose of, that knife.

Appellant said he would throw it in the weeds. Mr. Pinker said: "Well, now, suppose there were not any weeds convenient or handy for such disposal, what is the next thing you would do with a knife?" Appellant replied: "I would throw it in the ocean." Mr. Pinker said: "Well, now, supposing you were not near the ocean and you were not near weeds, how would you dispose of the knife?" Appellant said: "Well, I would hide it in the most obvious place where you would look at it and would not be able to see it." At that time Officer Gannon said, "Like on the City Hall steps, eh, Jack?", and appellant replied, "Something like that." Appellant then said: "I recall a public enemy once hiding from the FBI and working in a garage next door to the FBI." Mr. Pinker said to appellant: "Now, Jack, name me an obvious place, some place that I might look and not see it or anyone might look and not see it." Appellant said: "That would depend on the circumstances and upon different things." Mr. Pinker said: "Well, give me an obvious place, name an obvious place." Appellant said: "On the roof." Mr. Pinker asked appellant to lift his trousers on his left leg in order that he might see whether or not he had a wound there. Mr. Pinker found such a wound which corresponded to the general locality of the tear in the trousers given to him by Mrs. Planagan. The wound was scabbed at the time, deep enough to indicate that it had bled at the time of the injury.

On April 24, 1943, the officers took appellant in an automobile to the Courtemanche house and they asked appellant to direct them over the route he had taken on the day of the homicide. The officers had searched that route before, also the general vicinity, empty lots and whatever could be hiding places for knives. When a place come to their attention and they thought there might be something hidden there, they would get out of the machine and search for the knife, but none was found. They returned to the San Pedro police station and later took a ride to measure the distance by the automobile speedometer. They drove from the corner of the Planagan home on the route appellant stated he had taken after he viewed the body of Doris on April 21, 1943, and the distance was 1.2 miles. The route appellant took from his home to the Courtemanche home was 0.4 of a mile.

On April 27, 1943, forensic chemist Pinker had a talk with appellant at the crime investigation laboratory of the Los Angeles Police Department. He said to appellant: "Jack, in an effort to explain the picture of these blood stains on this jacket consistent with your theory of innocence, think hard now. It is possible that at the time you arrived at the scene this body was still moving around; it was still in motion, and the result of that movement blood could have been splattered or splashed on you?" Appellant said: "Yes, that is possible." He said to appellant: "All right now, Jack, let's go one step further. Is it possible that the body may have been in a different position than it was shown in the photograph that I showed you several days ago, the position in which we found the body? Is it possible that the body, as an example, was lying on the davenport and that it rolled or fell to the floor?" Appellant said: "No, it was on the floor." Mr. Pinker said: "Well, let's begin over again. To that first question what is your answer? At the time you arrived on the scene was the body moving or was the body still?" Appellant said: "The body was still." He said to appellant: "To the second question, what is your answer, Jack, was the body lying on the floor or was it lying on the davenport or elsewhere when you came to that scene?" Appellant said: "It was lying on the floor." Mr. Pinker said: "How come you let me find that jacket with all the blood stains on it, Jack?" Appellant said: "Oh, I knew there were blood stains on that jacket." He said to appellant: "When did you first know that there were blood stains on that jacket?" Appellant said: "Oh, it was that day or the next day." He said to appellant: "Why didn't you wash the blood stains off of that jacket?" Appellant said: "Well, you can't wash blood off. Blood is blood." Mr. Pinker had no further conversation with appellant.

On April 27, 1943, between five and six o'clock p.m., in the San Pedro jail, Officer Hargett talked with appellant. He asked appellant: "Do you realize that you are involved in a serious offense?" Appellant said, "Yes." He said to appellant: "You realize that the evidence against you is strong to connect you with the crime, and in view of those circumstances, and in view of the fact whether you win or lose this case in court that it is going to be a great burden on your parents, it is going

to cost them a lot of money and attorney's fees, and probably cost them their home and all of your father's savings, and in view of that fact why don't you tell me where I can find this knife, clear up this case and make a breast of things and get it off of your conscience?" Appellant meditated awhile and stated: "If I did that I would be cutting my own throat. I feel very confident in this case, and I think in a few days I will be out of here." Officer Hargett rejoined, that "I didn't think I would take it too lightly." Appellant stated that he could get a job later and pay back his father, and said, "I couldn't produce this knife without producing two other articles of evidence". Officer Hargett said to appellant: "Well, why don't you show me where I can find them, or come and take a ride with me and show me where I can find them and clean this case up?" Appellant waited awhile and Officer Hargett said: "Will you tell me where I can find them?" Appellant said: "They will be found in the simplest place. You could be looking at the place and never suspect them being there." Appellant said: "You know all the kids in school are for me, and I go with a nice girl, Mary Ruby. She can prove to you that I am a gentleman, and I have a lot of confidence, and I am sure I will come out of this case O.K." Appellant also said: "You know I pulled a fast one on my brother. He doesn't know anything. Although he and I fight quite a bit I wouldn't tolerate anyone picking on him." Officer Hargett said to appellant: "Jack, I would think that over and give this thing some serious thought. You can save your folks a lot of trouble." Appellant said: "You know I could put a feather in your cap. I could make you a lieutenant if I dared." The officer asked appellant to give him some information as to where the knife could be found, and appellant just sat silent. He told appellant to give the matter some serious thought and if he decided on anything to get in touch with him. At that or at a previous conversation, appellant asked him if he were tried on this charge and acquitted, could he be tried again, and the officer told appellant no, that he would be once in jeopardy. At this point appellant stated: "When this is all over I will look you up and show you a brain twister."

Mrs. Planagan, mother of appellant called as a witness by the defense, testi-

fied that appellant had a pair of fur-lined gloves which she believed were given to him the Christmas before. She also testified that she knew appellant did not have his knife on the Sunday prior to the homicide, that: "His brother Bill wanted to wear his coat to the show and sometimes they traded coats. He wore Bill's sport coat and when he did Bill wore the leather jacket if he wanted to, and he was going to wear it, and he knew that Jack carried his knife in there and he didn't want to wear it with it, so he was going to take it out but it wasn't in the coat." She also testified that on the day of the homicide "It was about 11:30 when he came down off the roof and he took a bath and talked to Bill on the roof a while, but he didn't paint. Then he came in and was going to one of the places. I don't remember, because when he went to one he usually went to both, so I told him as long as he was going down there I wanted him to go on downtown and get his boots. He left them downtown to get them half-soled, and I wanted him to pay the telephone bill and the gas bill and he said he would and I got the bills. They were up on the mantel where I always keep bills that are unpaid. He wanted to put them in his billfold which he carried in his right hand hip pocket, and riding his bicycle I was afraid he would lose his wallet and all, so I reached over and said I would put them in the zipper pocket. He was combing his hair in front of the mirror, and I reached over and unzipped the zipper of the pocket and put the bills in there * * * and I put the money in with them. * * * there was no knife in the pocket. * * * If there had been a knife in that pocket I could not have gotten the bills in there. * * * He had had a knife, but just recently I hadn't noticed it." Mrs. Planagan testified that it was five minutes to twelve when appellant left the house. Appellant's brother Bill testified that: "When he (appellant) got down to the telephone company I saw him take the bills out of his zipper pocket, where he usually carried his knife, but his knife wasn't there then. The bills were in an envelope and he took the bills out of the envelope and crumpled up the envelope and put it in his front pants pocket and went in and paid the bill." According to the testimony of Bill Planagan, he and appellant rode their bicycles to town to pay the utility bills sometime after lunch in the

afternoon of April 21, 1943; visited Kinney's clothing store; went back home and from there to the Barton Hill school grounds where they played handball for an hour or so.

Appellant took the stand and testified that his folks had given him black gloves for a Christmas present; that he bought a hunting knife at Roy Hook's on Seventh Street in the December previous to the homicide, which knife had a purple and blue mixture handle, a couple of lines around it, and he believed it must have been around five inches long but he didn't know how wide it was; that he used it to cut bales of paper at the Examiner paper office in San Pedro, which place he kind of looked out for; that on Thursday or Friday before April 21st he missed his gloves and knife while walking home from school; that he carried the knife in the zipper pocket of his black jacket; that he got the tear in the left knee of his pants while playing basketball the week before Easter; that he fell down and skinned his knee; that what Chief Alderson testified to was what he (appellant) told him; that he did not kill Doris Courtemanche, nor use a knife or wrench on her; that when he saw her that morning she was dead; that he recalled Sergeant Hargett's testimony regarding the knife and that when the Sergeant asked him where the knife was and he replied, "If I told you that I would be cutting my own throat"; he thought the officer was kidding and "I thought I would kid with him"; that they were both kind of joking. Appellant also testified that he was not in the Courtemanche home about 4:30 in the afternoon of the day before Doris' death, as testified by Marilyn Courtemanche, and did not see her on that day. On cross-examination he admitted that Sergeant Hargett said to him, "Do you realize that you are involved in a serious offense?" Also that Sergeant Hargett said to him, "In view of these circumstances and in view of the fact whether you win or lose this case in court, it is going to be a great burden on your parents, it is going to cost them a lot of money and attorney's fees, and probably cost them their home and your father's savings, and in view of the fact why don't you tell me where I can find this knife and clear up this case and make the best of it and get it off your conscience?"; that appellant said it might cost a lot of money; that in a few days he would be out and could get a job later

and pay back his father. Appellant denied that he said that he could not produce this knife without producing other articles, but that he did say: "You would want the other things with it, too"; and that Sergeant Hargett said "Yes." Appellant further testified that at that time Hargett hadn't mentioned anything but the knife; that he (appellant) "was just making up a big story of it. I was kidding"; that he didn't take the fact that he was in jail accused of murder very seriously; that at that time he did not have the knife and told Sergeant Hargett that he could not produce the knife without producing other things; that he could not even produce the knife; that he didn't know where the black fur gloves were; that he missed them on Thursday or Friday before the death of Doris, which occurred on a Wednesday; that he told Hargett, "They will be found in the simplest place, you could be looking at the place and not suspect them being there." That he was just kidding Hargett; just made that up; that Mr. Pinker asked him where he would hide a knife if he had one, and he had said, "Well, I would throw it away or throw it in the ocean or hide it in the simplest spot," and Gannon said, "Like on the jail house stairs?" and he (appellant) said, "Yes." Appellant admitted he was in the Courtemanche home the day before Doris died; that he had just come from Frankie's home and it was after 3:00 o'clock, then said he did not know what time it was but guessed it was about the middle of the afternoon; that he was not there around noon time; that he knew Betty Jane Worden; that Doris mentioned that she received a call from somebody while Betty Jane was there; that he had two spring knives; that he had thrown one of them away and guessed the other was at his home; that Chief Alderson's testimony was a fair statement of all that he (appellant) saw and all he knew about the circumstances, except that he did not tell Chief Alderson that after he left Frankie's house he went over to Pete's house; that he did not tell the officers he went directly from his home to his father's place to give him the keys to his automobile; that at the time he went to the Courtemanche house, he put his bicycle against the side of the garage; that Mrs. Worden came down with a basket of clothing when he was coming toward the Courtemanche house; that he called for Pete while he was on the front porch; that

he looked through the window and saw an object which appeared to be covered; that he thought something was wrong, the radio was going and nobody answered; that he didn't ring the doorbell; that a blanket was all over the body; that he lifted the blanket; that he didn't remember whether blood was dripping or running from the coverlet; that he wasn't sure whether the body he saw was that of Doris Courtemanche; that he guessed a murder had been committed; that he did not remember how long a time elapsed from the time he saw Mrs. Worden until he walked out the front door, whether it was as much as half an hour or not; that he did not tell Mrs. Worden what he had seen; that he saw Mrs. Nolton when he was going away from the Courtemanche house; that he did not make an outcry after he left the house; that he felt very sick at his stomach; that he did not know whether he was trembling all over; that he didn't remember what his mother said when she met him in his house; that he wanted to go home because he felt kind of weak; that he had not a clear recollection of all that took place while he was inside the Courtemanche house on that day, and not certain of all the things that he has stated; that he was not certain about what part of the "rug" he picked up off the body; that he met his mother in the house when he came back from the Courtemanche house, but did not remember what his mother said to him, and thought that his mother told him he was sick or ill when he talked to Chief Alderson; that he was not sick or ill to his knowledge when he talked to the police officers; that he remembered going to the school yard and playing a game or two of handball; that he wanted to go to the picture show to get away from what he had seen at the Courtemanche house; that up to that time he had not told anybody what he had seen at the Courtemanche house; that he was afraid he might be accused of murder; that he had a faint recollection of his mother asking him about an accident with his bicycle, hitting a woman down on First and Mesa; that it never occurred to him to tell Mrs. Worden about the awful thing that had happened downstairs; that it did not occur to him to use the telephone then and call the police; that he had known Doris for many years, since she was five or six years of age, and liked her, but did not remember whether he examined the body enough to see if it was Doris; that he knew that Mrs.

Courtemanche worked; that he saw it was a girl's body; that he did not tell anybody and didn't know why he did not tell his mother; that he and his father were pals and he didn't tell his father; that he wasn't afraid of his father's accusing him of murder; that he didn't want to bother or worry his father with something like that.

• On redirect examination, appellant testified that he thought Officer Hurst was a pretty funny guy, "He tried to pin it on me right away"; that he thought Officer Hurst was crazy and he would not trust him as far as he could throw a bull; that he never had any sickness and prior to April 21st his appetite was enormous, he ate three meals a day and meals in between meals.

On recross-examination, appellant was asked if he had told the officers that he had no explanation when they asked him about blood on his clothes, to which he replied: "No; why should I tell them anything? I don't trust them anyway."

In connection with the first point raised upon this appeal, appellant urges that since his identification as the person who committed the crime was based solely upon circumstantial evidence, the question of motive "becomes particularly and cogently material"; and that the only evidence of any motive on his part to commit the alleged crime was a childhood incident happening six years before the date of the homicide, which evidence was erroneously admitted over his objection.

[1, 2] On this question of motive, it is stated in Vol. 1 of Wigmore on Evidence, 3rd Ed., p. 559, as follows: "It is sometimes popularly supposed that in order to establish a charge of crime, the prosecution must show a possible motive. But this notion is without foundation. Assuming for purposes of argument that 'every act must have a motive', i. e. a prior impelling emotion (which is not strictly correct), yet it is always possible that this necessary emotion may be undiscoverable, and thus the failure to discover it does not signify its nonexistence. The kinds of evidence to prove an act vary in probative strength, and the absence of one kind may be more significant than the absence of another; but the mere absence of one kind cannot be fatal. There must have been a plan to do the act (we may assume); the accused must have been present (assuming it was done

by manual action); but there may be no evidence of preparation; or there may be no evidence of presence; yet the remaining facts may furnish ample proof. The failure to produce evidence of some appropriate motive may be a great weakness in the whole body of proof; but it is not a fatal one, as a matter of law. In other words, there is no more necessity, in the law of Evidence, to discover and establish the particular exciting emotion, or some possible one, than to use any other particular kind of evidential fact." Citing, *People v. Durrant*, 116 Cal. 179, 48 P. 75, and *Pointer v. United States*, 151 U.S. 396, 413, 14 S.Ct. 410, 416, 38 L.Ed. 208, the latter case holding: "The law does not require impossibilities. The law recognizes that the cause of the killing is something so hidden in the mind and breast of the party who killed that it cannot be fathomed; and as it does not require impossibilities, it does not require the jury to find it. Yet, if they do find it, it simply becomes an item of evidence in the case, which is only evidentiary at best; that is, it is only an item of evidence going to show whether a particular party may have committed an act, and sometimes going to show the characteristics of that act. * * * it is not indispensable to conviction that the particular motive for taking the life of a human being shall be established by proof to the satisfaction of the jury. The absence of evidence suggesting a motive for the commission of the crime charged is a circumstance in favor of the accused, to be given such weight as the jury deems proper; but proof of motive is never indispensable to conviction." When the perpetration of the crime has been brought home to the defendant, the motive for its commission becomes unimportant. *People v. Durrant*, supra.

"The establishment of a motive for the commission of a homicide is not essential to support a conviction, but the presence or absence of motive, whether weak or strong, is a circumstance bearing upon the guilt or innocence of the accused. Thus, while proof of motive is never indispensable, it is always permissible and often valuable. The prosecution may advance any theory within the range of human experience and reasonable probability, as to motive, and support it by appropriate evidence.

"Considerable latitude is allowed in the reception of evidence on the question of motive. It is settled that evidence having a direct tendency, in view of the surround-

ing circumstances, to prove motive on the part of a person to commit the homicide, and thus to solve a doubt either as to identity of the slayer, the degree of the offense, the insanity of the accused, or to the justification or excusability of his act, is admissible, however discredibly it may reflect upon the defendant, and even where it may show him guilty of other crimes." 13 Cal.Jur. 685, sec. 74, and cases there cited, including *People v. Greig*, 14 Cal.2d 548, 561, 95 P.2d 936; *People v. Larrios*, 220 Cal. 236, 251, 30 P.2d 404; *People v. Aranda*, 12 Cal.2d 307, 83 P.2d 928; *People v. Hall*, 27 Cal.App.2d 440, 81 P.2d 248; *People v. Perkins*, 8 Cal.2d 502, 66 P.2d 631.

[3, 4] From this it would appear that failure to prove motive is not fatal in a prosecution for murder where the conviction is based upon circumstantial evidence. Moreover, since the testimony elicited from the mother of the deceased child with respect to the so-called childhood episode was apparently permitted to be introduced in an attempt by the prosecution to prove a motive for the crime, its admission under the foregoing rules of law was not erroneous.

When appellant objected to the introduction of this evidence, a discussion was had between counsel and the trial court outside the hearing of the jury, at which time the court stated: "If your object is to show that the defendant was put on notice by the mother not to bother her children, if that is what your intention is, and that you can argue an inference that the boy knew that he was not wanted around there, and that sort of thing, I think that probably would be proper to do, but not directly or indirectly to attempt to get from this witness any details of why the mother made that sort of order, unless it is opened up on cross-examination in the guise of showing bias, motive and prejudice, and then, of course, if it is, I would let you go into it on your redirect examination." It was then brought out from the mother of the victim that six years before the homicide, she had told appellant not to return to her home; that he remained away about two years; that he then came to the Courtemanche home three or four times a week up to about a year before the homicide and that there were times when she (Mrs. Courtemanche) sent appellant home; that sometimes she would permit him to play there with the children when she could watch them; that she had not seen him very

often in the last year until quite recently; that she never found him there with Doris when she came home from work, but that he undoubtedly was there when she (Mrs. Courtemanche) was not at home; that on one occasion only during the period of six years did she consent to appellant's coming to her home and that was when he had some ice cream and her children begged her to let him come in so they could eat the ice cream, and that she said he could. The only inference the jury could have drawn from this direct evidence was that appellant knew Mrs. Courtemanche did not want him coming to her house and that she watched him when he was there. Therefore, its admission, as heretofore stated, did not constitute error, as urged by appellant under point numbered six.

Appellant also makes the point (numbered seven) that the district attorney's reference to the said childhood episode in his opening and closing arguments to the jury constituted "gross misconduct prejudicial to" appellant, in that "said prosecuting attorney constantly emphasized and reiterated prior but nonexistent inimical conduct on the part of the defendant of an unexplained nature."

The phraseology particularly objected to follows: "We will show you by the evidence in this case as we go backward—we are now speaking as to the motive, which the Court will tell you is not necessary in the proof of a case but is often helpful to those who can prove motive, the motive being to show why a thing is done and existing in the mind only of the person concerning whom the inquiry is made and capable of performing it by his own declarations and circumstantial evidence. We will prove to you that for six years or more this defendant had been unwanted at the * * * Courtemanche home; that when he did come, that if Mrs. Courtemanche was there he remained very briefly because we will prove to you that Mrs. Courtemanche had ordered him to go on home and stay and to never come back upon those premises and had threatened him with punishment if he ever did return. * * * Thereby we will establish to you that this defendant knew at the time of which we speak that Mrs. Courtemanche entertained toward him feelings of hostility of the character of which I have spoken to you, and we will further establish in connection with and as a fact affecting the motive in this case, which we will ask you to con-

solidate with all other proof in this case, this circumstance: Six years before the date of this occurrence, at the time when the girl was but approximately six and a half and * * * this defendant was approximately but nine and a half years of age, Mrs. Courtemanche ordered this defendant to get off those premises and to stay and never return. That will be testified to here before you. There is evidence in this case that the little girl came screaming to her mother from the upper floor of the garage on these premises where the defendant was, a short distance back of her, and cast herself into her mother's arms and told her mother certain things. Her mother walked up to Planagan and took him by the arm and told him, 'Planagan, don't ever come on these premises again. Don't you ever put your hand on any of my children,' and then reached up and twitched his ear. She said, 'Do you feel that? I don't know what I should do to you to make you understand, but if you ever come back here and touch one of my babies again I will cut that ear off. Now you get out and stay out.' From that moment on Planagan was unwanted on the place and knew it." Again, the prosecuting attorney told the jury: "* * * We will prove to you that death came upon this girl directly and unexpectedly without any attempt on her part to flee, at the hands of a person, who, in order to cause her death at that moment to protect himself from the results of something that he had done, and that the stab wounds that are described to you are not the result of sadistic tendencies of an insane person but the severity of the infliction of the blows due to terror at the time, and terror of the doer over the very seriousness of his act." In his closing argument to the jury, the district attorney stated: "* * * In that period of a year before last April, while Mrs. Courtemanche was at work, in that period of time, this defendant came there, and he must have had in his mind that Mrs. Courtemanche did not want him there. He knew and she knew why, but it is enough to know that she didn't want him there. He knew she didn't like him and I have every reason to infer, and I believe you are justified in the inference that when she said that during those occasions he remained around the premises and she was watching him she took the occasion to let him know that she was watching him and he was aware that she was watching him. * * * Let's consider that statement in the light of

what we come back to know about this case, and I ask your indulgence, if you think I am taking too much of your time, because if you find this boy guilty, you are going to take quite a lot of his time. There is going to be quite a lot of time in that community, when the parents of girls whom he knows will not have to wonder if he is coming to their house if you find him guilty, and if you find him innocent there will be throughout all time down to the beginning of eternity itself, there will be in San Pedro the impressive body of the little girl who is dead in her blood and her girlhood, which was uncalled for, unjustified and remains unavenged."

At the very beginning of his statement, the prosecuting attorney warned the jury that anything he said should not be considered as evidence in the case; and at the end thereof stated that he had outlined the case "simply for the purpose of permitting you to see * * * the theory of the prosecution * * * not to have you consider as evidence what I have told you but to be able to sit in and piece the evidence bit by bit." Appellant's counsel at no time excepted to the remarks of the prosecuting attorney, either in his opening or in his closing argument to the jury.

[5, 6] It is the duty of counsel making a statement to state the facts fairly and to refrain from stating facts which he cannot or will not be permitted to prove, *People v. Stoll*, 143 Cal. 689, 693, 77 P. 818. An opening statement is supposed to be an outline of what the people intend to prove. The failure to do so, either on account of the rules of evidence or for any other reason, does not necessarily indicate prejudice. It is the substance and implication of a statement, or the effect of an act which determines what the law recognizes as prejudicial misconduct.

[7] Applying the foregoing rules of law, the prosecuting attorney did not commit prejudicial misconduct in his opening statement to the jury when he referred to the specific details of the childhood episode which occurred six years prior to the homicide and which, under the ruling of the trial court hereinbefore mentioned, he was not permitted to prove by the witness Courtemanche.

[8] As stated in 4 Cal.Jur.Ten Yr.Sup., 1943 Revision, p. 767: "The scope of comment by the prosecuting attorney extends to facts that have been established

by cross-examination, as well as those that have been proved by direct examination. The permissible range of discussion of the merits of the case, both as to the law and the facts, is comprehensive. The attorney may discuss and argue questions of law, excuse or condemn the motives of actors, and advance any theory that finds support in the evidence. The credibility of witnesses may be assailed by him, if credibility has been impeached by evidence, by inconsistencies or incoherence of testimony, by the witness's manner of testifying, by the appearance of the witness while testifying, or by circumstances. Again, the prosecuting attorney may argue that the crime was committed in any manner that the evidence shows reasonably possible. He may denounce a theory of the defense, refer to things that have been seen by the jury while viewing the premises, speak of articles that have been exhibited to them, and comment respecting the instrument with which the crime was committed—although it has not been formally introduced in evidence. * * * In addressing the jury, the prosecuting attorney should restrict the scope of his statements to matters that are within the record. He should not attempt to evolve any theory or to introduce into the case any feature that is not fairly and reasonably justified by the evidence." (Citing numerous authorities.)

[9] It is only where the district attorney refers to matters not in evidence or expresses his own conclusions which are not founded upon evidence, or where he indulges in unwarranted attacks upon defendants or interferes with the orderly processes of the court in some way, that his alleged misconduct in argument to the jury may be construed to be reversible error. *People v. McKenzie*, 12 Cal.App.2d 614, 55 P.2d 1200.

None of the remarks of the prosecuting attorney to the jury herein comes within that category of prejudicial misconduct which would warrant a reversal of the judgment.

Although appellant does not raise the question of error in denying instructions requested, or of error committed in the giving of instructions, nevertheless, because of the remarks of the prosecuting attorney with respect to the childhood episode, hereinabove quoted, we think it proper to state that the following instruction was given by the trial court:

"You are the sole and exclusive judges of the weight of evidence and the credibility of witnesses, and it is your function to determine all questions of fact arising from the evidence in the case. It is the right of court and counsel to comment on the failure of defendant to explain or deny any evidence against him, and to comment on the evidence, the testimony and credibility of any witness; yet the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of witnesses.

"But while you are the sole and exclusive judges of the facts and of the weight of evidence, you are to judge of the facts upon the testimony and other evidence produced here in court. If any evidence has been admitted and afterwards stricken out, you must disregard entirely the matter so stricken out, and if any counsel has intimated by questions which the court has not permitted to be answered that certain things are, or are not true, you must disregard such questions and refrain from any inferences based upon them. If counsel, upon either side, have made any statements in your presence concerning the facts in the case, you must be careful not to regard such statements as evidence, and must look entirely to the proof in ascertaining what the facts are. If, however, counsel have stipulated or agreed to certain facts, you are to regard the facts so stipulated to as being conclusively proven. If either party has during the trial admitted any fact or facts material to the matters involved in this case, such admission is to be deemed by you as proven against the party making such admission."

[10] The trial court refused to give appellant's requested instruction:

"The District Attorney in his opening statement said that there would be evidence presented in this case that 'the little girl had come screaming to her mother from the upper floor of the garage on those premises where the defendant was, a short distance back of her, and cast herself into her mother's arms and told her mother certain things. Her mother walked up to Planagan and took him by the arm and told him, Planagan, 'Don't you ever come on these premises again. Don't you ever put your hand on any of my children' and then reached up and twitched his ear. She said, 'Do you feel that? I don't know what I should do to you to make you understand,

but if you ever come back here and touch one of my babies again I will cut that ear off. Now, you get out and stay out". From that moment on Planagan was unwanted on the place and knew it."

"You are instructed that no evidence or testimony has been adduced to establish these facts which the District Attorney stated he would prove, and that there has been a failure of proof in this respect. For this reason you are instructed to entirely and absolutely disregard the statement of the District Attorney as to these facts, nor are you to draw any inference that these facts may be true."

It would have been improper to give the requested instruction in the form proposed, because the following direct evidence was introduced which tended to establish some of the facts which the prosecuting attorney stated he would prove:

"Q. (by Deputy District Attorney to Mrs. Courtemanche, the mother of the deceased child): I want to be sure that you answer just what is asked of you and no more and no less. Mrs. Courtemanche, on one occasion approximately 6 years before this date of April the 21st last did you talk with Jack Planagan at your own place? That question is to be answered yes or no. A. Yes.

"Q. Now, at that time in that talk did you say anything about whether or not Jack Planagan, this defendant, was to be or come upon those premises at any future time? Just answer yes or no. (Objection by defense counsel overruled) A. Yes.

"Q. By Mr. Veitch: Now, in that conversation what did you say to him? Did you tell him to return or tell him not to return, which of the two? (Objection by defense counsel overruled) A. Not to return.

"Q. By Mr. Veitch: After that talk did this defendant continue to return to your premises? A. No sir.

"Q. For about how long did he continuously remain away from your premises? A. I imagine at least 2 years. * * *

"Q. Well, after such period of time what did you observe of this defendant returning to your home or being around the premises? (Objection of defense counsel overruled) A. I noticed that he had grown up quite a bit.

"Q. By Mr. Veitch: No. What did you notice about him being around the premises,

first? You say you did see him around the premises or upon the premises of your home? A. After the 2 years?

"Q. Yes. A. Yes sir.

"Q. Now, how frequently would it occur in that period of which you are now speaking that you saw Jack Planagan in or around your premises? A. Well, 3 or 4 times a week.

"Q. On those occasions at that time had you as yet gone to work? A. No sir.

"Q. Got yourself a job? A. No sir.

"Q. When did you first start in to go to work and get yourself a job? A. A year ago last April.

"Q. Well, how long did it continue that this Planagan boy would be around those premises as you say 2 or 3 times a week, up to about when? A. Well, when school started he wouldn't be there quite so often, just now and then, but not often.

"Q. Up to how long before the 21st of April last year was it that you saw Planagan now and then, perhaps 2 or 3 times a week, in or upon the premises? A. I can't give the definite number of times.

"Q. That is not quite what I intended to ask you either. Up to about how long ago was it that Jack Planagan continued to come or that you would from time to time see him upon your premises as you have said perhaps 2 or 3 times a week? Is that question clear to you? A. Yes, I believe it is.

"Q. Then answer it. (Objection of defense counsel overruled) * * * A. Well, I guess about a year ago.

"Q. By Mr. Veitch: Now, during this period of time when he was coming to the house perhaps 2 or 3 times a week, to the premises, did you say anything to him about being around the place on any of those occasions? (Objection of defense counsel overruled) A. There were times when I sent him home.

"Q. By Mr. Veitch: Well, how frequently would it transpire that you would send him home? (Objection of defense counsel overruled) * * * A. Well, 7 or 8 times.

"The Court: Mrs. Courtemanche, sometimes when the boy would come over there you would not send him home? A. Not always.

"Q. Sometimes you would let him play there with the children, wouldn't you? A. Yes sir, when I could watch them I would.

"Q. And other times you would get tired from having him around and say 'Go on home,' was that it. A. No sir, that was not the reason.

"The Court: All right, go ahead.

"Q. By Mr. Veitch: Now, about a year ago what happened in respect to Planagan coming around the place? Did you see him after that or not? A. Yes, I have seen him but not very often in the last year until quite recently.

"Q. Well, when you say quite recently you mean rather recently during the spring time of this year? A. Yes sir.

"Q. Did you see him during this year before the Easter vacation of school around your place. A. No, I don't believe I did.

"Q. Now, did you ever come home from your work and find Jack Planagan there with Doris and Pete? A. No, I didn't come home from work and find him there.

"Q. Did you ever come home in this period of several months, now, well, let's say before the time this terrible thing happened, during the year before then, did you ever come home from work anywhere and find him there? A. I suppose I may have. I can't remember of him being there in the evening but undoubtedly he was there when I wasn't home.

"Q. No, you don't understand my question. Did you ever come home from being somewhere at work or downtown during that year before April 21st and discover that this defendant was there with your children at the house? When I say discover, I mean see him there with your children at the house. A. No sir. * * *

"Q. During that whole period of six years to which you have just referred did you at any time invite or ask this defendant to be in or upon the premises, your home? (Objection of defense counsel overruled) * * * A. I only consented once to Planagan coming into my home.

"Q. When was that? A. He had some ice cream and my children begged me to let him come in so they could eat the ice cream and I said he could. * * *

"Q. By Mr. Veitch: Other than that one occasion of which you have spoken, did you ever invite or consent to the invitation of Jack Planagan into your home or upon your premises during that period of 6 years. A. No sir. * * *

"Q. By Mr. Veitch: During that period of 6 years of which you are speaking, did

you ever request Jack Planagan to go home or to leave, at least, your premises? (Objection of defense counsel overruled) * *

A. I have on occasions called my children in to get rid of him. (Answer stricken upon motion of defense counsel) * * *

A. I never definitely told Jack Planagan to go home with the exception of once.

"Q. Was that the occasion about which you told us yesterday, 6 years ago? A. Yes sir.—no sir; then the night before she died I told him to go home.

"Q. That was the night before she died? A. Yes, and then on one other occasion 6 years ago."

[11] Appellant urges that "a showing of a mere opportunity to commit a crime is insufficient to justify a verdict of guilty." It is the law that evidence showing an opportunity to commit the crime does not justify a conviction apart from other circumstances, unless it excludes all reasonable opportunity for its commission by another. *People v. Tom Woo*, 181 Cal. 315, 328, 184 P. 389; *People v. Tarbox*, 115 Cal. 57, 63, 46 P. 896; *People v. Silva*, 48 Cal.App. 728, 737, 192 P. 330. Even though it were conceded that no one of the facts, hereinbefore summarized, standing alone, would be sufficient to uphold the verdict, nevertheless, when all the circumstances which the jury may have resolved from the evidence are considered together, it cannot be held on this appeal that they were not sufficient to warrant an inference of guilt.

[12] Appellant next calls attention to the rule that the circumstances relied upon to establish the guilt of one accused of crime must be consistent with that hypothesis and inconsistent with any other rational conclusion. In other words, where the incriminatory circumstances relied upon are equally compatible with innocence, a reviewing court will reverse a judgment of conviction, and a like application of that rule, to this case, it is claimed, would impel a reversal of the judgment.

The rule above announced, as pointed out in *People v. Newland*, 15 Cal.2d 678, 682, 104 P.2d 778, 780, quoting from *People v. Perkins*, 8 Cal.2d 502, 519, 66 P.2d 631, "is a rule of instruction for the jury, and is not the rule for the guidance of the court on review." The rule "does no more than to instruct the jury that, if a reasonable doubt is created in their minds for any reason, they must acquit the defendant. But, where the jury rejects the

hypothesis pointing to innocence by its verdict, and there is evidence to support the implied finding of guilt as the more reasonable of the two hypotheses, this court is bound by the finding of the jury."

[13] In *People v. Martinez*, 20 Cal.App. 343, 344, 128 P. 952, 953, it is said: "Where the circumstances are such as to reasonably justify an inference of guilt, as found by the jury, the fact that an inference of innocence might likewise be reasonably drawn therefrom does not present a question of law for review by an appellate court any more than does a verdict based upon direct conflicting evidence; in neither case will the verdict be disturbed. We are not unmindful that the Supreme Court in *People v. Staples*, 149 Cal. 405, 86 P. 886, employs language seemingly inconsistent with this view, and upon which appellant claims that, if upon review this court is of the opinion that the circumstances are reasonably compatible with innocence, then, notwithstanding the fact that they reasonably justify the inference of guilt drawn therefrom by the jury, he is entitled to a reversal of the judgment. In reply to this we quote with approval the language used by Judge Chipman in *People v. Muhly*, 15 Cal.App. [416], 419, 114 P. [1017], 1018, where, in discussing the *Staples* case, he says: 'We do not understand that case to hold that, where the circumstances are such as to reasonably justify the inference of guilt, the case will be taken from the jury because an inference of innocence might also reasonably have been drawn. Between these two inferences the jury must choose, and it is only where the evidence obviously does not warrant the inference of guilt that the court will interfere. This must be so, or the weight of circumstantial evidence, and the inference to be drawn from it in almost every case, must finally be determined by the appellate court, thus making the court the arbiter of both law and fact.'"

In the instant case the circumstances established by the evidence reasonably justified the conclusion of the jury as expressed in their verdict.

Appellant next contends that the court erred in admitting in evidence over his objection *People's Exhibit 21*, a spring-bladed knife. Officer Hargett testified that in a conversation he had with appellant, the latter told him that he owned three knives, a pocket knife, a spring-back knife with a

snap blade, and a hunting knife in a brown scabbard; that the regular knife and the spring-back knife were at home, but that he lost the hunting knife on Friday previous to the homicide. Appellant testified that he had three or four knives; that he bought a push-button spring knife about a year before but had it only a few months when he broke it and threw it away, and that he bought a hunting knife after that. On cross-examination, he testified that he had two spring-bladed knives, one he threw away and guessed that the other was at his home at the time of his arrest; and that the snap that held up the blade on the knife which was at home was broken. He was shown the spring-bladed knife and testified that the catch was broken and it did not lock; that he did not know whether the blade on this knife was as long as the blade on the hunting knife. The broken spring-back knife was then offered in evidence by the prosecution, to which the defense objected on the ground it was immaterial. The court overruled the objection stating that the direct examination of the appellant specifically referred to two knives which he had possessed.

[14, 15] Appellant argues that the error of the court in allowing this knife to be placed in evidence becomes more pronounced in view of the prosecuting attorney's argument to the jury, in which he stated: "And when that body received these awful wounds upon the head, I maintain that that evidence alone, 13-A and 13-B show us that as she sat there she got knife cuts; that knife that has a blade as big as this which perhaps Mr. Hurst—I want to show the size of the knife it would take to make those cuts. Those cuts are from three-quarters of an inch to better than an inch. It would take a blade as big as the one that is there in this *Exhibit 21* to do that sort of work. It was the hunting knife of this defendant built to order for that purpose and carried by him upon him."

"Tools and instruments of crime found in the possession or under the control of the defendant soon after the commission of the offense may be offered in evidence whenever they constitute a link in the chain of circumstances which tend to connect him with the commission of the offense charged. But before they can be received in evidence, it must be shown that the crime charged was in fact committed, and that it was committed with the aid of

instruments like those proposed to be shown in evidence, and that the defendant was in the vicinity at or about the time the offense was committed." 8 Cal.Jur. 144.

[16-18] Since the evidence showed that appellant had several knives and had broken some and lost others, particularly the hunting knife, but had a broken spring-bladed knife at his home, the admission of this latter knife in evidence was for the purpose of showing the jury the type and kind of knives possessed by appellant. The prosecuting attorney in his argument used the knife, People's Exhibit 21, in speaking of the cuts found in the body of the deceased, and that these cuts were made by a blade as large as the one in evidence. The admission of this knife was within the sound discretion of the trial court.

"Physical objects which form a part of, or serve to illustrate, the transaction or occurrence which is the subject of investigation may be formally introduced in evidence, and it rests in the discretion of the trial judge whether they may be carried from the bar by the jury on its retirement. As to its competency, demonstrative evidence is measured by all the qualifications prescribed by law, and it must always be relevant to the issue. * * * where it is competent, tends to throw light on, and has direct bearing upon, a material issue, it is admissible and is not to be excluded because of its other effects on the jury." Wharton's Criminal Evidence, 11th Ed., Vol. 2, page 1275.

[19,20] Appellant contends that the evidence produced at the trial herein is insufficient to support the verdict and the judgment. In determining this question, it is incumbent upon this court to keep in mind and be guided by the rule that after the finding of the jury has been approved by the trial court on a motion for a new trial it is conclusive on appeal, and an appellate court may disturb it only when it can be said as a matter of law that there was no sufficient and substantial evidence to support it. We must assume in favor of the decision of the jury the existence of every fact which the jury could reasonably have deduced from the evidence and then determine whether guilt is deducible therefrom. *People v. Walsh*, 50 Cal.App.2d 164, 169, 122 P.2d 671; *People v. Hennessey*, 201 Cal. 568, 258 P. 49; *People v. Rose*, 26

Cal.App.2d 513, 79 P.2d 737; *People v. Tedesco*, 1 Cal.2d 211, 34 P.2d 467.

[21] As stated by the Supreme Court in *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778, 779: "The rule applicable where there is evidence, circumstantial or otherwise, that a crime has been committed and that the defendant was the perpetrator thereof, has been many times reiterated by the reviewing courts of this state as follows: The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground of' insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. The determination of a charge in a criminal case involves proof of two distinct propositions: First, that the offense charged was committed; and, second, that it was perpetrated by the person or persons accused thereof. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury." (Citation of authorities.)

The record discloses that appellant was not 'wanted' at the Courtemanche home. Pete Courtemanche did not care to associate with him. Apparently the only member of the family that appellant was interested in was Doris. He visited her at her home in the absence of other members of the family. He did not think she should go out with other boys, because she was too young. He called for her under her bedroom window two nights before she was slain, and was told to go home by her mother. On the day before the homi-

cide, appellant was in the living room of the Courtemanche home ruffling up Doris' hair in a playful mood, and was there when Marilyn Courtemanche came home from work. However, he left before Mrs. Courtemanche came home. On the day of the homicide, instead of going to the beach where Pete Courtemanche and Frank Cordero were spending the day, appellant went to see Doris. In looking through the window he saw the body on the floor near the divan in the living room. He entered the house, lifted the cover, saw it was a girl's body and left by the front door. He got on his bicycle and rode away, not toward his home but away from his home, then felt sick to his stomach and went home where he was met by his mother. He looked pale and ill and when his mother asked him what was wrong he told her he had hit a woman while riding on his bicycle, which he later admitted was a false story. He went to bed, took a nap for ten or fifteen minutes, drove to the dairy with his brother to get some milk, went to town and paid some bills for his mother, went to a schoolyard with his brother and played handball, returned home, his mother served dinner but he could not eat, went to a moving picture show with his brother, returned home and went to bed. During this time he disclosed to no one what he had seen in the Courtemanche home earlier in the day. He did not tell his father because he did not want to bother or worry him. He did not disclose what he had seen until the next morning when his father questioned him. The black leather jacket which he was wearing the day of the homicide had splatters of human blood on it and there was human blood on the right cuff which had saturated into the lining on the sleeve on the inside of the jacket. Inside the zipper pocket of the jacket were spots of human blood, as well as on appellant's trousers over the right side pocket and over the right rear pocket. When asked about the spatter stains on his jacket by forensic chemist Pinker, appellant said he had no explanation to make. Appellant told Mr. Pinker he knew there were blood stains on his jacket and when asked why he didn't wash the stains off, he replied: "Well, you can't wash blood off. Blood is blood." Appellant testified that he did not remember whether blood was dripping or running from the blanket covering the body; that he was not sure that the body he saw was that of Doris Courtemanche; that he guessed a murder had been committed; that

he didn't remember how long a time elapsed from the time he saw Mrs. Worden until he walked out the front door of the Courtemanche house, whether it was as much as half an hour or not; that he did not tell Mrs. Worden what he had seen; that he saw Mrs. Nolton when he was leaving the Courtemanche house after his discovery of Doris' body; but that he made no outcry. It was conclusively established that Betty Jane Worden at 11:00 o'clock on the morning of April 21, 1943, saw Doris Courtemanche "out by that little white fence that is on the edge of the cliff"; that Mrs. Olson saw Doris walking her dog at 11:25 o'clock that morning about a block from the Courtemanche home; that Mrs. Worden saw appellant approaching the Courtemanche house at 11:30 o'clock, and that the dead body of Doris Courtemanche was discovered by her brother, Robert Courtemanche, at 12:28 o'clock that day; that Robert Courtemanche notified the police and that officer Gannon and Lieutenant Elliott arrived at the Courtemanche home at 12:35 or 12:40 o'clock.

[22] The evidence produced at the trial definitely placed appellant at the scene of the homicide, and, although mainly circumstantial, it was sufficient from which the jury could find appellant's guilt beyond a reasonable doubt and to a moral certainty.

[23] While there is nothing in the record to indicate that the jury reached its verdict as the result of passion or prejudice and it is also clear that the black leather jacket was introduced in evidence without objection, nevertheless this court condemns the practice followed in this case of placing pieces of red cellophane upon the said jacket to mark the blood stains thereon which were not visible to the naked eye. It would appear that these stains or spatters might have been marked in some less conspicuous manner in obviate the gruesome appearance which this packet presented to the eyes of the jury, covered, as it was with these red markers which simulated the appearances of blood.

[24] In his closing brief appellant's counsel makes the statement that appellant "was subjected continuously and with shameful pertinacity to the unconstitutional inquisition of a group of husky adult men, as many as five in number at a time, so that the lad was unable to have any normal mental reaction", etc. The record does not disclose any foundation for this complaint. On the contrary, appellant tes-

tified that he was not afraid of any of these officers and that he did not remember any unkind act displayed toward him when he was being questioned by them during the period from April 22 to April 30, 1943.

No prejudicial error appearing in the record and the evidence being sufficient to sustain the verdict of the jury, the judgment and order appealed from are, and each of them is, affirmed.

DORAN, J., concurs.

WHITE, Justice.

I dissent.

Concededly, this is a case wherein circumstantial evidence alone is relied upon to sustain the conviction. It is also conceded that no motive whatsoever was shown for the commission of the homicide by the defendant. In connection with the absence of motive, our Supreme Court, in the case of *People v. Albertson*, 23 Cal. 2d 550, 566, 145 P.2d 7, 15, uses this language:

"In considering the sufficiency of this evidence to prove the guilt of Albertson, it is pertinent to note the startling fact that no motive whatsoever is shown. * * *

"The absence of motive, it may be conceded, furnishes but one element for consideration by the jury in connection with the other circumstances in the case, and if proof of guilt is otherwise sufficient to overcome the presumption of innocence the defendant must stand convicted notwithstanding no motive has been shown. But, nevertheless, 'absence of motive tends to support the presumption of innocence' (*People v. Tom Woo*, 181 Cal. 315, 328, 184 P. 389, 394, or as stated in *People v. Kelley*, 208 Cal. 387, 390, 391, 281 P. 609, 610, a case relied upon by the prosecution. 'The absence of proof of motive is a fact to be reckoned on the side of innocence.'")

In this state of the record, I am impressed that any errors of law committed during the trial might well assume proportions which could have turned the scales in favor of the prosecution and militated prejudicially against the defendant's substantial rights. While the law makes no distinction between direct and circumstantial evidence in the degree of proof required for conviction and only demands that proof of guilt be established beyond a reasonable doubt by evidence of the one character or the other, or both, it is never-

theless, elementary law that the circumstances relied upon to establish the guilt of the accused must be consistent with that hypothesis and inconsistent with any other rational conclusion.

In his opening statement to the jury, the district attorney referred to an incident which had occurred some six years prior to the homicide and in connection with which the district attorney said: "There is evidence in this case that the little girl came screaming to her mother from the upper floor of the garage on these premises where the defendant was, a short distance back of her, and cast herself into her mother's arms and told her mother certain things". This matter is referred to at some length in the main opinion.

When during the trial, the district attorney sought to introduce evidence of the incident just mentioned, vigorous objection was made by the defendant. After discussion outside the presence of the jury, the court ruled that the prosecution could not introduce evidence of the incident in question other than as to what the mother of the deceased said to the defendant, admonishing him to remain away from the Courtemanche premises. In order to overcome any inferences the jury might draw from what the district attorney said in his opening statement, the defendant offered the following instruction, which was refused:

"The District Attorney in his opening statement said that there would be evidence presented in this case that 'the little girl had come screaming to her mother from the upper floor of the garage on those premises where the defendant was, a short distance back of her, and cast herself into her mother's arms and told her mother certain things. Her mother walked up to Planagan and took him by the arm and told him, Planagan, "Don't you ever come on these premises again. Don't you ever put your hand on any of my children" and then reached up and twitched his ear. She said "Do you feel that? I don't know what I should do to you to make you understand, but if you ever come back here and touch one of my babies again I will cut that ear off. Now, you get out and stay out"'. From that moment on Planagan was unwanted on the place and knew it."

"You are instructed that no evidence or testimony has been adduced to establish these facts which the District Attorney stated he would prove, and that there has

been a failure of proof in this respect. For this reason you are instructed to entirely and absolutely disregard the statement of the District Attorney as to these facts, nor are you to draw any inference that these facts may be true."

This instruction should have been given. The prejudicial effect of what the district attorney said in his opening statement with reference to "The little girl had come screaming to her mother from the upper floor of the garage on those premises where the defendant was, a short distance back of her, and cast herself into her mother's arms and told her mother certain things" was intensified by the discussion attending the objection made by the defendant when it was sought, during the trial, to introduce testimony of the incident into evidence. While it is true the judge did give a certain instruction as set forth in the majority opinion and which is read to juries in practically all cases, it is my opinion it did not cover the prominent and necessary features of the instruction which was offered and refused.

The defendant also requested the trial court to instruct the jury that the defendant was of the age of fifteen years; that a boy of that age is not presumed or required by law to exercise the same "judgment, discretion, consideration or acumen" in his actions or reactions, conduct or statements, that would be exercised by a person of more mature age under the same circumstances but is only required to exercise that degree of judgment and discretion which would ordinarily or usually be exercised by a youth of the age of fifteen years acting under the same circumstances. The court refused to give this or any similar instruction.

I am impressed that the proffered instruction contains a correct statement of the law and that the jury should have been so advised. The refused instruction assumed much importance because the jury was required to consider, as a link in the chain of circumstantial evidence, the reactions, conduct and behavior of the minor defendant, when, according to his testimony, he discovered the lifeless body of the deceased. I am convinced that, in giving consideration to such evidence, the jury should have been admonished as to the law applicable thereto when the actor therein was of the more or less immature age of fifteen years.

I am further convinced that the court should have instructed the jury as request-

ed by the defendant, that their personal opinions as to facts not proven cannot properly be resorted to as the basis for a verdict; that although, as men and women, they might believe that certain facts exist, nevertheless, as jurors, they could only act upon the evidence introduced at the trial, and upon that and that alone, their verdict should be based. While it is true that in a general instruction given in practically every criminal trial the court, in the course of such instruction, counselled the jury, "You are to be governed, therefore, solely by the evidence introduced in this trial and the law as given you by the court," it is my belief that, because of the nature of this case, the circumstantial character of the evidence introduced, and the absence of motive, the court should have specifically warned the jury to beware of acting upon anything except the evidence introduced at the trial and inferences legally deducible therefrom, in arriving at their verdict. In a case such as the instant one, where the evidence is entirely circumstantial, and the lack of motive tends to support the presumption of innocence, the court should meticulously guard against the possibility of resort being had by the jury to considerations other than the evidence introduced at the trial in arriving at their verdict.

It is also my opinion that prejudicial error resulted from the introduction of People's Exhibit 21, a spring-bladed knife, under the circumstances set forth in the majority opinion herein.

In his closing argument, the district attorney exhibited the knife to the jury and said: "It would take a blade as big as the one that is there in exhibit 21 to do that sort of work. It was the hunting knife of this defendant built to order for that purpose and carried by him, upon him." The error of admitting this knife as an exhibit lies in the fact that there was no evidence identifying the knife admitted into evidence with the crime under investigation. *People v. Hill*, 123 Cal. 571, 56 P. 443. Consequently, the jury could only conjecture that it, or one like it, was used by the defendant.

With reference to the manner in which the trial was conducted, the majority opinion, while holding that it cannot be said the jury arrived at its verdict as the result of passion or prejudice, nevertheless, in reference to the manner in which the defendant's black leather jacket was introduced into evidence, my associates have this to say: " * * * This court condemns the

practice followed in this case of placing red cellophane upon the said jacket to mark the blood stains thereon which were not visible to the naked eye. It would appear that these stains or splatters might have been marked in some less conspicuous manner in order to obviate the gruesome appearance which the jacket presented to the eyes of the jury, covered, as it was, with these red markers which simulated the appearance of blood." Conduct of a trial which merits such vigorous condemnation does not impress me as being of that type of judicial investigation which the law contemplates and which seeks to arrive at the truth.

Guilty or innocent, appellant was entitled to have his case fairly tried according to the established rules of law. That unfair means may have resulted in doing justice to a defendant in a particular case, furnishes no valid argument for resorting to such means, because justice so attained is unjust and dangerous to the whole community. That respect for the law cannot be inspired by withholding the protection of the law, recognizes no exceptions. True, the acquittal of a guilty person is a miscarriage of justice, but we should not forget that the conviction of an innocent person through relaxation of those fundamental legal principles, with which we are here concerned, would be a tragedy.

With reference to section 4½ of article VI of the Constitution, it is not my understanding that the same is intended to mean that merely because the evidence may legally be able to stand up under the weight of the judgment, that is sufficient reason in all cases for refusing to set aside the judgment. *People v. Davis*, 210 Cal. 540, 556, 293 P. 32. As was said in *People v. Wilson*, 23 Cal.App. 513, 524, 138 P. 971, 975:

"The phrase 'miscarriage of justice' does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied. The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of

all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. 'It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected.' (Opinion written by Mr. Justice Sloss in *People v. O'Bryan* [165 Cal. 55], 130 P. 1042.)"

When a defendant is denied that fair and impartial trial guaranteed by law, such procedure amounts to a denial of due process of law. *Powell v. State of Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527.

I am persuaded that it is not for this court to say whether we think that the defendant is guilty, and nothing herein said by me is to be taken as indicating any opinion one way or the other on the question of his actual guilt. It is, however, my judgment that, had the jury been instructed as heretofore set forth, and had the errors of law upon the admission into evidence of the knife not been committed, such instructions and the absence of such errors would have added a substantial item to the balance in defendant's favor, and who can say but what a different verdict might have been rendered. This I assert because of the fiendish, brutal, and depraved character of the murder with which we are here concerned. Appellant was charged with that murder. If guilty at all of this cruel and inhuman crime, he was guilty of first degree murder. Strictly speaking, there was no middle ground. However, the jury found appellant guilty of only second degree murder. Here, indeed, was a remarkable verdict. To me, the verdict rendered showed nothing if it did not indicate a doubt in the minds of the jurors as to the correctness of their solution of the problem submitted to them. Was such doubt engendered by the errors to which I have alluded? Who can say?

In my opinion, the judgment and the order denying a new trial should be reversed and the cause remanded for a retrial devoid of such errors and consequent prejudice.

Hearing denied; TRAYNOR and SCHAUER, JJ., not participating.

KENDRICK v. KLEIN et al.

Civ. 7049.

District Court of Appeal, Third District,
California.

Aug. 19, 1944.

Rehearing Denied Sept. 16, 1944.

Hearing Denied Oct. 16, 1944.

1. Appeal and error ⇨1008(1)

In action to quiet title based on alleged adverse possession, whether defendants' construction and use of a shed on disputed property was sufficient to show that plaintiff's occupancy was not exclusive or whether maintenance of shed was with permission of plaintiff was for trier of facts.

2. Adverse possession ⇨47

The mere fact that record owner of disputed land entered and built a shed thereon to temporarily shelter a horse and store machinery was not, in itself, sufficient to interrupt adverse claimant's possession in the absence of evidence to show that entry was connected with right to enter.

3. Adverse possession ⇨94

The fact that disputed property may have been doubly assessed by public authorities both against record owner and adverse claimant could not serve to destroy claimant's adverse possession on theory that he did not pay all of the taxes assessed against property.

4. Adverse possession ⇨95

Where plaintiff, who claimed 1.72 acres of land by adverse possession, paid taxes assessed to portion of tract "lying north of the north bank" of certain creek, which description embraced some three acres, defendants could not contend that description of property assessed to plaintiff was insufficient to identify the land assessed with the land claimed by plaintiff because owing to changes in banks of creek the north bank could not be established.

5. Adverse possession ⇨40

Plaintiff's possession for five years prior to commencement of action was sufficient to sustain his title by adverse possession, the other elements necessary to establish title by prescription being shown, without the necessity of tacking his parents' prior possession.

6. Adverse possession ⇨114(1)

In action to quiet title to land claimed by plaintiff by adverse possession, the prior

possession of plaintiff's parents, the use made by them of the land, their filing of a declaration of homestead and the execution of a deed by plaintiff's mother to plaintiff were evidence of open and notorious use and occupancy by plaintiff's parents and their claim of right to the area which together with evidence of plaintiff's possession for five years and payment of taxes for such time authorized judgment for plaintiff.

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Action by Michael W. Kendrick against Louis Klein and another to quiet title to land. From a judgment for plaintiff, defendants appeal.

Affirmed.

James Snell, of Grass Valley, for appellants.

Frank G. Finnegan, of Nevada City (H. Ward Sheldon, of Nevada City, of counsel), for respondent.

ADAMS, Presiding Justice.

Plaintiff, Michael W. Kendrick, on September 24, 1942, filed this action seeking to quiet his title to a tract of land consisting of 1.72 acres, described by metes and bounds, and constituting a part of the southeast quarter of the northeast quarter of the northeast quarter (SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of NE $\frac{1}{4}$) of Section 15, T. 16 N., R. 8 E., M. D. B. & M.

Defendants Louis Klein and Anton C. M. Larsen, answering plaintiff's complaint, denied plaintiff's ownership, and set up title in themselves.

The cause was tried by the court sitting without a jury, and resulted in findings and a judgment in favor of plaintiff. A motion for a new trial was denied.

Plaintiff's claim of ownership is based upon adverse possession, and on this appeal it is contended by appellants that the findings of the trial court in favor of plaintiff are not sustained by the evidence; that there is no evidence proving or tending to prove that plaintiff's possession of the property was hostile to the true owners, that it was exclusive, that it was under claim of title or that plaintiff and his predecessors had paid all taxes levied or assessed against said lands or that no taxes were levied or assessed against said lands.

The property in controversy is located in the northern half of the SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 15, T. 16 N., R. 8 E., M. D. B. & M. The evidence shows without conflict that as early as 1871 a farm which includes the disputed area was occupied by James Kendrick and Alice Kendrick, his wife, who were the father and mother of plaintiff, Michael W. Kendrick; that plaintiff was born on the property in 1871, and during his whole lifetime lived in the house of his parents, a portion of which house extends into the area in controversy; that the contested area was, during all of said time, enclosed by a substantial fence which was always kept in repair; and that the said area was each year cultivated for a garden. James Kendrick, during his lifetime, claimed the property as his own, and in July, 1892, he and his wife executed and recorded a declaration of homestead upon a tract which included the area in controversy, alleging that they resided on said premises and claimed them as a homestead, and that same were community property.

After the death of James Kendrick, his wife, Alice, and her son, plaintiff herein, continued to reside on the property, and on September 12, 1907, Alice Kendrick executed a deed of said premises to plaintiff, which deed was recorded on August 3, 1912. She died some eighteen or twenty years prior to the trial, and thereafter plaintiff continued to reside upon the land. Since 1915, at least, plaintiff has paid taxes assessed against the property each year, the tax bills describing certain land not in controversy but including the portion of the SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ lying north of the north bank of Deer Creek. Deer Creek, as shown by the map in evidence, crosses the said SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ from east to west near the center of same, and the disputed tract lies within the area described in the tax bills as aforesaid.

Plaintiff testified that he had claimed to own the property ever since his mother's death, that he had continuously resided thereon, that no one ever questioned his ownership or attempted to interfere with his possession; that for fifteen years or more he had maintained at each gate to his premises signs 12" x 24" in size, printed in large letters, reading: "Private Property, permission to pass over revocable at any time." Plaintiff's testimony was corroborated by his nephew, Eldon Kendrick, who

testified that he had been familiar with the property since 1915, that it was then fenced, and that there had always been a garden on it and feed for cows. Thomas Coan, who had been familiar with the property for sixty-five years, said the fences were there over sixty years before the trial, and in the same position, and that the disputed area was always cultivated in the summer time.

Defendants, in support of their claim of title, introduced in evidence a notice of placer location made and recorded by three men named Gray, Clancy and Garver in 1885, covering, among other lands, the SE $\frac{1}{4}$ of the N $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 15, T. 16 N., R. 8 E., M.D.B. & M., a deed by the above-named locators to E. S. Hawke on the same day that the location notice was recorded; a mineral certificate from the United States to Ellen S. Hawke, dated May 5, 1887, and recorded October 20, 1890; a deed from Ellen S. Hawke to James Hawke and Albert Hawke, dated April 27, 1891, and a deed by Albert Hawke to Louis Klein dated December 26, 1916, purporting to convey an undivided one-half interest in the property. However, they also introduced a decree of foreclosure of mortgage made and entered October 28, 1919, in favor of one Ora D. Larsen, which foreclosed all interest of James Hawke, Louis Klein, and others; a sheriff's certificate of sale of said property to Ora D. Larsen dated November 18, 1919, and a sheriff's deed to her dated January 14, 1921. A deed by Ora D. Larsen to Anton C. M. Larsen, dated February 26, 1941, was also filed.

Continuous occupation of the property by plaintiff and his parents before him is not denied by the defendants, nor is it denied that the portion in controversy was fenced and cultivated as testified by plaintiff. Defendants do not deny knowledge of the occupancy of the land by plaintiff and his parents before him, nor the fact that it was fenced and cultivated; and it is admitted by them that such occupancy was not disputed by them nor was rental or other compensation for use of the premises ever demanded. And as showing that plaintiff's possession was hostile there was testimony by plaintiff that at one time he had a dispute with James Hawke when the latter sought to pass over the land, at which time he hit Hawke over the head with a shovel, and thus deterred him from entering. Appellants contend, however, that the possession of plaintiff and his parents before him

was not hostile to the true owners nor exclusive because, about 1915, the brother of defendant Klein built a rough board shed about 10 feet within plaintiff's fence, which shed was at one time used to stable a horse, and thereafter used to store tools which were being used in dredging operations on the land south of plaintiff's fence. Plaintiff stated that this shed was built without his knowledge, but that on discovering it he made objection and asked James Hawke why he had put it inside the fence; that Hawke said he wanted to store some machinery in it, which would be safer if inside the fence; that he (plaintiff) told Hawke that "it was all right, but we owned the ground." He also testified that he had objected to the use of the shed for a horse, whereupon the horse was moved across the creek.

[1,2] But appellants argue that plaintiff's occupancy was not exclusive, also that he did not pay all of the taxes because defendants also paid taxes assessed against the whole of the SE $\frac{1}{4}$ of the N.E. $\frac{1}{4}$ of the NE $\frac{1}{4}$ of the section. Whether the construction and use of the shed was sufficient to show that plaintiff's occupancy was not exclusive or whether the maintenance of such shed was with the permission of plaintiff, was a question of fact for the trial court whose conclusion is binding upon an appellate court. The mere fact that the shed was built upon the disputed area many years prior to the trial and put to the use shown by the evidence was not, in itself, sufficient to interrupt plaintiff's possession. As stated in Volume I, Ruling Case Law, section 39, page 724, referring to the interruption of the possession of an adverse possessor: "The mere act of going upon the land is not enough. The owner must assert his claim to the land, or perform some act that would reinstate him in possession, before he can regain what he has lost. It is evident, therefore, that an entry by stealth, under circumstances going to show that he claimed no right to enter, or an entry for purposes other than those connected with a right to enter, would not break the continuity of the disseisor's possession."

In *Smith v. Southern Pacific R. Co.*, 1 Cal.2d 272, 275, 34 P.2d 713, 714, the court said that to interrupt the adverse user the re-entry of the legal title holder must be open, notorious and under claim of right and must equal in dignity and character that required to initiate an adverse posses-

sion; citing *Armstrong v. Payne*, 188 Cal. 585, 597, 206 P. 638. No particular use of the shed appears to have been made during recent years, nor has anything of real value been stored therein, and there was testimony that boards had been pulled off its walls, and that it was so broken down that one could walk in without going through the door. No use of same by Ora D. Larsen during the time she held the legal title—from 1919 to 1941—was shown. The trial court may well have concluded that its use had been abandoned.

[3] As to appellants' argument that plaintiff did not pay all of the taxes assessed against the property because it was included within the description of an area upon which defendants also paid taxes, the fact that the property may have been doubly assessed by the public authorities cannot serve to destroy plaintiff's adverse possession. In *Cavanaugh v. Jackson*, 99 Cal. 672, 34 P. 509, the court said that where a claimant by adverse possession had the land assessed to him and paid the taxes levied thereon it was immaterial that it had also been assessed to and the taxes paid by others; that it was never intended by the lawmaking power that such claimant should pay taxes for any stated year more than once. Also see *Owsley v. Matson*, 156 Cal. 401, 406, 407, 104 P. 983; *Cummings v. Laughlin*, 173 Cal. 561, 565, 160 P. 833; *Pereira Farms Corp. v. Simas*, 69 Cal.App. 159, 163, 230 P. 976; *Bell v. Germain*, 12 Cal.App. 375, 378, 107 P. 630.

[4] Appellants make some contention that the description of the property assessed to plaintiff is insufficient to identify the land assessed, described as "That portion lying N. of the N. bank of Deer Creek in the SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ ", with the land claimed by plaintiff; that owing to changes in the banks of Deer Creek due to dredging, etc., the north bank of that stream could not be and was not established. But the evidence shows that the land assessed to plaintiff north of the north bank of the stream amounted to 3 acres or more, while this action involves but 1.72 acres; also the map shows the relative position of Deer Creek, and shows that plaintiff's south line fence is well north of it; and the evidence shows that said fence has always been maintained in its present position. Changes in the bank of Deer Creek did not, then, affect the boundaries of plaintiff's land as claimed in this action, and as the trial court impliedly has held that such tract

was included within the 3 acres upon which plaintiff paid taxes, the fact that plaintiff paid taxes upon the larger area of 3 or more acres cannot be held to establish as matter of law that he did not pay taxes assessed against the area claimed, which lies entirely within the portion of the 10 acre tract north of Deer Creek.

[5,6] Appellants also argue that plaintiff failed to show that his parents paid taxes upon the property, or that taxes were paid prior to 1915, and that the absence of such showing establishes that they did not acquire title by adverse possession, and that, therefore, their possession cannot be "tacked" to plaintiff's possession for the purpose of showing continuous adverse possession. We are unable to see that plaintiff sought to "tack" the possession of his parents to his own possession for such purpose. Plaintiff's possession for the five years prior to the commencement of the action was sufficient to sustain his title by adverse possession, the other elements necessary to establish his title by prescription being shown. The prior possession by his parents, the use made by them of the land, the filing of the homestead by the husband and wife, and the execution of the deed by Alice Kendrick to her son, go to show open and notorious use and occupancy by them, and their claim of right to the area. As stated in *Park v. Powers*, 2 Cal.2d 590, 594, 595, 42 P.2d 75, 77: "Until 1923 the possession of the Park family lacked one of the essential elements to ripen into title by adverse possession—payment of taxes. As this action was not filed until January 21, 1931, adverse possession, including payment of taxes, dating from 1923, is sufficient to establish title in plaintiffs. However, the facts pertaining to the prior occupation and possession are material, as the possession of plaintiff D. W. Park is a continuation of the occupation by other members of his family, and the character of his possession must be determined with reference to the circumstances under which the occupancy of his family began and was perpetuated. *Akley v. Bassett*, 189 Cal. 625, 643, 209 P. 576."

We think that the evidence is ample to support the conclusion that there was actual, open, notorious and uninterrupted occupancy and possession of the property in controversy by plaintiff's parents, and by him after their deaths; that such possession was under claim of title, that it was exclusive and hostile against the various holders

of the record title, that the property was cultivated annually, that it was protected by a substantial enclosure, and that plaintiff paid taxes assessed against same continuously for a period much in excess of five years. The judgment of the trial court is therefore affirmed.

PEEK and THOMPSON, JJ., concur.



65 Cal.App.2d 503

DYKZEUL et al. v. MANSUR,
Civ. 3338.

District Court of Appeal, Fourth District,
California.

Aug. 21, 1944.

1. Waters and water courses ☞152(8)

Evidence supported finding that defendant acquired a prescriptive right to certain amount of water per month from plaintiffs' land for use on riparian land belonging to defendant and to an easement over plaintiffs' land for purpose of conveying water to defendant's land.

2. Waters and water courses ☞144½

A riparian proprietor may acquire a right by prescription to maintain a ditch or other means of diversion over land of another, and he may acquire prescriptive right to transport in that ditch that water to which he is entitled, both under his prescriptive right or as a riparian proprietor when such water is used for beneficial use on his riparian land.

3. Waters and water courses ☞130

An owner of land adjacent to a stream may acquire prescriptive title to waters therefrom in addition to his normal riparian rights.

4. Waters and water courses ☞152(11)

Where defendant had, for many years, taken not only such water as it acquired by prescription but also had taken some proportionate share from his riparian waters across plaintiffs' land, judgment was not erroneous because it gave defendant the right to take water off of plaintiffs' land

in an undetermined amount to which he might be entitled as a riparian owner of land located below plaintiffs' land in addition to awarding a prescriptive right to a definite amount of water.

5. Waters and water courses ⇨152(8)

Evidence supported finding that defendant had previously, for 20 or more years, used water taken from plaintiffs' land pursuant to a prescriptive right in an amount in excess of 27 acre feet per year, so as to authorize an award of a prescriptive right to such amount.

6. Waters and water courses ⇨143

The quantity of water to which a person is entitled by prescription is not necessarily determined by capacity of ditch, but it is limited to the amount applied to a beneficial use, and such amount is a question of fact in each case.

7. Waters and water courses ⇨152(12)

On appeal from judgment in quiet title action, wherein defendant claimed a prescriptive right to take water from plaintiffs' land, fact that trial judge viewed the premises should be taken into consideration by reviewing court in reviewing the evidence in support of the findings.

Diego County. Upon taking possession of the land, plaintiffs learned that the defendant owned a tract of land of approximately 34 acres which, in part, bordered upon the southerly boundary line of the plaintiffs' tract. For many years a small stream of water has flowed across this 1100 acre tract and into the San Luis Rey River, the source of which arose in the mountains northeast of the rancho. It flowed diagonally southwesterly through the westerly corner of the 1100 acre tract, thence across a small portion of lot 3 of defendant's land and thence diagonally southwesterly across lot 2 of the same land. The stream of water crossing this property is fed to some extent by springs upon plaintiffs' land. After taking possession of the 1100 acres plaintiffs were informed by defendant that defendant owned, or at least claimed the water arising on or crossing the land just purchased by plaintiffs. This action followed.

In the answer filed, defendant admitted his claim to "an easement in and upon the land described" and alleged that because of an appropriation recorded in 1891 by one Mary Salmons he had the right to divert and take from plaintiffs' land 100 miners' inches of water under a four-inch pressure; that he had a prescriptive title to 100 miners' inches. He filed a cross-complaint setting up his claimed right thereto, as well as a right and easement to maintain upon plaintiffs' land, pipes and ditches for the diversion of water, and to divert water and transport it upon his land. He prayed that his said easements may be established.

The evidence discloses that for many years there had existed over and across plaintiffs' land, and on lot 3 of defendant's land, an open ditch through which water had been diverted from the stream above mentioned; that, originally, the ditch had been approximately a thousand feet in length from the southerly boundary line of plaintiffs' land, but that floods had washed out the ditch until, from 1937 on, the ditch was approximately 205 feet in length. The evidence also shows that from 1937 on the defendant had taken water from this stream on plaintiffs' land and conveyed it by means of this open ditch and two one-inch pipes located therein across plaintiffs' land onto his own land, where he used it for the purpose of domestic household uses, watering a few head of stock and some fowl, irrigating a

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action to quiet title by Pete Dykzeul and another against Leon W. Mansur, wherein the defendant filed a cross-complaint. From a judgment in favor of the defendant, the plaintiffs appeal.

Affirmed.

Lindley & Higgins, of San Diego, for appellants.

Monroe & McInnis, of San Diego, for respondent.

GRIFFIN, Justice.

This is an ordinary action to quiet title wherein plaintiff alleged ownership of certain described real property and that defendant "claims some right, title, interest, estate or lien in or to the above described real property adverse to these plaintiffs * * *" Plaintiffs and appellants herein, a few months before this action was commenced, purchased, as joint tenants, a tract of land (approximately 1100 acres which originally was a part of the Rancho Pauma) lying in the northeasterly section of San

vegetable garden, fruit trees, and also for the purpose of irrigating shrubbery, flowers and eucalyptus trees.

The court found and adjudicated that the defendant had, by adverse use, obtained an easement and the right to take off of plaintiffs' land, at the point where the 205-foot ditch intersected the stream bed, 27 acre feet of water per year in certain proportionate amounts each month of the year, and to convey the same by means of the open ditch and water pipe therein onto the defendant's land. The court then found that both the land of the plaintiffs and the land of the defendant were riparian to the stream of water; that in addition to the definite amount of water which the court found the defendant had actually acquired by prescription and put to a beneficial use on his land, he had also secured, by prescription, the right to divert and take through the open ditch and the water pipes therein, all of the water to which defendant might be entitled as a riparian owner on the stream below plaintiffs' land up to the capacity of the ditch, to be used for beneficial uses only. The findings then recite: "* * * the court herein making no finding as to the extent or amount thereof" (riparian rights) "* * * That it is stipulated and conceded by both parties and found by the court that the respective properties and the owners thereof are entitled to and possess their riparian rights in and to the waters of said unnamed creek except as said rights are modified by and are subject to the prior right and easement herein found to be possessed by defendant." The judgment then recites that "each have their riparian rights in and to the waters of said unnamed stream * * * subject only and as modified by and subordinate to the prior right and easement of the defendant * * * it being expressly provided that this decree is without prejudice to any further proceeding in the future which may be necessary to adjudicate or determine the exact proportionate amounts of said waters to which either of the parties hereto is entitled by reason of said riparian rights."

Appellants, on this appeal, claim first that the judgment is erroneous because it awards to defendant a prescriptive right to take water from plaintiffs' land and use it on riparian land belonging to defendant. Second, it is claimed that the judgment is erroneous because it not only awards a prescriptive right to a definite amount of

water to be taken by defendant off of plaintiffs' land, but also gives the defendant the right to take water off of plaintiffs' land in an undetermined amount to which he might be entitled as a riparian owner of land located below the land of the plaintiffs. Third, that the evidence is insufficient to justify the court's conclusion as to the amount of water which the defendant is entitled to take from the stream of water on plaintiffs' land. Fourth, that the judgment is erroneous because it is uncertain as to the extent of the defendant's right, title, and interest in plaintiffs' land.

[1] The evidence in this case fully supports the finding that the defendant acquired a prescriptive right in and to the proportionate amount of water per month as described in the findings and judgment and to the easement in and over plaintiffs' land for the purpose of conveying water to defendant's lands. Defendant's predecessor in interest acquired defendant's property many years ago. In 1891, she recorded her notice of appropriation and in addition thereto, ever since that time, she and defendant have diverted and used, openly, continuously, notoriously, and adversely under a claim of right, at least "100 miners' inches of water, under a four-inch pressure" for a beneficial use and upon defendant's property.

[2,3] It is fundamental that a riparian proprietor may acquire the right by prescription to maintain a ditch or other means of diversion over the land of another, and he may acquire the prescriptive right to transport in that ditch that water to which he is entitled, both under his prescriptive right or as a riparian proprietor when such water is used for a beneficial use on his riparian land. *Logan v. Guichard*, 159 Cal. 592, 114 P. 989; *Albaugh v. Mount Shasta Power Corporation*, 9 Cal.2d 751, 73 P.2d 217. An owner of land adjacent to a stream may acquire prescriptive title to waters therefrom distinct from or even in addition to his normal riparian rights. *Mount Shasta River Corp. v. McArthur*, 109 Cal.App. 171, 292 P. 549; *Oliver v. Robnett*, 190 Cal. 51, 210 P. 408; *Ward v. City of Monrovia*, 16 Cal.2d 815, 108 P.2d 425; *Morgan v. Walker*, 217 Cal. 607, 20 P.2d 660; and *Larsen v. Apollonio*, 5 Cal.2d 440, 55 P.2d 196.

[4] It was conceded at the trial and the court found that both plaintiffs and defendant were riparian owners. There

were other lower riparian owners. It is apparent from the pleadings and judgment that the trial court was not called upon nor did it endeavor to determine the extent of the riparian rights of the respective landowners. This question was specifically left in abeyance. It appears, therefore, that plaintiffs and defendant were endeavoring to determine just the nature and extent of the respective easements claimed by defendant in and over plaintiffs' land. Defendant had, for many years, taken not only such water as he had acquired by prescription but also had taken some proportionate share from his riparian waters from and across plaintiffs' land. The evidence indicates that this was the only accessible method or means of obtaining defendant's riparian waters from the stream. The trial court held that defendant's easement permitted this method of obtaining defendant's water acquired by prescription, the amount of which was definitely fixed by the court, "and any other waters up to the capacity of said ditch as he may be entitled to use from said stream by reason of the riparian rights appurtenant to the land owned by him, the court herein making no finding as to the extent or amount thereof." Under the pleadings and issues as thus framed, the trial court was authorized to and did sufficiently describe and fix the extent of the "defendant's right, title and interest in plaintiffs' land."

[5] The evidence fully supports the court's finding that defendant had previously, for a period of 20 or more years, used such water for a beneficial use, on his property, in an amount in excess of 27 acre feet per year; that the nature of the stream was such that in the dry seasons defendant's land required more water than was obtainable from it; that plaintiffs' land was arid and that plaintiffs' predecessors in interest had never used the waters therefrom to any extent; that in the rainy seasons more water ran through the creek than could be used by either plaintiffs or defendant.

150 P.2d—61

[6, 7] In *Stinson Canal & Irrigation Co. v. Lemoore Canal & Irrigation Co.*, 45 Cal. App. 241, 188 P. 77, it was held that in determining how much of the water in fact used on a given acreage is reasonably necessary for the purpose for which it is used, a court should be liberal with the appropriator to the extent, at least, that it should not deprive him of any portion of the amount of water that he has in fact used for the period necessary to gain title by prescription, unless it is clearly and satisfactorily made to appear that he used more than was reasonably necessary. There is no evidence in the instant case that defendant has taken more water out of the stream than he was able to put to a beneficial use upon the land which is riparian to the stream. It has been held that the quantity of water to which a person is entitled by prescription is not necessarily determined by the capacity of the ditch, but is limited to the amount applied to a beneficial use, and such amount is a question of fact in each case. *Pabst v. Finmand*, 190 Cal. 124, 211 P. 11; *Witherill v. Brehm*, 74 Cal. App. 286, 240 P. 529. Because of a conflict in the testimony, it became necessary for the trial judge to view the premises and ascertain for himself the kind and character of the use made by defendant of the property involved. As a result of the inspection and the testimony, the court found that the water was used beneficially on six acres of defendant's property and that he had a prescriptive right to use that amount of water reasonably necessary to properly supply the needs of that acreage. The fact that the judge viewed the premises should be taken into consideration by a reviewing court. *McManus v. Otis*, 61 Cal. App. 2d 432, 143 P. 2d 380. The trial court's determination on the issues here presented is not unreasonable. The judgment is sufficiently certain and will not be disturbed on appeal.

Judgment affirmed.

BARNARD, P. J., concurs.

65 Cal.App.2d 482

PEOPLE v. GORMAN et al.
Civ. 7053; Sac. 5649.

District Court of Appeal, Third District,
California.

Aug. 14, 1944.

1. Appeal and error ⇐643(1)

Respondent's motion for augmentation of record on appeal by adding thereto an order of correction of court minutes would be denied, where parties had not yet filed their briefs and neither respondent's notice of motion nor appellant's opposition thereto, nor the arguments nor order itself threw light on whether such minutes would assist in determination of the appeal on its merits. Code Civ.Proc. § 953.

2. Appeal and error ⇐660(1)

On respondent's motion for augmentation of record on appeal by adding thereto order of correction of court minutes, District Court of Appeal could not pass on question raised by appellant's contention whether minutes as corrected were true statement of the proceedings, since, if there was error in record, application to correct was to be made to trial court.

Appeal from Superior Court, Mono County; Pat R. Parker, Judge.

Action by the People of the State of California, acting by and through the Department of Public Works, against Mary W. Gorman, formerly Mary W. Gotham, and others. From an adverse judgment, defendant June Knapp appeals. On plaintiff's motion for augmentation of the record on appeal.

Motion denied.

Benjamin Chipkin, of Los Angeles, for appellant.

Lincoln V Johnson and Francis Carr, both of San Francisco, for respondent.

ADAMS, Presiding Justice.

On December 13, 1943, appellant June Knapp filed in the Supreme Court an appeal from a judgment rendered in favor of respondent on January 18, 1943. The record on appeal consists of the clerk's transcript, and two reporter's transcripts of testimony given and proceedings had on September 14, 1942, and August 20, 1940, respectively.

After the filing of the appeal in the Supreme Court the cause was transferred to this court, and on February 5, 1944, appellant filed a notice of motion for an order for "Diminution of Record, Augmentation and Correction of the Record," requesting, among other things, that there be incorporated in the record on appeal what he designated as an "Order of Abatement" made on September 20, 1937, which order was alleged to have been omitted from the clerk's transcript. A copy of this purported order was attached to the notice of motion and reads as follows: "By the Court: The Order heretofore made setting this case for trial is vacated, and the case dropped from the Trial Calendar, to be set on motion."

A written "opposition" to appellant's motion was filed by respondent, verified by Lincoln V. Johnson, one of its attorneys, in which it was alleged "That the minute orders of September 27 [20], 1937 and August 20, 1940 are not material to the appeal, or any question to be determined upon the appeal," and that "Said minute orders have no possible relation to the judgment which is the subject of the appeal herein."

Hearing on appellant's motion was had on March 3, 1944, at which time the matter was argued by respective counsel. Counsel for appellant offered and was granted permission to file a copy of the minutes of the trial court dated August 20, 1940, but no copy of the minutes of September 20, 1937, was filed.

On April 6, 1944, respondent, by its counsel, Lincoln V. Johnson, filed herein a notice of motion for augmentation of the record on appeal by adding thereto what was designated as an "Order for Correction of Certain Court Minutes," said order purporting to have been made September 10, 1943, nunc pro tunc as of September 20, 1937, and reading as follows:

"Knapp vs. Watterson. No. 2620.

"Order for Correction of Certain
Court Minutes

"It appearing from the Court's own knowledge that the Minutes of the Court as recorded in the Book of Minutes regularly kept are incorrect and incomplete in certain respects and in specified cases:

"It is ordered that said Minutes be corrected in detail, as follows:

"On page 181 of Book 7 of Minutes of Court under date of September 20th 1937 covering the session of Court convening at

1:30 P. M. of said date, the minutes of the Court are corrected and amended by adding to the said minute entry the following, which is to be inserted immediately preceding the words 'By the Court:' It appearing that the same issues are being litigated and still pending before the Supreme Court in the case of Watterson v. Knapp and that a determination of the pending case will determine the issues here presented.

"The Minutes are further amended by striking out the words 'By the Court' at the place appearing in said minutes and replacing the same words 'By the Court' immediately after the words 'further argument by counsel for and against abatement.'

"The Minutes of said date are further corrected as to the same date in the preceding entitled 'The People of the State of California, Plaintiff v. Mary W. Gorman, et al' to read as follows:

"Benjamin Chipkin, Esq., Attorney for June Knapp now states that inasmuch as abatement has been ordered in the case of June Knapp v. Thos Watterson for the same reasons there should be no further proceedings in this case until the determination of the pending litigation between those parties and he therefore moves that all proceedings herein be abated as the case just preceding

"By the Court: Motion granted and the case dropped from the Trial Calendar to be reset on motion.

"The foregoing corrections made by the Court to the end that the Minutes might correctly reflect the proceedings had.

"Dated September 10th, 1943 Nunc Pro Tem as of September 20th, 1937.

"Pat R. Parker
"Judge"

Respondent's notice of motion alleged that the motion would be made "on the ground that the augmentation of record on appeal is necessary in order to correctly and properly present the record of the proceedings in the lower court." The affidavit of Lincoln V. Johnson in support of his motion alleged that the requested augmentation of the record "is necessary for the reason that said order corrects the record of the proceedings of the lower court and shows the true proceedings therein had and taken and should be embodied in the record on appeal herein." No other reason why said order for correction of minutes should be made a part

of the record on this appeal is alleged, nor is it pointed out how or for what reason its inclusion is necessary to a determination of the appeal on its merits, nor why, if the order of September 20, 1937, which appellant sought by her motion to have made a part of the record, was not material, the minutes of September 20, 1937, as amended September 10, 1943, are material. No proceedings prior to August 20, 1940, are incorporated in the reporter's transcripts on file, and the clerk's transcript contains no court minutes whatsoever prior to August 20, 1940.

Opposition to respondent's motion was made by appellant, it being asserted, among her other objections, that the amended minute order is not a true statement of the proceedings had on September 20, 1937, but that said minute order as originally made, and as hereinbefore set forth, is correct; and that the trial court had no authority to make such a change of its minutes, such change being a judicial one and not a correction of a clerical error.

Section 953 of the Code of Civil Procedure provides that: "If it appear that there is any paper or record in the custody of the clerk of the trial court which was before the trial court but which is not included in the record on appeal, and an examination of such paper or record will assist in a determination of the appeal on its merits, the court in which the appeal is pending may, on motion of either party, or on its own motion, require the production of a certified copy of such paper or record, and the same shall thereupon be deemed a part of the record on appeal."

[1] We cannot refrain from stating that neither respondent's notice of motion nor appellant's opposition thereto, nor the arguments of respective counsel before this court, have served to throw light upon whether the minutes of the trial court of September 20, 1937, "will assist in a determination of the appeal on its merits"; and we are of the opinion that it is not incumbent upon us, at this stage of the proceeding, to examine the record on appeal in detail, or to anticipate, in advance of the filing of their briefs, what grounds for reversal or affirmation of the judgment counsel for the respective parties intend to urge when consideration of the appeal on its merits is reached. An examination of the nunc pro tunc order itself is insufficient to enlighten us; and, as above stated, counsel for respondent, when opposing the mo-

tion of appellant to augment the record by adding thereto the original minutes of September 20, 1937, alleged that same were not material to the appeal or to any question to be determined thereon, and that they had no possible relation to the judgment which is the subject of the appeal. It seems logical to infer that if the original minutes are immaterial, an order correcting them, made long after the entry of the judgment appealed from, is likewise immaterial.

[2] As for appellant's contention, in his opposition to respondent's motion, that the minutes of September 20, 1937, as corrected, are not a true statement of the proceedings had on that date, and that the trial court had no authority to make the changes appearing in the nunc pro tunc order, this court cannot on this motion determine what actually transpired on September 20, 1937, nor can it determine whether the trial court had authority to make the purported change in its minutes. If there is error in the record, application to correct it must be made to the court below. 2 Cal.Jur. 679. And, as was said in *Stafford v. Geary*, 213 Cal. 650, 652, 3 P.2d 10, 11: "If the order was an improper one, or was improvidently made, a matter upon which we express no opinion, it was for the appellant to start the legal machinery by which such an error, if any, might be rectified."

Respondent's motion is denied.

PEEK and THOMPSON, JJ., concur.



65 Cal.App.2d Supp. 844

PEOPLE v. VAUGHAN et al.

Cr. A. 2016.

Superior Court, Appellate Department,
Los Angeles County, California.

July 28, 1944.

1. Criminal law ☞1159(4)

An appellate court cannot review the credibility of witnesses on appeal but must accept as true the evidence which tends most strongly to support the verdict.

2. Disorderly conduct ☞1

The statute making it a misdemeanor for any person to maliciously and willfully disturb the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, prohibits a disturbance, by the specified means, of the peace of "any neighborhood or person", and it is not necessary to establish that it is a disturbance of the "public" peace in order to authorize a conviction under the statute. Pen.Code, §§ 415, 416.

3. Disorderly conduct ☞9

Evidence that two members of Jehovah's Witnesses entered hotel and disturbed guests by persistent course of loud knocking at all rooms in succession, extending over a period of ten minutes, authorized finding that there was a disturbance of the peace, so as to authorize conviction under statute making it a misdemeanor for a person to maliciously and willfully disturb the peace or quiet of any neighborhood or person. Pen.Code, § 415.

4. Disorderly conduct ☞9

Proof that defendants who were members of Jehovah's Witnesses insisted on going ahead and knocking loudly at all doors in hotel after manager had previously prohibited them from doing so was sufficient to enable jury to infer willfulness and malice on part of defendants, within statute making it a misdemeanor for a person to maliciously and willfully disturb the peace and quiet of any neighborhood, or person. Pen.Code, §§ 7, 415; Code Civ.Proc. § 1963, subd. 3.

5. Constitutional law ☞251

The Fourteenth Amendment applies only to action by or under color of authority of the state, and it does not run against action of private individuals not purporting to be in exercise of the power of the state. U.S.C.A.Const. Amend. 14.

6. Innkeepers ☞8

The guests of an ordinary hotel which has no housekeeping facilities for its guests are not "tenants" and have no interest in the realty, but they are mere "licensees" and the control of the rooms, halls and lobbies remains in the proprietor.

See Words and Phrases, Permanent Edition, for all other definitions of "Licensee" and "Tenant".

7. Criminal law § 13

The statute making it a misdemeanor for every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, is not invalid on ground that it is fatally uncertain and sets up no ascertainable standard of guilt. Pen.Code, § 415.

8. Constitutional law § 84, 90

The constitutional guaranty of freedom of speech, press and religion did not entitle defendants who were members of Jehovah's Witnesses to enter hotel, over manager's objection, and there disturb peace of the guests by a persistent course of loud knocking at all rooms in succession, and holding of conversation with guests in an endeavor to get them to accept some of the printed matter in which religious tenets and views of their organization were set forth. Pen.Code, § 415.

Appeal from Municipal Court of City of Los Angeles; Arthur S. Guerin, Judge.

Grace Vaughan and Leon F. Scheerer were convicted of willfully and maliciously disturbing the peace and quiet of certain persons by loud and unusual noise and by tumultuous and offensive conduct in violation of section 415 of the Penal Code, and they appeal.

Affirmed.

A. L. Wirin, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., of Los Angeles, Donald M. Redwine, Asst. City Atty., of Hollywood, and John L. Bland, Deputy City Atty., of Los Angeles, for respondent.

SHAW, Presiding Judge.

The charge against defendants is that they wilfully and maliciously disturbed the peace and quiet of the complainant and other persons present by loud and unusual noise and by tumultuous and offensive conduct, in violation of section 415 of the Penal Code. It appears that the defendants are members and ordained ministers of a religious organization known as Jehovah's Witnesses, and that they went to a hotel known as the Daily Hotel, in the City of Los Angeles, taking with them a supply

of pamphlets and other printed matter in which the religious tenets and views of their organization were set forth, for the purpose of talking with the guests of the hotel and distributing this printed matter to them. Their mode of operation was to go through the halls of the hotel, knocking on all the doors and if they had no answer placing a leaflet under the door, but if there was an answer getting the occupant of the room to the door, if possible, and then holding conversation with such occupant and endeavoring to get him or her to accept some of the printed matter which the defendants carried.

Defendants arrived at the hotel at about 9:30 a. m. on a Sunday morning. The hotel had three floors and they began on the second floor. After they had knocked at several doors the manager of the hotel attempted to get them to stop. The manager told them to leave, that there were many war workers there and people objected to being disturbed on their Sunday sleep and said, "You must leave because I can't have you waking my people." The defendants, who appear to have fortified themselves with information on various legal decisions in which their organization has been involved, said to this, "We have a right to knock on these doors and talk to people." Both the manager and the defendants did some loud talking on this subject. The manager then called police officers, who came and interviewed the manager, the hotel clerk, and defendants, listened to defendants' legal arguments and went away, saying they had no grounds for arresting defendants, as no offense had been committed in the presence of the officers, but for the hotel people to keep the peace and use whatever force was necessary. The defendants then resumed their knocking on the doors of the hotel rooms, and after the defendant Scheerer had first knocked at and then entered the door of one room the clerk, Aiken, forcibly pulled him out of it. This resulted in what was described by some witnesses as a commotion, with some loud talking. Defendant Vaughan then called the police again and when they arrived requested them to arrest Aiken for assaulting Scheerer. After some further discussion in the hotel lobby the officers took Aiken and the two defendants to the police station, without purporting to arrest any of them. Later Aiken swore to the complaint on which defendants have been convicted.

Witnesses produced by the people described the conduct of defendants in going through the hotel and knocking at the doors, and its effect on them as follows. Witness Pletz was the occupant of a room jointly with one Siess, also a witness, and had just returned from a church service. He and several others were engaged in a card game when defendant Scheerer "pounded" at the door, and when the inmates said, "Who is there?" he came in. He offered them some literature which they refused, and at this time he was pulled from the room by Aiken, as above stated. After this there was "a good deal of loud talking, excessively loud" in the halls, but the witness did not say who did it. He said that, although his door was closed, he had heard pounding on the doors going on for about ten minutes before his door was reached, and that it was loud. The witness Siess gave testimony similar to that of Pletz. Both witnesses said they were disturbed by the pounding and the intrusion into their room.

Miss Kindred, a roomer, testified that she worked at nights and was asleep when she was awakened by "rather a loud knock, more of a pound than anything else" on her door; that she turned over and went back to sleep and in a few moments heard another knock or pound, got up to see who was there and found defendant Vaughan at her door. Defendant offered the witness some literature, which was refused. The witness said she was sleepy and tired and did not want to be disturbed. Defendant Vaughan "kept talking and I closed the door in her face." The witness no more than got back in bed than she heard pounding on the doors in the next room, and about that time "began to get mad right" and later complained to the manager. She also heard, just after this incident, loud talking outside of her room but could not tell who did it except that the man across from her said, "Get out of here and stay out."

Guy Powell, another lodger, testified that he worked nights, that he was in bed at 9:35 a. m., that there was a knock at his door, he got up and went to the door and there found defendant Vaughan. She spoke about her religious views, came in and put some literature on his dresser. He told her he had been working all night and had been sleeping and was tired and had no time to talk to her. "She made a statement about I was in the bed and the bed

was afire and I was the kind of man who didn't know it was on fire and she wanted to wake me up." She kept on standing in the doorway and would not leave until the witness made several requests. All this disturbed his peace and quiet, he said.

Charles Kramer was in bed when he was disturbed by talking outside, heard the manager ask some one to leave, and went out to see what it was. He found the manager telling the defendants to leave and defendant Vaughan said, "No, the Lord had sent her there and she was going to see the people." The witness Roberts saw defendant Scheerer knock at a door at the opposite end of the hall from that where the witness was, but did not hear him. The witness Bengoshea was awakened by loud talking during the time the defendants were in the hotel but did not know who was talking.

The hotel manager, Mrs. Reynolds, testified that on the occasion in question she saw and conversed with defendants on the second floor and that by that time there was quite a commotion on the third floor—apparently among the guests. We have already stated the substance of her conversation with defendants. The manager also testified that defendant Vaughan had come there twice before, the last time being about six weeks before the incident involved in the charge, and had then engaged in the same process of knocking on doors. The manager then told her she must not do this, that they had a rule requiring all visitors to come to the office and ask for persons they wanted to see, that they had sleepers and she must not wake people, but defendant insisted that the Lord sent her there and she had a right to knock at the doors without the manager's consent and would do so. The hotel clerk, Aiken, also testified regarding this conversation and said that in it defendant Vaughan was told that many of the guests were day sleepers who worked at night, and "we wanted her to leave and stop disturbing them."

The defendant Scheerer was not present at the previous conversations between the manager and defendant Vaughan. He testified, however, that when he went with her to the hotel he knew she had been there before and had been requested to stay out of there, and that he went with her at her request. It is apparent from the record that they were acting in concert in the matter of their visitation of the

hotel, and each is criminally responsible for the acts of the other in that behalf.

[1] The defendants gave testimony which conflicts with the evidence above recited in some respects, but of course we cannot review the credibility of the witnesses on appeal and must accept as true the evidence which tends most strongly to support the verdict.

The defendants contend that the evidence is insufficient to support the verdict of conviction and that the court erred in refusing certain instructions requested by them; also, that the statute under which they were charged is—at least as applied to their activities above mentioned—unconstitutional and void.

The statute in question, section 415 Penal Code, so far as it is involved here, reads as follows: "Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, * * * is guilty of a misdemeanor * * *."

[2] Defendants contend that a disturbance of the peace is not punishable under this part of the section unless it is a disturbance of the *public* peace, citing in support on this claim *People v. Anderson* (1931) 117 Cal.App.Supp. 763, 767, 1 P.2d 64, decided by this court. Section 416 of the Penal Code, which was under consideration there, relates to "disturbing the public peace" and the quoted words were held to be the equivalent of "breach of the peace", which imports a disturbance of public peace or tranquility. In referring to the disturbance of the peace during our discussion we omitted the word "public", but in view of the words of the statutory provision we were construing, which had already been quoted, no significance should be given to this omission. While a reference was made to Section 415 and it was said to add little to the phrase appearing in section 416, that statement was made with reference to the facts of that case, where the disturbance was undoubtedly public, and is not a decision that a disturbance of the peace, in order to violate section 415, must extend to the public peace. The language of section 415 is to the contrary, for the word "public" does not appear in it, although its use in section 416 indicates that the legislature was acquainted with it and used it where the legislative intent so required. The part of section 415 above

quoted prohibits a disturbance, by the specified means, of the peace of "any neighborhood or person", and we see no reason for reading into it any limitation not stated. There are some decisions by the lower New York courts which, on a statute no more explicit than ours on this point, hold that the disturbance must be public, but we are not disposed to follow them.

Defendants also contend that in order to violate section 415 the disturbance must occur in a public place, that the interior of the hotel where the acts proved were done by them is not of that character and that therefore their requested instruction No. 5 to that effect should have been given, and their guilt was not shown. Apparently this contention is a sort of corollary of the preceding one, the theory being that the public peace cannot be disturbed unless the disturbance occurs in a public place. Having rejected the foundation of this argument, we need not pass upon the reasonableness of such a conclusion from it, but again point out that section 415 contains no such limitation of its scope.

[3] The testimony is sufficient to support the jury's finding that there was a disturbance of the peace. Perhaps the hotel could be regarded as a neighborhood, but whether this be so or not, the peace of several persons there was disturbed. Two of them, who were night workers, were awakened from their sleep by defendant Vaughan knocking at their doors and when they stated the situation and their desire to sleep she would not go away, but kept on talking to them until one shut the door in her face and the other made several requests that she leave. One of these witnesses testified that the knock was loud. Another witness testified to loud pounding on the doors in the hotel going on for a period of ten minutes, which he could hear through his closed door, and the other evidence reveals defendants as the pounders. The group of card players were disturbed, not only by the pounding on their own and other doors, but by the uninvited intrusion of defendant Scheerer into their room. While the disturbances shown were not of the violent nature which would be classed as tumultuous conduct, there were acts which could reasonably be classed as offensive conduct (see *People v. Beifuss* (1937) 22 Cal.App.2d Supp. 755, 67 P.2d 411), that is, the indiscriminate knocking on doors, the intrusion of defendant

Scheerer into a private room and the persistence of defendant Vaughan in talking to persons who said they desired to sleep and asked her to leave. It was also shown that the disturbance was caused by loud noises, and while perhaps ordinary knocking at a hotel room door might not be considered unusual, a persistent course of loud knocking at all the rooms in succession, extending over a period of ten minutes, could well be so regarded by the jury.

Defendants argue that the loud talking shown by the evidence was done, at least in part, by the manager and the clerk and they are not responsible for it. Perhaps this is a result of defendants' conduct that they ought reasonably to have anticipated, but we need not so hold, for their previous acts are sufficient to support the verdict.

[4] There is a sufficient showing that the disturbances were wilful and malicious to satisfy the requirement of section 415 that they be so done. Both of these terms are defined by section 7 of the Penal Code. The stronger word is "maliciously", which imports "a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law." A presumption of law applicable here is declared by section 1963, subd. 3, C.C.P., "That a person intends the ordinary consequences of his voluntary act." Here the defendant Vaughan had been previously informed that many of the guests of the hotel were day sleepers and must not be awakened, that she must not knock on the doors or go to them, but the rule of the hotel was that those desiring to see guests must come to the desk and ask for them. Similar statements, though not in so much detail, were made to both defendants on the Sunday in question. But relying on what they regarded as their legal rights, they insisted on going ahead and knocking on all doors loudly. The ordinary consequences of this would be to awaken the sleepers of whose presence they had been informed, to disturb their peace, and to vex and annoy them. This is sufficient, under the above-cited statutory provisions, to enable the jury to infer wilfulness and malice.

Defendants contend that they have a constitutional right to go into the halls of such a hotel as is here involved and knock on the doors of the rooms for the purpose of preaching the gospel and distributing religious literature to the tenants

and that the operator of such hotel cannot lawfully exclude them. We doubt whether this claimed right is determinative of the case, for even if defendants' presence in the hotel was a proper exercise of such right, we are aware of no decision that freedom of speech, press and religion carries with it a freedom to disturb the peace of others in the manner shown here. We find no such holding in *Cantwell v. State of Connecticut* (1940) 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352, or in *Martin v. Struthers* (1943) 319 U.S. 141, 63 S.Ct. 862, 882, 87 L.Ed. 1313, on which defendants rely.

[5, 6] But if the right of defendants to enter within the hotel is material, we think they did not have such right, in face of the hotel management's order excluding them. The Fourteenth Amendment, on which the defendants base their claims, applies only to action by or under color of the authority of the state; it does not run against the action of private individuals, whether hotel proprietors or others, not purporting to be an exercise of the power of the state. (*Iowa-Des Moines Nat. Bk. v. Bennett* (1931) 284 U.S. 239, 245, 52 S.Ct. 133, 76 L.Ed. 265, 272; *Swank v. Patterson* (1943), 3 Cir., 139 F.2d 145, 146; *Title Guarantee & Trust Co. v. Garrott* (1919) 42 Cal.App. 152, 154, 183 P. 470.) From the evidence the place in question appears to be an ordinary hotel, or at least a lodging house. Its character in this respect is not necessarily altered by the fact that many or the majority of its guests are not transients and that some of them occupy their rooms on a monthly basis. (*Fox v. Windemere Hotel Apart. Co.* (1916) 30 Cal.App. 162, 157 P. 820; *Magee v. Pacific Improvement Co.* (1893) 98 Cal. 678, 681, 33 P. 772, 35 Am.St.Rep. 199.) The guests of such a place are not tenants and have no interest in the realty; they are mere licensees and the control of the rooms, halls and lobbies remains in the proprietor. (*Fox v. Windemere Hotel Apart. Co.*, supra; *Roberts v. Casey* (1939) 36 Cal.App.2d Supp. 767, 771, 93 P.2d 654; *Edwards v. City of L. A.* (1941) 48 Cal.App.2d 62, 67, 119 P.2d 370.) Since the proprietor, rather than the guests, has the control of the place and its lobbies and halls, he may exclude persons such as defendants therefrom, or make rules regarding their admission. In *Goldstein v. Healy* (1921) 187 Cal. 206, 201 P. 462, it is held that the guests of a hotel may invite others to visit them, as of

right, and that such invitees are lawfully in the hotel and entitled to the exercise of due care for their safety by the innkeeper; but there the court also held this right of the guest to be subject to reasonable regulation by the management. Here there was such a regulation, which the defendants violated; moreover, they had not been invited by any guest to enter and hence this rule is not applicable to the case. In support of their argument on this matter defendants rely mainly on *Commonwealth v. Richardson* (1943) 313 Mass. 632, 48 N.E. 2d 678, 146 A.L.R. 648, and *Martin v. Struthers*, supra, (1943) 319 U.S. 141, 63 S.Ct. 862, 882, 87 L.Ed. 1313. In the Massachusetts case a statute referring to the person having "lawful control" of premises was involved and the court held that by reason of the construction and arrangement of the lobbies and halls of the apartment house there in question the tenants had control thereof and the landlord did not. The place in question here had no housekeeping facilities for its guests; as far as appears they occupied single rooms, not suites or apartments; there were no means by which they could control entrance to the lobby or halls and it was clearly not an apartment house. The Massachusetts case is not applicable to it. *Martin v. Struthers* dealt with governmental action and is not applicable to the

conduct of hotel keepers, but it recognizes the right of those in control of private property to exclude therefrom persons on errands like that of defendants.

[7] Defendants attack this statute on the ground that it is fatally uncertain and sets up no ascertainable standard of guilt. We think it is not vulnerable to this attack. (*People v. Beifuss*, supra, (1937) 22 Cal. App.2d Supp. 755, 758, 67 P.2d 411; *People v. Smith* (1939) 36 Cal.App.2d Supp. 748, 752, 92 P.2d 1039; *Smulson v. Board of Dental Examiners* (1941) 47 Cal.App.2d 584, 587, 118 P.2d 483.)

[8] Defendants' further attack on the statute is not against its terms in general but on the ground that its enforcement against them infringes on the rights guaranteed them by the Fourteenth Amendment. We have already sufficiently discussed this matter. We are satisfied that the guarantee of freedom of speech, press and religion does not entitle any person to go into a hotel or lodging house, over the objection of the proprietors, and there disturb the peace of the guests, in the manner shown by this record.

The judgment and order appealed from are affirmed.

FOX, J., and KINCAID, Judge pro tem., concur.

150 P.2d—61½



